

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)	
)	
PHILADELPHIA ELECTRIC COMPANY)	Docket Nos. 50-352
)	50-353
(Limerick Generating Station,)	
Units 1 and 2))	

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

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 1, 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 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 T 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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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I, David G. 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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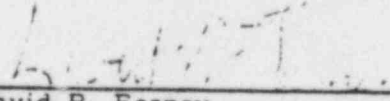
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Before the Atomic Safety and Licensing Appeal Board

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Philadelphia Electric Company)	Docket Nos. 50-352
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APPLICANT'S BRIEF IN OPPOSITION TO GRATERFORD
PRISONERS' APPEAL OF THE ATOMIC SAFETY AND
LICENSING BOARD'S ORDER DENYING ITS CONTENTIONS
AND APPLICANT'S ANSWER TO GRATERFORD PRISONERS'
SUPPLEMENTAL PETITION FOR REVIEW

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SUPPLEMENTAL PETITION FOR REVIEW

Introduction

The matters before the Atomic Safety and Licensing Appeal Board ("Appeal Board") involve an appeal by intervenor Graterford Prisoners pursuant to 10 C.F.R. §2.714a and a request by intervenor for further disclosure of the radiological emergency response plan for the State Correctional Institution at Graterford ("SCIG").

The presiding Atomic Safety and Licensing Board ("Licensing Board") properly determined that intervenor's proposed contentions did not meet the Commission's "basis and specificity" requirements or the additional requirements for late-filed contentions. The Licensing Board also correctly refused to order full disclosure of the SCIG emergency plan, which had previously been released in a sanitized version to intervenor's counsel and expert consultant on prison security with practically no deletions.

Intervenor fails to demonstrate any legal error by the Licensing Board in finding the proposed contentions inadmissibly vague and without foundation. Although intervenor would weigh the five factors for admitting late contentions differently than the Licensing Board, its analysis reveals no abuse of discretion by the Board in finding, on balance, that the factors weigh against admitting the late contentions.

Also, intervenor has not shown any abuse of discretion by the Licensing Board in not compelling full disclosure of the Graterford Prison emergency plan. Intervenor does not actually contest the validity of the Licensing Board's actions. In reality, intervenor is aggrieved only by the Licensing Board's denial of its proposed contentions. It is apparently pursuing an appeal as to full plan disclosure with the misconception that an appeal will enhance its position on the admissibility of its proposed contentions. Accordingly, the decision of the Licensing Board should be affirmed.

Statement of Facts

The Licensing Board in this proceeding has now issued a First and Second Partial Initial Decision ("PID") which, together with the Third PID anticipated shortly, will (assuming a disposition favorable to Applicant) provide the basis for the Board's authorization to the Director of Nuclear Reactor Regulation for the issuance of a full-power operating license for Unit 1 of the Limerick Generating

Station ("Limerick").^{1/} The only contested issues left for resolution after the First and Second PID's were offsite emergency planning contentions. Except for those proposed by the Graterford Prisoners, emergency planning contentions were the subject of evidentiary hearings held from November 19, 1984 through January 29, 1985 and a disposition is forthcoming.^{2/} Contentions filed by the Graterford Prisoners were ruled inadmissible in a separate Memorandum and Order on April 12, 1985.^{3/}

As the Licensing Board discussed, a petition for intervention was filed on behalf of the SCIG inmates on September 18, 1981 by the Philadelphia Chapter of the National Lawyers' Guild. The Licensing Board admitted the Graterford Prisoners as a consolidated party under that collective designation.^{4/} In a separate order admitting and

^{1/} See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413 (1983), rev'd in part, ALAB-785, 20 NRC 848 (1984); LBP-84-31, 20 NRC 446 (1984), appeal pending. Following ALAB-785, the Licensing Board dismissed the remainder of the remanded case in an unpublished Memorandum and Order (November 8, 1984), which the Appeal Board affirmed in ALAB-804 (April 10, 1985).

^{2/} Intervenor's counsel did not participate in or attend those hearings.

^{3/} Limerick, supra "Memorandum and Order on Graterford Prisoners Proposed Contentions" (April 12, 1985).

^{4/} Limerick, supra, LBP-82-43A, 15 NRC 1423, 1446-47 (1982). The Board based its grant of the petition for intervention upon its conditional admission of a single
(Footnote Continued)

denying various emergency planning contentions, the Licensing Board ordered intervenor to file its proposed contentions 20 days after receipt of the Graterford emergency plan.^{5/}

On December 13, 1984, the Commonwealth of Pennsylvania provided intervenor's counsel with a sanitized version of the Graterford emergency plan. The Bureau (now Department) of Corrections deleted a substantial portion of the plan,

(Footnote Continued)

contention proposed by the Graterford Prisoners, alleging inadequate plans to evacuate prisoners at Graterford Prison, which is located within the 10-mile EPZ. The Board held that intervenor would be required to respecify its contention(s) at the time an emergency plan for Graterford Prison became available. Id. at 1520.

Although perhaps unclear at the time the Board so ruled, licensing boards lack authority to admit a nonspecific contention conditionally, subject to respecification when new information becomes available. Rather, a board must await the submission of a contention with the requisite specificity and bases and then determine whether the petitioner has met the five-prong test for late contentions. As the Appeal Board stated in Catawba, "a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements." Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), rev'd on other grounds, CLI-83-19, 17 NRC 1041 (1983) (emphasis in original). As the Appeal Board added, the Commission's rules regarding bases and specificity do not permit "the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff." 16 NRC at 468. Therefore, the Board should have denied the Graterford Prisoners' petition for intervention and ruled upon a resubmitted petition after the Graterford emergency plan became available.

^{5/} Limerick, supra, LBP-84-18, 19 NRC 1020, 1030 (1984).

which was released without the benefit of a protective order, for security reasons. On December 20, 1984, intervenor filed a motion seeking full plan disclosure. At a hearing on January 29, 1985, the Licensing Board heard oral argument from the parties and inquired into the particulars of intervenor's alleged need for further plan information to draft its contentions (Tr. 20424-83). The Board also heard from the Deputy Commissioner for the Department of Corrections regarding the reasons for the deletions (Tr. 20430-57).

The Licensing Board orally denied the motion for full disclosure of the Graterford evacuation plan (Tr. 20479-81) and subsequently issued a written denial.^{6/} An appeal of that denial was dismissed without prejudice by the Appeal Board on February 12, 1985. Nonetheless, the Appeal Board suggested that the parties, with the Licensing Board's assistance, attempt to work out their differences towards a fuller disclosure of the plan subject to a protective order.^{7/}

^{6/} Limerick, supra, "Memorandum and Order Regarding Graterford Prison" (February 5, 1985). The Licensing Board ruled that intervenor had not demonstrated a need for additional information in order to formulate its contentions.

^{7/} Limerick, supra, ALAB "Memorandum and Order" (February 12, 1985). Nonetheless, intervenor sought Commission review in a petition filed February 21, 1985.

On February 15, 1985, intervenor filed its proposed contentions,^{8/} consisting of three broadly stated issues and ten supporting bases (the actual contentions) as to the capability for protecting the Graterford inmates in the event of a radiological emergency.^{9/}

Thereafter, the Licensing Board convened two prehearing conferences in an attempt to resolve intervenor's request for further plan disclosure as well as its substantive concerns. As a result of a compromise reached at the prehearing conference on February 27, 1985, virtually the entire Graterford emergency plan, with only minor deletions for security reasons, was made available on March 18, 1985 to intervenor's counsel and expert consultant under a protective order and affidavits of nondisclosure.^{10/}

At the prehearing conference on March 22, 1985, counsel for the Graterford Prisoners conceded that both he and intervenor's consultant were able "to see the plan virtually

^{8/} The Licensing Board had ruled that the Graterford Prisoners must file any contention(s) based upon the Graterford emergency plan no later than February 18, 1985. Limerick, supra, "Memorandum and Order Regarding Graterford Prison" (February 5, 1985) (slip op. at 3).

^{9/} Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan (February 15, 1985).

^{10/} See Limerick, supra, "Memorandum and Order on Graterford Prisoners Proposed Contentions" (April 12, 1985) (slip op. at 4).

in its entirety" (Tr. 20612-13). On the basis of his personal review, counsel stated:

MR. LOVE:

So with regard to the issue of disclosure, I do believe that we are satisfied and that we are willing to drop that issue except for one or two points that we think need clarified so I will wait until the end of the meeting before I make that decision, however it seems to me that this does satisfy our concerns regarding the disclosure issue [Tr. 20613].

As intervenor frankly concedes on appeal, it had been its intention "to drop the present action [for further plan disclosure] as they were satisfied with the further disclosure brought forth by the review" of the plan on March 18, 1985.^{11/}

Only after intervenor's counsel expressed dissatisfaction with the Licensing Board's denial of new, late contentions did he change his mind and state anew his intention to pursue an appeal as to full plan disclosure. As he stated midway through the prehearing conference on March 22, 1985 after discussing the proposed contentions:

MR. LOVE: Those are my concerns. I will drop my motion for further disclosure. I am quite satisfied with the information that has been forthcoming however, I would reserve the right to file additional contentions based upon the discussions today. [Tr. 20657]

^{11/} Intervenor Graterford Inmates' Supplemental Petition at 3 (April 16, 1985).

Later, counsel added "that we have had full disclosure or at least to my satisfaction" of the Graterford emergency plan.

With regard to the substantive issues, intervenor expressed a desire to supplement its filed contentions with new contentions which supposedly arose from its counsel's and consultant's review of the less sanitized plan (see, e.g., Tr. 20613, 20615). Intervenor's counsel described several subjects on which it wished to propose new contentions,^{12/} but no contention as such was proposed at the prehearing conference nor has any ever been submitted by intervenor for a ruling as to admissibility.

Moreover, at no time has intervenor demonstrated or even attempted to demonstrate any nexus between the review of the less sanitized plan by its counsel or expert with the allegedly "new" areas of concern. In any event, intervenor has elected not to pursue these issues on appeal.^{13/}

^{12/} Those concerns were described as a desire to have further input into the plans from the union representing Graterford Prison guards (Tr. 20624); the possibility of "panic" or "some kind of a stampede to the front door" upon notification to the inmates of a radiological emergency (Tr. 20655); notification of off-duty prison personnel (Tr. 20626-27); and an evacuation time estimate for Graterford (Tr. 20641).

^{13/} Intervenor states that "they will continue to appeal this denial [of new contentions based upon subsequent plan disclosures] which is currently pending before the Nuclear Regulatory Commission" rather than before the Appeal Board. See Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions at 2 (April 18, 1985). As
(Footnote Continued)

As to those unresolved contentions which were submitted in writing on February 15, 1985,^{14/} the Licensing Board determined that they lack the requisite specificity and bases and also fail to satisfy, on balance, the Commission's requirements for admitting late contentions.

Thereafter, intervenor sought appellate review of these issues by supplementing his petition filed with the Commission for review of the Appeal Board's order denying directed certification on the issue of full plan disclosure^{15/} and by appealing the Licensing Board's denial of its proposed contentions.^{16/} In an Order dated April 23, 1985, the Appeal Board stated that intervenor's supplemental pleading

(Footnote Continued)

discussed infra, there is no basis in the Commission's regulations for this attempted bifurcation of the issues relating to the admissibility of intervenor's proposed contentions.

^{14/} A number of the contentions were voluntarily withdrawn by intervenor at the prehearing conference on March 22, 1985 as a result of the further plan disclosures and additional information and explanations provided by the Acting Commissioner of and counsel for the Department of Corrections (Tr. 20677-94). See Limerick, supra, "Memorandum and Order on Graterford Prisoners Proposed Contentions" (April 12, 1985) (slip op. at 5).

^{15/} See Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification (April 16, 1985).

^{16/} See Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions (April 18, 1985). Although styled as a "Notice of Appeal," it is clear that the denial of all of its proposed contentions is governed by the appeal procedures of 10 C.F.R. §2.714a(b).

to the Commission had been referred to the Appeal Board and would be considered concurrently with intervenor's appeal.^{17/} The Appeal Board further stated that, because there was "good cause for acting expeditiously," all replies on both matters should be received on April 30, 1985.^{18/}

Argument

I. The Licensing Board Did Not Abuse its Discretion in Denying Full Disclosure of the Graterford Emergency Plan.

As discussed, the issue of full disclosure of the Graterford emergency plan initially arose when intervenor sought directed certification of an order issued February 5, 1985 in which the Licensing Board denied full disclosure of the plan, which had previously been released in a sanitized form.^{19/} As recounted above, the ultimate outcome of events

^{17/} The Appeal Board informed the parties by telephone the preceding day of the substance of the Order.

^{18/} Limerick, supra, ALAB "Order" (April 23, 1985). The redirection of the supplemental petition to the Appeal Board was confirmed by an Order from the Secretary of the Commission, dated April 23, 1985. In a letter to intervenor's counsel the same day, the Secretary stated that the Commission had not granted review of intervenor's original petition because the issues raised had been eliminated by agreement of the parties and because a petition for review of a denial of directed certification is impermissible under 10 C.F.R. §2.786(b)(1).

^{19/} The Licensing Board ruled that, despite repeated directives to specify information allegedly needed by intervenor to formulate and litigate its contentions, beyond information disclosed in the sanitized version of the plan, it had not done so. The Board further
(Footnote Continued)

thereafter was the release to intervenor's counsel and expert of a far less sanitized version of the plan, which contains only very minor deletions.

Accordingly, the request for full plan disclosure is now moot. Notwithstanding some equivocation, intervenor's counsel has stated that he is satisfied with the extent of plan disclosure.^{20/} Thus, the supervening events have mooted intervenor's request for relief.^{21/} Moot issues may not be litigated.^{22/}

It is quite clear from intervenor's supplemental petition seeking full plan disclosure that the controversy, if one exists, is limited to the right of intervenor to file new contentions following its review of the less sanitized

(Footnote Continued)

ruled that security concerns outweighed intervenor's interests in obtaining further plan disclosure. Limerick, supra, "Memorandum and Order Regarding Graterford Prison" (February 5, 1985).

20/ See pages 6-8, supra.

21/ See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 NRC 72, 74 (1983); United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 419 (1982); Consolidated Edison Company of New York, Inc. (Indian Point, Unit No. 2), CLI-81-7, 13 NRC 448, 449 (1981); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433, 435 (1980).

22/ Three Mile Island, supra, ALAB-697, 16 NRC 1265, 1273 (1982); ALAB-658, 14 NRC 981, 982 (1981); Portland General Electric Company (Trojan Nuclear Plant), ALAB-627, 13 NRC 20, 23 (1981).

version of the plan.^{23/} In effect, intervenor has confused two distinct issues, i.e., its claim to full plan disclosure without deletions and its asserted right to file a new round of contentions following its review of the less sanitized version of the plan.

Even if the Appeal Board were to consider the merits of full plan disclosure, intervenor has not demonstrated or even alleged that the Licensing Board abused its discretion in not requiring complete disclosure of the Graterford emergency plan. There is no claim, nor could there reasonably be any such claim, that the very limited nondisclosures in the less sanitized version of the plan in any way prejudiced intervenor. The deletions were so sparse that they could not possibly have impaired the drafting of

23/ As intervenor states:

Thus, the Inmates have been denied the right to refile their contentions and the right to respecify the bases for their contentions, despite the allowance of further disclosure, i.e. a review of the Plan 2 [the less sanitized version]. For these reasons, the Inmates have no other option but to continue to pursue their request for full disclosure and to supplement said request with a provision regarding the right not only to review the additional information, but to update their initial contentions based upon a review of the second plan.

Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification at 5 (April 16, 1985).

proper contentions.^{24/} Inasmuch as intervenor has failed to point to any specific deletion of the plan which prejudiced its ability to formulate contentions, there is no real controversy for the Appeal Board to decide and certainly no merit to intervenor's request to see a totally uncensored copy of the plan.

II. The Licensing Board Properly Denied
Intervenor's Proposed Contentions.

A. The Contentions Lack Specificity
and Bases.

On February 15, 1985, intervenor filed three general contentions supported by ten bases, which are really more in the form of proposed contentions themselves, wholly lacking in any specificity.^{25/} As noted, most of the "bases" were withdrawn by intervenor because it was satisfied with the

^{24/} For example, intervenor bases one contention upon the "general concept of evacuation" stated at page E-1-A-1 of the plan. See pages 22-23, *infra*. It is evident that only the exact relocation points and staff numbers have been deleted.

^{25/} The third contention was withdrawn at the prehearing conference on March 22, 1985 (Tr. 20677). The other two contentions were:

A. There is no reasonable assurance that the evacuation plan will protect the staff and inmates at the State Correctional Institute [sic] at Graterford.

B. There is no reasonable assurance that the evacuation plan will provide a safe and secure evacuation from the State Correctional Institute [sic] at Graterford.

information furnished by the Department of Corrections in the plan and at the two prehearing conferences.^{26/} The only remaining "bases" in dispute are:

D. Medical Services

There is no reasonable assurance that medical services will be provided to individuals contaminated by radiation. Inmates cite as a basis for this 10 CFR 50.47(b)12.

.....

G. Training

There is no reasonable assurance that SCIG personnel, drivers (once identified), and the Pennsylvania State Police will receive any training in preparedness for a nuclear emergency at SCIG. Inmates cite as a basis for this contention 10 CFR 50.47(b)15.

.....

J. General Concept of Evacuation

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 inmates and SCIG personnel during said evacuation.^{27/}

^{26/} The Department of Corrections provided additional information in a separate report to the Licensing Board and parties. See 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 (March 15, 1985).

^{27/} See Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan at 8-9 (February 15, 1985); Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions at 6 (April 18, 1985).

Although intervenor pays lip service to the requirement for specificity and bases in pleading its contentions,^{28/} it scarcely addresses the findings of insufficient specificity and bases on appeal. Rather, it simply asserts that a "debate has arisen regarding the standards with which hospitals are charged" in rendering medical services to radiologically contaminated inmates in the event of an emergency and that, as to training, "the civilian bus drivers [who will assist in transporting inmates if evacuated in an emergency] should be afforded the same opportunity as civilian bus drivers evacuating school children and other such persons in the EPZ."^{29/} As to the third basis, regarding the general concept for evacuation, intervenor cannot even point to any provision in the more recently disclosed plan which provides any basis for the contention.^{30/} The Licensing Board was correct in finding that the proposed contentions lack specificity and bases.

1. No basis has been alleged to dispute the adequacy of medical services for inmates. This proposed contention does nothing more than paraphrase the language of 10 C.F.R.

^{28/} See generally Limerick, supra, "Memorandum and Order on Graterford Prisoners Proposed Contentions" (April 12, 1985) (slip op. at 6-8).

^{29/} Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions at 10 (April 18, 1985).

^{30/} Id. at 11. See note 24, supra.

§50.47(b) (12) requiring availability of medical services for contaminated injured individuals.^{31/} It points to no inadequacy in the Commonwealth's plan for radiological emergencies in providing medical and health support.^{32/} Nor is there any showing that existing procedures and resources within the Limerick EPZ or adjacent areas which might be called upon in an actual emergency are in any way inadequate to treat contaminated injured inmates at Graterford.

Although the vagueness of this proposed contention would have warranted its denial even if the Graterford emergency plan had been available at the outset of the proceeding, the lack of specificity is even more pronounced in the context of the existing, well developed record. Adequate specificity and bases, like good cause for lateness, must be judged in that context.^{33/}

31/ The regulation states: "Arrangements are made for medical services for contaminated injured individuals."

32/ See Disaster Operations Plan - Annex E, Appendix 13. The Commonwealth's plan is maintained and updated by the Pennsylvania Emergency Management Agency ("PEMA").

33/ The Appeal Board has recently recognized this principle in another aspect of this proceeding. In ALAB-804, the Appeal Board affirmed the Licensing Board's denial of new contentions proposed by another intervenor, related to environmental impacts of the supplemental cooling water system for Limerick, on the ground that the intervenor had not formulated contentions which specifically took issue with statements in the existing record as to those impacts. As here, intervenor "did not have to prove its thesis, but was expected to supply some cognizable basis as support for the charge"

(Footnote Continued)

Although related to the adequacy of medical services for Applicant's onsite personnel, the issue of medical services for contaminated/injured persons has already been the subject of evidentiary hearings and detailed findings by the Licensing Board. Those findings encompass the very narrow issue raised by intervenor as to the effect of hospital accreditation, as discussed below. Nonetheless, the proposed contention ignores that record entirely and is utterly bereft of any attempt to show why hospital accreditation suitable for onsite planning is insufficient here.

As background, the Licensing Board has held that considerable planning exists to provide medical services for contaminated injured individuals.^{34/} The Board found that there are 20 hospitals within the Limerick EPZ capable of providing radiation exposure/contamination treatment.^{35/} Outside the Limerick EPZ, the Hospital of the University of Pennsylvania and other hospitals would be available.^{36/}

At the last prehearing conference, intervenor's counsel asserted that there should be another designated hospital whose capacity for handling contaminated injured individuals

(Footnote Continued)

in the proposed contention. Limerick, supra, ALAB-804, 21 NRC ____ (April 10, 1985) (slip op. at 12).

^{34/} Limerick, supra, LBP-84-31, 20 NRC 446, 531-34 (1984).

^{35/} Id. at 535.

^{36/} Id. at 531-36.

had been reviewed and found acceptable in addition to the two hospitals where Limerick workers would be taken if contaminated (Tr. 20616-18). Counsel stated that he was unwilling to rely upon the previous findings by the Licensing Board that accreditation by the Joint Committee on Hospital Accreditation ("JCHA") is sufficient to reasonably assure the capacity of the hospital to treat contaminated injured individuals (Tr. 20667-70).

In its Second PID, the Licensing Board did, however, hold that JCHA accreditation provides such reasonable assurance. The Board stated:

Neither the Applicant nor RMC have made arrangements with any of these . . . hospitals [other than Pottstown Memorial or HUP] to receive contaminated injured from the plant, but the Applicant argues that, even so, none of these hospitals would refuse to accept a contaminated injured patient, for all of them are accredited by the principal national accrediting organization, the Joint Committee on Hospital Accreditation (JCHA). The JCHA requires that each accredited hospital have some plans for treating contaminated injured patients.
. . . .

Regarding the availability of other hospitals in the highly unlikely event that Pottstown Memorial is evacuated, the County Radiological Emergency Response Plans (RERPs) show that there are twenty hospitals in the three county risk areas listed with radiation exposure/contamination treatment capability (Montgomery County - 12, Berks County - 3, Chester County - 5). While the Board has no detailed knowledge of the specific abilities and training of the emergency medical service personnel at these potential alternative receiving hospitals, who might handle "contaminated

injured," it is not unreasonable to assume that they are adequately prepared. . . . It may also be reasonably assumed that in the event of a hospital evacuation, trained personnel and some equipment would travel to the receiving hospital and provide assistance.^{37/}

Intervenor has not disputed the representation by the Department of Corrections that adequate agreements for medical services do exist between hospitals and the Department's correctional institutions in the area where Graterford prisoners would be relocated if evacuated (Tr. 20619-20).^{38/} Likewise, there is no dispute regarding hospital accreditation. Intervenor acknowledges that each of the hospitals to which SCIG inmates would be transported if contaminated and injured is accredited by the JCHA (Tr. 20620). Documentation provided by the Department of Corrections establishes its ongoing relationship with hospitals and clearly indicates JCHA accreditation.^{39/}

Thus, the only contested issue stated by intervenor was the legal effect of JCHA accreditation. The Licensing Board

^{37/} Limerick, supra, LBP-84-31, 20 NRC 446, 534-35 (1984). The correctness of this holding by the Licensing Board is presently pending disposition on appeal.

^{38/} Accordingly, though not raised by intervenor, there is no question as to compliance with GUARD v. NRC, No. 84-1091 (D.C. Cir., February 12, 1985).

^{39/} See Response of the Commonwealth of Pennsylvania, Department of Corrections to Request for Information Raised at the February 27, 1985 Atomic Safety and Licensing Board Conference (March 15, 1985) (Exn. F).

correctly followed its previous ruling as the law of the case that JCHA accreditation meets the NRC's regulatory requirements for providing medical services in a radiological emergency.^{40/}

Notwithstanding the contention's lack of any legal basis, Applicant went one step further to establish the absence of any possible issue. At the prehearing conference on March 22, 1985, intervenor took the position that its concern as to medical services would be satisfied by an affidavit from Dr. Roger E. Linnemann, Applicant's medical expert in the earlier proceeding, as to the capability of the hospital which routinely treats SCIG inmates to handle contaminated/injured individuals (Tr. 20720). Applicant obtained such an affidavit and filed it with the Licensing Board in response to the proposed contention.

Dr. Linnemann's affidavit states that he has personally reviewed the capability of Montgomery County Hospital in Norristown, Pennsylvania^{41/} for handling contaminated/injured patients and has determined that "Montgomery County Hospital has adequate facilities, plans, procedures and trained staff to handle contaminated and injured

^{40/} Limerick, supra, "Memorandum and Order on Graterford Prisoners Proposed Contentions" (April 12, 1985) (slip op. at 15).

^{41/} Counsel for the Department of Corrections had advised that this particular hospital routinely provides medical services for SCIG inmates.

patients."^{42/} While that information was unavailable to intervenor at the time it submitted its proposed contention, its failure on appeal to point out any residual concern, having been provided the very information it sought, confirms the lack of any basis for pursuing the contention.

2. Bus driver training concerns have been met. The second "basis" raised by intervenor boils down to an argument that training should be afforded bus drivers of those private companies which will be providing transportation to relocate Graterford inmates in the event of a radiological emergency.^{43/} Intervenor's counsel expressly stated that intervenor would be satisfied (drop the contention) if a commitment were made to provide those bus drivers with an opportunity to receive the same training offered to bus providers which have agreed to assist in the evacuation of school children and other transportation-dependent individuals in the event of a radiological emergency at Limerick (Tr. 20687-90).^{44/}

^{42/} Affidavit of Roger E. Linnemann, M.D. at ¶4 (April 4, 1985).

^{43/} Although the Department of Corrections declined to release precise numbers for security reasons, a substantial number of prisoners would be evacuated by means of Department-owned vehicles.

^{44/} See also Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions at 10 (April 18, 1985).

In a recent letter from PEMA to all bus companies which would be providing the Department of Corrections with buses in the event of a radiological emergency, PEMA offered dosimetry training to bus drivers.^{45/} Additionally, Applicant has represented on the record that bus driver training by Energy Consultants^{46/} will be made available on the same basis as to other bus providers which have agreed to assist in an evacuation.^{47/} Accordingly, intervenor's claims as to bus driver training have been rendered moot because the parties have met the very terms it has requested. Put differently, intervenor has show no basis for pursuing the proposed contentions.

3. Remaining concerns relating to a "generalized concept of evacuation" lack merit. Whatever issues intervenor might now seek to group under this umbrella contention, its analysis is clearly an afterthought. The Licensing Board properly rejected this catch-all contention, whatever it means. Although intervenor does not contend on

^{45/} See Answer of the Commonwealth of Pennsylvania to Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan, Exhibit B (April 4, 1985).

^{46/} Energy Consultants is a consulting firm retained by Applicant to provide assistance to counties and municipalities within the EPZ in preparing their emergency plans and achieving emergency preparedness.

^{47/} See Applicant's Answer to Proposed Emergency Planning Contentions of the Graterford Prisoners at 4 n.3 (April 4, 1985).

appeal that this particular "basis" encompasses the new matters it wishes to raise,^{48/} the Licensing Board properly rejected those new issues as beyond regulatory requirements under 10 C.F.R. §50.47 and 10 C.F.R. Part 50, Appendix E.

B. The Licensing Board Did Not Abuse its Discretion in Balancing the Five Factors on Late Contentions to Deny Their Admission.

Under the Commission's rules for admitting late contentions in 10 C.F.R. §2.714(a)(1)(i)-(v), late contentions

^{48/} At the time of the prehearing conference on March 22, 1985, intervenor's counsel took the position that new issues not pleaded in the written contentions filed on February 15, 1985 could be subsumed within the "general concept of evacuation." Clearly, none of the new matters raised by intervenor at the prehearing conference (Tr. 20691) falls within the ambit of this contention. On appeal, intervenor does not pursue this theory, but rather limits this alleged "basis" to concerns regarding page E-1-A-1 of the plan.

It is unclear whether intervenor is attempting to preserve a right to file contentions along the lines discussed at the prehearing conference on March 22, 1985 (see note 13, *supra*) or other new contentions. It is each party's job "to present its respective position in an intelligible form to the decisionmaker." Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC (March 22, 1985) (slip op. at 6). Whatever its intent, intervenor has indisputably failed to brief the merits of any such claim. As such, it has waived any such claim regarding the admission of those contentions. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC (March 26, 1985) (slip op. at 10-11 n.30); Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 395 (1983).

should not be granted unless, on balance, the intervenor demonstrates that: (i) good cause exists for its failure to file timely; (ii) other means are unavailable to protect its interest; (iii) its participation may reasonably be expected to assist in developing a sound record; (iv) the existing parties will not adequately represent its interest; and (v) its participation will not broaden the issues or delay the proceeding.^{49/} Applicant agrees with the Licensing Board's evaluation and balancing of the five factors in this instance.

In the WPPSS proceeding, the Appeal Board restated the standard it would utilize in reviewing the balance struck by a licensing board in granting or denying a late petition or contention as follows:

The Commission long ago referred to the "broad discretion" conferred by Section 2.714(a) upon licensing boards in the fulfillment of their responsibility to decide whether a particular intervention petition should be rejected because of untimeliness. . . . Accordingly, as we recently had occasion to observe, "neither this Board nor the Commission has been readily disposed to

^{49/} The Appeal Board in Catawba held that good cause is shown where the late contention "(1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination." Catawba, supra, ALAB-687, 16 NRC 460, 469 (1982), aff'd in part, CLI-83-19, 17 NRC 1041, 1043-44 (1983).

substitute its judgment for that of the Licensing Board insofar as the outcome of the balancing of the Section 2.714(a) [lateness] factors is concerned."

. . . .

It follows that the [appellant] has a substantial burden on this appeal. It is not enough for it to establish simply that the Licensing Board might justifiably have concluded that the totality of the circumstances bearing upon the five lateness factors tipped the scales in favor of denial of the petition. In order to decree that outcome, we must be persuaded that a reasonable mind could reach no other result.^{50/}

1. Good cause exists, but is not controlling. Applicant believes that good cause exists for the late filing of contentions in writing by intervenor on February 15, 1985.^{51/} Nonetheless, contrary to intervenor's belief, good cause alone is not controlling. The institutional unavailability of an emergency plan until after the period for filing timely contentions does not automatically warrant admission of late contentions related to the plan. The contrary proposition was squarely rejected by the Commission in Catawba, which held:

[T]he Commission believes that the Appeal Board erred in holding that Section 189a. of the Atomic Energy Act requires a Licensing Board to treat the

^{50/} Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC II67, 1171 (1983) (emphasis added) (brackets in original).

^{51/} Again, Applicant notes that intervenor has not pursued its orally stated issues on appeal and has waived any rights thereto. See note 48, supra.

good cause factor as controlling in ruling on the admissibility of a contention that is filed late because it is based solely on information in institutionally unavailable licensing-related documents. Rather, the Commission finds that all of the factors in 10 CFR 2.714(a)(1) should be applied by the Licensing Board, including the Appeal Board's three-part test for good cause.^{52/}

2. Other means are available to protect intervenor's interest. In addition to the candid and free-flowing information provided by officials from PEMA and the Department of Corrections,^{53/} intervenor's counsel or

^{52/} 17 NRC at 1045. The Commission stated, inter alia, that "the admission of late-filed contentions must be balanced against the public interest considerations in the efficient and timely conduct of administrative proceedings." Id. at 1046-47. It therefore overruled the Appeal Board's conclusion that, where "the nonexistence or public unavailability of relevant documents made it impossible for a sufficiently specific contention to have been asserted at an earlier date, that factor must be deemed controlling; it is not amenable to being overridden by other factors such as that relating to the broadening of the issues." Catawba, supra, CLI-83-19, 17 NRC at 1044, citing ALAB-687, 16 NRC at 470.

^{53/} See Limerick, supra "Memorandum and Order on Graterford Prisoners Proposed Contentions" (April 12, 1985) (slip op. at 11). At both of the prehearing conferences on February 27 and March 22, 1985, the Director of PEMA, the Acting Director of the Department of Corrections as well as both agency's counsel were present to respond to the various inquiries by intervenor's counsel and expert consultant. Further explanation of emergency preparedness at Graterford was provided by the Department in its 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 (March 15, 1985).

representative will have the opportunity to comment on the Graterford emergency plan at the public hearing required under 44 C.F.R. §350.10. Accordingly, the Licensing Board correctly held that other means are available to protect intervenor's interest.

3. Intervenor's participation will not assist in developing a sound record. As the Licensing Board also held, intervenor made a very weak showing that its participation may reasonably be expected to assist in developing a sound record. It wholly failed to meet the Grand Gulf criteria for particularizing precise issues, identifying prospective witnesses and summarizing their proposed testimony.^{54/} The input to be expected from intervenor's expert consultant is problematical; he demonstrated no expertise in the area of medical services for contaminated individuals or bus driver training.

4. Intervenor's interest will be protected by the responsible agencies. The Licensing Board correctly found that intervenor's interest in adequate emergency preparedness at Graterford will be adequately protected by PEMA and the Department of Corrections, as amply demonstrated by the

^{54/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983).

highly professional and cooperative attitudes of those agencies in responding to the concerns expressed by intervenor's counsel in its pleadings and at two prehearing conferences.

Moreover, both the Federal Emergency Management Agency ("FEMA") and the NRC Staff will represent the intervenor's interest in the adequacy of emergency preparedness at Graterford by fulfilling their respective roles under 10 C.F.R. §50.47 and 44 C.F.R. Part 350 in finding, prior to issuance of a full-power operating license, "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" for the benefit of Graterford inmates,^{55/} based upon a FEMA finding and determination that the Graterford emergency plan is "adequate" and "can be implemented."^{56/}

An exercise to test emergency preparedness at Graterford was conducted on March 7, 1985 and evaluated by FEMA. Its evaluation of the exercise was transmitted to the NRC with a memorandum dated March 27, 1985, which stated that "the Graterford authorities adequately demonstrated an understanding of the emergency response procedures and the

^{55/} 10 C.F.R. §50.47(a)(1).

^{56/} 10 C.F.R. §50.47(a)(2).

ability to adequately implement them."^{57/} This amply demonstrates that intervenor's interests will be adequately represented by the existing parties.

5. Admitting the late contentions will significantly delay the proceeding. The final factor, delay of the proceeding and broadening of the issues, weighs very strongly against admitting intervenor's contentions. Now that the proceeding before the Licensing Board is about at an end with the issuance of the Third PID, admitting the late-filed contentions would not only "delay" the proceeding but effectively reopen it.^{58/} Moreover, admitting new contentions at this very late stage would undoubtedly delay the issuance of an operating license for Limerick unless the outstanding application for an exemption were granted.^{59/}

^{57/} See Memorandum from Richard W. Krimm, Office of Natural and Technological Hazards Programs, FEMA, to Edward L. Jordan, Office of Inspection and Enforcement, NRC (March 27, 1985).

^{58/} It is noted that the fifth factor involves delay of the proceeding, not delay of the operation of the facility. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982), citing Fermi, supra, LBP-82-96, 16 NRC 1408, 1434 (1982); Shoreham, supra, LBP-83-30, 17 NRC 1132, 1146 (1983).

^{59/} Presumably as a result of its denying intervenor's contentions in their entirety, the Licensing Board has not ruled upon Applicant's Motion for Exemption from the Requirements of 10 C.F.R. §50.47(a) and (b) as They Relate to the Necessity of Atomic Safety and Licensing Board Consideration of Evacuation Provisions of the Emergency Plan for the State Correctional Institution at Graterford (February 7, 1985).

Intervenor's argument that it is not at fault for any delay is simply a repetition of its "good cause" argument for late filing. As the Commission held in Catawba, however, there is a countervailing interest in the timely and efficient conduct of its proceedings, which the fifth factor encompasses, regardless of any fault on the part of an intervenor for the delay.^{60/}

In sum, the Licensing Board correctly found that only one of the five factors favored admission of intervenor's proposed late contentions. The other four factors weighed strongly against their admission. The Licensing Board did not abuse its discretion in balancing the weight of the five factors against admission of the contentions. On the record, intervenor has not met its heavy burden of persuading this Board that "a reasonable mind could reach no other result" than to admit the late contentions.^{61/}

Conclusion

For the reasons discussed above, the Appeal Board should affirm the Licensing Board's denial of the late-filed contentions proposed by intervenor on the grounds that they are impermissibly vague and without basis or, alternatively,

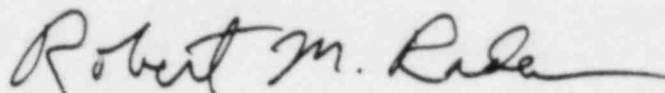
^{60/} See note 52, supra.

^{61/} WPPSS, supra.

because they fail to satisfy the Commission's five-factor balancing test for admitting late-filed contentions. Further, intervenor's claims as to full plan disclosure are, by its own admission, completely satisfied and hence moot.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in cursive script, reading "Robert M. Rader". The signature is written in dark ink and is positioned above the typed names of the attorneys.

Troy B. Conner, Jr.
Robert M. Rader
Nils N. Nichols

Counsel for the Applicant

April 30, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Brief in Opposition to Graterford Prisoners' Appeal of the Atomic Safety and Licensing Board's Order Denying its Contentions and Applicant's Answer to Graterford Prisoners' Supplemental Petition for Review" dated April 30, 1985 in the captioned matter, have been served upon the following by deposit in the United States mail this 30th day of April, 1985:

- * Christine N. Kohl, Esq.
Chairman Atomic Safety and
Licensing
Appeal Board
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
- * Dr. Reginald L. Gotchy
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555
- 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
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Washington, D.C. 20555
- Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory
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- Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
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Washington, D.C. 20555

* Hand Delivery

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West Chester, PA 19380

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Pennsylvania Emergency
Management Agency
B151 - Transportation
Safety Building
Harrisburg, PA 17120



Mark J. Wetterhahn

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

BEFORE ADMINISTRATIVE JUDGES:

HeLen F. Hoyt, Chairperson
Dr. Richard F. Cole
Dr. Jerry Harbour

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

Docket Nos. 50-352-OL
50-353-OL
(ASLBP No. 81-465-07-OL)

March 20, 1985

PROTECTIVE ORDER

Counsel and representatives of the parties¹ to this proceeding who have executed an Affidavit of Non-Disclosure in the form attached shall be permitted access to "protected information"² upon the following conditions:

¹ For the purpose of this Protective Order reference to parties is limited to the Graterford Inmates, Commonwealth of Pennsylvania, Philadelphia Electric Company, and the NRC Staff.

² As used in this order, "protected information" has the same meaning as used in the Affidavit of Non-Disclosure, attached hereto. The provisions of this Protective Order do not apply to Nuclear Regulatory Commission employees; they are subject to internal requirements. (See NRC Manual Appendix 2101) concerning the treatment of protected information.

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1. Only counsel and representatives of the parties who have executed an Affidavit of Non-Disclosure may have access to protected information. All executed Affidavits of Non-Disclosure or copies shall be provided to the Licensing Board and the parties.

2. Counsel and representatives who receive any protected information (including transcripts of in camera hearings, filed testimony or other documents that reveals protected information) shall maintain its confidentiality as required by the attached Affidavit of Non-Disclosure, the terms of which are hereby incorporated into this protective order.

3. Counsel and representatives who receive any protected information shall use it solely for the purposes of participation in matters directly pertaining to this proceeding and any further proceedings in this case and for no other purposes.

4. Counsel and representatives shall keep a record of all documents containing protected information in their possession and shall account for and deliver that information to counsel for the staff in this proceeding in accordance with the Affidavit of Non-Disclosure that each has executed.

5. In order to keep the service list as limited as possible and thus to reduce the possibility of materials becoming lost or misplaced, copies of documents will be formally served on each Board member and only on the following, who shall be considered "lead counsel" for service purposes:

Counsel for Inmates: Angus B. Love, Esq.
Montgomery County Legal Aid
107 East Main Street
Morristown, Pennsylvania 19401

Counsel for Commonwealth
of Pennsylvania, Department
of Corrections: Theodore G. Otto, III, Esq.
Department of Corrections
Commonwealth of Pennsylvania
P.O. Box 598
Camp Hill, Pennsylvania 17011

Counsel for Governor's
Energy Council: Zori Ferkin, Esq.
Governor's Energy Council
P.O. Box 8010
1625 N. Front Street
Harrisburg, Pennsylvania 17105

Philadelphia Electric: Troy Conner, Jr., Esq.
Mark J. Wetterhahn, Esq.
Robert Rader, Esq.
Conner and Wetterhahn
1747 Pennsylvania Avenue, N.W.
Washington, DC 20006

NRC Staff: Donald F. Hassell, Esq.
U.S. Nuclear Regulatory Commission
Washington, DC 20555

6. There shall be a limit of two transcripts per party for any proceeding conducted on the record in which protected information is disclosed or discussed. Parties shall not photocopy these transcripts without the express prior approval of the Board.

7. Authorized persons may review at a designated facility the RERP as modified by Order of this Licensing Board. In addition, (a) any notes which authorized persons have made from their review of the RERP, (b) copies of pleadings and testimony containing protected information,

may be maintained by authorized persons at the following designated offices:

Staff: Donald F. Hassell, Esq.
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commonwealth
of Pennsylvania: Zori Ferkin, Esq.
Governor's Energy Council
P.O. Box 8010
1625 N. Front Street
Harrisburg, Pennsylvania 17105

Theodore G. Otto, III, Esq.
Department of Corrections
Commonwealth of Pennsylvania
P.O. Box 598
Camp Hill, Pennsylvania 17011

Counsel for
Inmates: Angus B. Love, Esq.
Montgomery County Legal Aid
107 East Main Street
Norristown, Pennsylvania 19401

Philadelphia
Electric: Troy Conner, Jr., Esq.
Conner and Wetterhahn
1747 Pennsylvania Avenue, N.W.
Washington, DC 20006

8. Counsel for Inmates, in keeping protected information at the above-designated office, shall take such protective measures and procedures as follows:

(a) The building in which the protected information (i.e., notes and pleadings) will be maintained will qualify as a controlled

access building in that it is either attended around the clock or locked at night;

(b) The protected information, when unattended, will be stored in a locked security storage container. Access to the security storage container will be positively controlled by use of keys or other comparable means; and

(c) While in use, the protected information will be under the sole control of an authorized person.

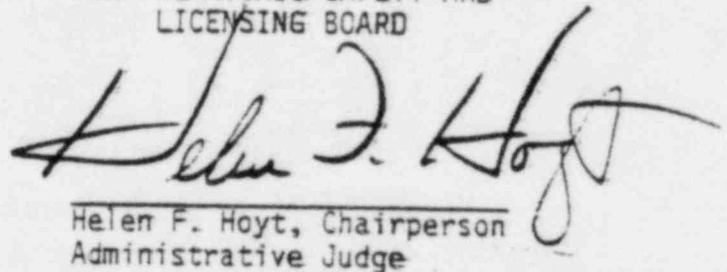
9. With respect to transportation of the protected information in question, procedures will be utilized which ensure compliance with this order. Specifically, documents containing protected information, when transmitted outside an authorized place of use or storage, will be enclosed in two sealed envelopes or wrappers, with the inner envelope or wrapper containing the name and address of the intended recipient and marked on both sides, top and bottom, with the words "PROTECTED INFORMATION." The outer envelope or wrapper will contain the intended recipient's name and address, with no indication that the document inside contains protected information. Protected information will be transported by registered or certified mail or by other courier methods or hand delivery which ensure that a receipt is obtained to verify delivery or by an individual authorized access pursuant to this order. Any authorized individual transporting the protected information in question will be instructed to retain the documents in his personal possession at all times.

10. Anyone who has reason to suspect that documents containing protected information may have been lost or misplaced (for example, because an expected paper has not been received) or that protected information has otherwise become available to unauthorized persons shall notify this Board promptly of those suspicions and the reasons for them.

11. Counsel, representatives, or any other individuals who has reason to suspect that documents containing protected information may have been lost or misplaced (for example, because an expected paper has not been received), or that protected information has otherwise become available to unauthorized persons, shall notify this Board promptly of those suspicions and the reasons for them.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD



Helen F. Hoyt, Chairperson
Administrative Judge

Dated at Bethesda, Maryland
this 20th day of March, 1985.

Attachment: Affidavit of Non-Disclosure

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

BEFORE ADMINISTRATIVE JUDGES:

Helen F. Hoyt, Chairperson
Dr. Richard F. Cole
Dr. Jerry Harbour

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

Docket Nos. 50-352-0L
50-353-0L
(ASLBP No. 81-465-07-0L)

AFFIDAVIT OF NON-DISCLOSURE

I. I, being duly sworn state:

1. As used in this Protective Order:

a. "Protected information" is (1) any form of the Pennsylvania Bureau of Correction Radiological Emergency Response Plan (Appendix E-Annex 1 (RERP)); and (2) any information obtained by virtue of this proceeding which is not otherwise a matter of public record and which deals with or describes features of the RERP.

b. "Authorized person" is (1) a person designated by this Board from lists furnished by the parties who has executed an Affidavit of Non-Disclosure and filed it with the Board, including counsel for the inmates of the State Correctional Institute at Graterford (Counsel for Inmates) and any expert who has been determined to be qualified by the Licensing Board, (2) an employee of the Nuclear Regulatory Commission

entitled to access to protected information. (3) any other person so designated by the Licensing Board as having a need to review the protected information. Nothing in this definition shall be deemed to deny or affect access by an officer, employee, or contractor of a party to information maintained in the normal course of business by that party, or to deny or affect access to protected information by members of this Board, the cognizant Atomic Safety and Licensing Appeal Board, the Commission, their respective staffs, and appropriate law enforcement agencies.

c. A "lead attorney or representative" is an individual designated by a party and approved by this Board to accept service of protected information, insure that it is distributed only to those persons authorized to receive it on behalf of that party, and to assume overall responsibility for the control and protection of sensitive information in the hands of that party.

d. A "designated facility" is the State Correctional Institute at Graterford or the offices of the Commonwealth of Pennsylvania, Department of Corrections, at Camp Hill, Pennsylvania.

e. A "designated office" is one office approved by each party for the preparation of written pleadings and testimony containing protected information and for the storage of protected information in the hands of that party.

2. I shall not disclose protected information to anyone except another authorized person, unless that information has previously been disclosed in the public record of this proceeding. Authorized persons

shall safeguard protected information (including any portions of transcripts of in camera hearings, filed testimony or any other documents that contain such information) so that it remains at all times under the control of an authorized person and is not disclosed to anyone else.

3. I shall not photocopy any protected information by any means without the Board's express approval or direction except to the extent necessary to make required service on another party. So long as an authorized person possesses protected information, he or she shall continue to take these precautions until further order of the Board.

4. I shall similarly safeguard and hold in confidence any data, notes, or copies of protected information and all other papers which contain any protected information by means of the following:

a. reviewing and using the document constituting the RERP (which shall not be photocopied or otherwise reproduced) only at a designated facility, and may make notes with respect to the document and remove such notes to a designated office;

b. preparing written pleadings and testimony containing protected information only at a designated facility or a designated office;

c. keeping and safeguarding all such materials in a safe or locked filing cabinet to be located at all times in a designated facility or a designated office; and

d. performing necessary typing or reproduction services or other secretarial work connected with the preparation of papers

containing protected information at a designated facility or a designated office.

5. I shall use protected information only for the purpose of preparation for this proceeding or any further proceedings in this case dealing with evacuation of the State Correctional Institute at Graterford, and for no other purpose.

6. I shall keep a record of all protected information in my possession and in the possession of any authorized person acting on behalf of the party I represent including any copies of that information made by or for them. At the conclusion of this proceeding, they shall account to the Board or to a Commission employee designated by the Board for all the papers or other materials containing protected information in their possession. When they have finished using the protected information, but in no event later than the conclusion of this proceeding, they shall deliver those papers and materials to the Board (or to Counsel of the Pennsylvania Department of Correction), together with all notes and data which contain protected information.

7. I shall not corroborate to any unauthorized person the accuracy or inaccuracy of information obtained outside this proceeding by using protected information gained through the hearing process.

[Title]

II

10

GLEN JEFFES
Acting Commissioner

ERSKIND DERAMUS
Deputy Commissioner

PENNSYLVANIA DEPARTMENT OF CORRECTIONS
P. O. BOX 598
CAMP HILL, PENNSYLVANIA 17011
(717) 787-7480

April 4, 1985

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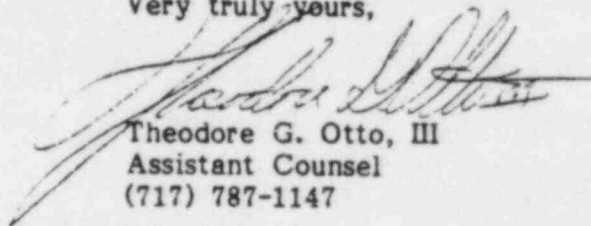
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: In the Matter of Philadelphia Electric Company
Docket Nos. 50-352, 50-353

Dear Sir:

Enclosed please find the original and two copies of the "Answer of the Commonwealth of Pennsylvania to Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan" in reference to the above-captioned matter.

Very truly yours,


Theodore G. Otto, III
Assistant Counsel
(717) 787-1147

TGO:bs

cc: As per Certificate of Service

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FOIA-85-304

A-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA
TO PROPOSED CONTENTIONS OF THE GRATERFORD
INMATES WITH REGARD TO THE EVACUATION PLAN

I. INTRODUCTION

On April 20, 1984, the Atomic Safety and Licensing Board ordered the Graterford inmates to submit specific contentions within 20 days following the receipt of the evacuation plan for Graterford. On December 13, 1984, counsel for the inmates received a "sanitized" version of the evacuation plan for Graterford. On December 19, 1984, the Graterford inmates moved for full disclosure of the Graterford plan, as well as asking for additional time in which to file their contentions. On January 29, 1985, the Board denied the inmates' motion for full disclosure and ordered them to submit their contentions within 20 days. Counsel for the inmates filed proposed contentions on February 15, 1985.

In response to the January 29, 1985 order of the Board denying any further disclosure, counsel for the inmates filed an appeal with the Atomic Safety and Licensing Appeal Board on February 8, 1985. Although the Appeal Board dismissed the appeal of

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the inmates', the Appeal Board also expressed its opinion that the parties should attempt to find a middle ground with regard to the disclosure issue.

In response to the language in the Appeal Board order, this Board held a hearing on February 27, 1985, between the parties to try and find a middle ground. Using the proposed contentions of the inmates as a structure for the hearing, the Board reviewed each contention with all the parties and had counsel for the inmates specify what information would satisfy him. As a result of that hearing, the Commonwealth of Pennsylvania (hereinafter Commonwealth) filed a Response of the Commonwealth of Pennsylvania, Department of Corrections To Request for Information Raised at the February 27, 1985 Atomic Safety and Licensing Board Conference. Furthermore, the Commonwealth made available to counsel for the inmates, as well as other interested parties, a substantially less sanitized version of the plan under the aegis of a protective order and affidavits of non-disclosure. On March 22, 1985, another hearing was held with the interested parties present. At the conclusion of that hearing, counsel for the inmates had not withdrawn all of his proposed contentions, and had raised some new "concerns".¹ This is the Answer of the Commonwealth to the remaining contentions and new "concerns". Our answer will use the same format as the proposed contentions of the Graterford inmates, including answers to the new "concerns" where appropriate.

II. GENERAL CONTENTIONS

A. Counsel for the inmates has not withdrawn his proposed contention. The Department of Corrections objects to the language in the proposed contention that refers to the staff of the State Correctional Institution at Graterford since counsel for the inmates only has standing to represent the Graterford inmates pursuant to the

1. The term "concerns" is used to describe the new matters raised by counsel for the inmates at the March 22, 1985 Hearing. The Board correctly viewed the actions of counsel for the inmates as attempts to amend or add to his original proposed contentions. The Commonwealth agrees with the Board but addresses the new concerns here to ensure our position is clear.

Atomic Safety and Licensing Board Order in this case at Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-39, 15 NRC 1423 (1982). Furthermore, the Commonwealth objects to the proposed contention because it is not reasonably specific and is unsupported by specific bases.

B. Counsel for the inmates has not withdrawn this proposed contention. The Commonwealth objects to this contention since it is again not specific and raises no litigable issue in itself. It also is overly broad in that it is not limited to representing the interests of the inmates.

C. Counsel for the Graterford inmates withdrew this proposed contention at the March 22, 1985 Hearing at Transcript Pages 20,677-20,678.

III. SPECIFIC BASES FOR CONTENTIONS

A. Transportation

At the March 22, 1985 Hearing, Mr. Love was satisfied that there would be a sufficient number of buses, vans, ambulances and drivers available to complete the evacuation. His satisfaction was indicated at the March 22, 1985 Hearing at Transcript Pages 20,678 through 20,681. Therefore, the transportation issue is resolved.

B. Preparation for Evacuation

1. Manpower

At the February 27, 1985 Hearing before the Atomic Safety and Licensing Board, Mr. Love was asked what concerns he had regarding the manpower issue. At that time, he requested information regarding the call-up procedure and was given that information. Furthermore, Mr. Love requested information regarding whether the system worked. He also requested information regarding the number of officers in the compliment at the State Correctional Institution at Graterford and explained that the National Guard was not a necessary part of the evacuation plan, as they were only being used for back-up (see Tr. 20533 through 20537).

In the Response of the Department of Corrections to the Request for Information, the Department of Corrections indicated the specifics of the call-up system. Furthermore, we provided the information that the system was tested as of January, 1985, and the system worked. We also provided information regarding the number of officers and other employes available to conduct the evacuation.

At the March 22, 1985 Hearing, counsel for the inmates indicated he was satisfied with the amount of manpower (see Tr. 20,681). However, counsel for the inmates then raised new "concerns" regarding the manpower issue. One concern was with the use of commercial telephone lines in the call-up system and the second was with regard to the lack of correctional officer union participation in the hearings before the board.

With regard to the commercial telephone line issue, the Department of Corrections objects to what would result in a new contention. Counsel for the inmates has not shown any good cause for his failure to include this with his original proposed contentions and to fully litigate this issue would significantly delay the proceedings. Counsel for the inmates can protect the interests of his clients with regard to the commercial telephone line issue by expressing his concerns to either the Federal Emergency Management Agency (FEMA) or the Pennsylvania Emergency Management Agency (PEMA). He has offered no information regarding any possible testimony that would help this board in developing a sound record. With regard to this issue, the counsel for the inmates has not shown how the inmates' interests are any different than other individuals with regard to the evacuation and, therefore, the inmates' interests were represented by other intervenors. For all the reasons referred to above, we would suggest that this new "concern" should not be admitted due to its lateness in filing.

The Commonwealth further objects to this concern due to counsel for the inmates having no basis for his contention. Furthermore, it lacks specificity

and, thus, fails to meet the requirements of 10 C.F.R. § 2.714(b). We also suggest that this is not a litigable issue and should be dismissed for that reason.

The other new "concern" that counsel for the inmates raised was with regard to the participation of the correctional officers at the State Correctional Institution at Graterford in the evacuation plan. Again, counsel for the inmates has not offered any reason for the lateness of this contention and has certainly not met the good cause standard in 10 C.F.R. § 2.714(a). It is clear, even in the sanitized version of the evacuation plan filed with this Board on December 13, 1984, that the correctional officers would play a significant part in the evacuation. It is clear that any additional testimony on this issue would broaden the issues and delay this proceeding. Therefore, we request that the contention not be admitted due to its lateness.

The Commonwealth also objects to the proposed contention because counsel for the inmates has expressed no basis for his contention. Additionally, it is not reasonably specific and, thus, fails the requirement of 10 C.F.R. § 2.714(b). Finally, since the correctional officers are employees of the Commonwealth of Pennsylvania, Department of Corrections, they are subject to discipline for failure to obey direct orders. The Commonwealth of Pennsylvania, Department of Corrections would be the party to provide testimony with regard to the officers participation in the plan.

2. Security Equipment

Counsel for the inmates was satisfied with the provision of security equipment for the evacuation. This is indicated on Transcript Page 20,681 of the March 22, 1985 Hearing.

3. Communications Equipment

Counsel for the inmates was satisfied with the provision of communications equipment. This is indicated on Transcript Pages 20,681-2 of the March 22, 1985 Hearing.

4. Radiological Equipment

Counsel for the inmates was satisfied with the provision being made for radiological equipment. This satisfaction is indicated on Transcript Page 20,682 of the March 22, 1985 Hearing.

C. Notification to the Public

Counsel for the inmates was satisfied with the notification system in place. This satisfaction is indicated on Transcript Page 20,682 of the March 22, 1985 Hearing.

D. Medical Services

The Commonwealth would object to the proposed contention on this subject since it refers to individuals contaminated by radiation and not solely to inmates (see Inmates' Proposed Contention at Page 8). Counsel for the inmates only has standing to raise issues on behalf of the inmates, and, therefore, the contention, if admitted, must be limited to medical services for the inmates.

At the February 27, 1985 Hearing, counsel for the inmates was requested to specify what information he required on this issue. The relevant responses by counsel for the inmates were "...we just think there should be some mention of what medical services could be provided if someone were seriously contaminated", Tr. at 20,555. Furthermore, beginning on Tr. Page 20,557 and continuing onto Tr. Page 20,558, the following exchange took place:

Mr. Otto: I think we could offer this at this point: At our support correctional institutions, we obviously have contracts — I don't know if it's obvious or not. We have contracts with local hospitals to take care of our inmates when they have serious medical needs, because we really don't run our own hospitals inside of our institutions. And I see no reason why those hospitals couldn't be used for decontamination.

Judge Hoyt: If, in fact, those institutions, those medical institutions would have that capability, Mr. Otto, that's the kicker.

Judge Cole: Don't we have evidence in our record that indicates that certified hospitals, by virtue of their certification, are qualified to handle contaminated inmate personnel?

Ms. Ferkin: There is some testimony, and I believe it was addressed in one of the initial decisions, that that was a finding by the Brenner Board.

Judge Hoyt: I think we had better revise that particular piece of information also and be certain that we have it.

Now that, Mr. Love, would appear to me that what you're after, and what the D.C. Circuit opinion seems to indicate we need to have.

Mr. Love: Certainly; just an assurance that there is provision for radiological, not just any kind of — Because I assume it's a whole different type of medication (sic).

During further testimony on the medical service issue, the following exchange took place at Tr. Pages 20,561 through 20,562:

Ms. Ferkin: I think what Judge Cole is referring to — and correct me if I'm wrong — is the Joint Committee on Hospital Accreditation, am I correct?

Judge Cole: Yes.

Ms. Ferkin: There is also a certification procedure for hospitals by the Pennsylvania Department of Health which, frankly, I am completely unversed with. I'm not sure how that fits in with what Judge Cole is referring to, but I do recall very clearly the findings that Judge Cole is referring to.

Judge Cole: And I believe it's a national accreditation.

Judge Hoyt: Anything else, Mr. Love, that you need on the medical services?

Mr. Love: Nothing, just so it's something from the Bureau. Because I don't agree with Mr. Rader that the assurances for the public are sufficient for the inmates, because the inmates are in the custody of the Bureau, and

anyone that wants to treat the inmates would have to go through the Bureau first.

So, I think something has to come forth from the Bureau.

Pursuant to that testimony, the Commonwealth had executed, by each of the hospitals for the Department of Corrections support institutions, an addendum to the hospitals statement of understanding with the institution. That addendum indicated that the hospital complied with the provisions of the Joint Commission on the Accreditation of Hospitals, Standard 5, which deals with the treatment of radioactively contaminated wounded. Furthermore, the Commonwealth attached to our response to the request for information the Joint Commission on the Accreditation of Hospitals Standard No. 5, which indicated the requirements of that standard.

At the March 22, 1985 Hearing, counsel for the inmates was not satisfied with what he had originally indicated would be satisfactory and expressed new "concerns". His concerns were expressed on Pages 20,665 through 20,671 of the Transcript and centered around his belief that the JCAH Accreditation was not sufficient to give him a reasonable assurance that adequate medical services were available for the inmates.

The Commonwealth objects to the new "concern" of counsel for the inmates. He has not established good cause as to why this late-filed contention is so late. He has also not shown that there are not other means to protect the interests of the inmates with regard to this issue. Furthermore, this Board has heard substantial testimony with regard to the sufficiency of medical services for the general public and what the standards for the medical care should be. Thus, the inmates' interests as to the standards to be used to measure the hospitals have already been represented by existing parties. Any additional testimony on this issue would be cumulative and would certainly delay the proceedings. For the above reasons, we request that this new "concern" not be admitted since it was late-filed.

The Commonwealth would also argue that this issue has already been litigated in this proceeding. This Board has clearly held in its second partial initial decision that the accreditation by the Joint Committee on Hospital Accreditation indicates that these hospitals have plans for treating contaminated, injured patients. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) LBP-84-31, 20 NRC 446 (1984). The decision by this Board is not affected by the recent District Court opinion in the case of Guard v. NRC, since the Guard opinion only held that a mere list of hospitals for the radiation exposed public was insufficient. In the case presently before the Board, the Department of Corrections has existing agreements with our support institution hospitals, all of which are JCAH accredited.

E. Monitoring

Counsel for the inmates was satisfied with the information provided regarding monitoring. This satisfaction is indicated on Transcript Page 20,683 of the March 22, 1985 Hearing.

F. Simulated Evacuation Plan Exercise

Counsel for the inmates indicated that he would be satisfied with regard to this proposed contention upon receipt and review of the FEMA evaluation of the Table Top Exercise conducted by FEMA, PEMA and the Department of Corrections on March 7, 1985 with the reservation that the FEMA Report would indicate that "[the exercise] is fine, then that would end my concern". Tr. 20,684. Attached as Exhibit A is the FEMA Report on the March 7, 1985 Table Top Exercise which states "the Graterford authorities adequately demonstrated an understanding of the emergency response procedures and the ability to adequately implement them...".

G. Training

The concerns of the counsel for the inmates were satisfied. To satisfy counsel for the inmates, PEMA agreed to offer emergency response training to civilian

bus drivers. Counsel for the inmates recognized that we could not force the people to attend this training, but stated he would be satisfied if PEMA sent a letter to the bus providers offering the training. This satisfaction was indicated on Transcript Pages 20,684 through 20,691 of the March 22, 1985 Hearing. A copy of the letter that was sent by PEMA is attached hereto as Exhibit B.

H. Recovery and Reentry

Counsel for the inmates was satisfied with the information provided on the recovery and reentry procedures. This is indicated on Transcript Page 20,691 of the March 22, 1985 Hearing.

I. Sheltering

Counsel for the inmates was satisfied with the information provided regarding sheltering in the plan. This is indicated on Transcript Page 20,691 of the March 22, 1985 Hearing.

J. General Concept of Evacuation

The Commonwealth objects to this contention since it is lacking in specificity or bases. It appears to be a "catch-all" contention which raises no litigable issues.

At the March 22, 1985 Hearing, Mr. Love raised new "concerns" under this heading (See Tr. 20,693 through 20,694). The one concern was with regard to the estimated time of evacuation and the second was with regard to the possible panic at the institution during evacuation.

The Commonwealth objects to the "concerns" of counsel for the inmates new concern with regard to the ETE. At the time he filed his original proposed contentions, he was very much aware that it would take six to ten hours to evacuate the institution. (See Inmates' Proposed Contentions, Page 5.) At the February 27, 1985 Hearing, he was given an opportunity to raise any concerns he had with regard to the six to ten hour evacuation estimate. Therefore, it is patently obvious that counsel for the inmates has not shown good cause for this late-filed contention. To pursue this issue any

further would certainly broaden the issues and delay the proceeding. Therefore, we ask that the Board not admit this proposed contention.

The Commonwealth also objects to the admission of this contention since it is not reasonably specific and has no basis. NUREG-0654 does not specify a minimum or maximum evacuation time. Furthermore, counsel for the inmates own expert, Mr. Case, indicated that he had no problem with the ETE (See Tr. 20,665). Therefore, the Commonwealth submits that this is not a litigable issue.

Counsel for the inmates' second new "concern" under this heading is a concern that an evacuation would cause a panic. This concern was raised at the March 22, 1985 Hearing.


The Commonwealth requests that this proposed contention not be admitted since it is late-filed, and counsel for the inmates has not shown good cause for the late filing nor has he shown any of the other requirements for permitting late-filed contentions in 10 C.F.R. § 2.714(a).

The Commonwealth objects to this contention since it is not reasonably specific and lacks a basis. Counsel for the inmates' alleged basis for this proposed contention is Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), LBP-82-100 16 NRC 1550 (1982). From Page 1562 of that case, he stated "the Board recognized that excessive anxiety on the part of the public could result in an overreaction and possible disruption of the plans for protective action. It would most likely take the form of spontaneous evacuation". The Board in the Louisiana Power case also held later on in that same subheading that "we conclude that public overreaction to a nuclear accident is likely to be minimized provided the guidance in NUREG-0654 is followed, and we conclude that no additional measure need be taken to cope with the public safety."


IV. CONCLUSION

For the reasons discussed above, the Commonwealth respectfully submits that the Graterford inmates have failed to raise an admissible contention and that, therefore, we request that they be dismissed from this proceeding.

Respectfully submitted,



ZORI G. FERKIN
Assistant Counsel
Governor's Energy Council



THEODORE G. OTTO, III
Assistant Counsel
Department of Corrections

Dated: April 4, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of the Commonwealth of Pennsylvania to Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan" in the captioned matter have been served upon the following by deposit in the United States Mail this 4th day of April, 1985, except as indicated:

- | | |
|---|--|
| * Helen F. Hoyt, Esq.
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Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
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Washington, D.C. 20555 | Donald Hassell, Esq.
Counsel for NRC Staff
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| * Dr. Richard F. Cole
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Federal Emergency Management Agency

Washington, D.C. 20472

MAR 27 1985

MEMORANDUM FOR: Edward L. Jordan
Director, Division of Emergency
Preparedness and Engineering
Response
Office of Inspection and Enforcement
U.S. Nuclear Regulatory Commission

FROM: *Richard N. Krizan*
Richard N. Krizan
Assistant Associate Director
Office of Natural and Technological
Hazards Programs

SUBJECT: Remedial Exercise at Graterford State Correctional
Institution in Support of the Limerick Generating
Station

On March 7, 1985, a remedial exercise was conducted at the State Correctional Institution, Graterford, to demonstrate that a portion of one of the Category A deficiencies cited at the July 25, 1984, Limerick Offsite Radiological Emergency Preparedness Exercise has been corrected. The report on the July 25, 1984, exercise was forwarded to you on September 25, 1984.

The remedial exercise was conducted to more fully exercise the emergency response procedures at the State Correctional Institution, Graterford, including simulated evacuation of inmates. During the exercise the Graterford authorities adequately demonstrated an understanding of the emergency response procedures and the ability to adequately implement them, therefore, this portion of Category A deficiency number 2 has been corrected.

As additional Category A and B deficiencies are corrected, we will notify you. If you have any questions, please contact Robert S. Wilkerson, Chief, Technological Hazards Division, at 287-0200.

Attachment
As Stated

8505010330
"EXHIBIT A"



Federal Emergency Management Agency
Region III 105 South 76th Street Philadelphia, Pennsylvania 19106

March 16, 1985

MEMORANDUM FOR: Robert F. Wilkerson, Chief
Technological Hazards Division

ATTENTION: Gloria Joyner

FROM: *Richard L. Korman*
for: L. Korman, Chairman
Regional Assistance Committee

SUBJECT: Graterford State Correctional Institution Exercise

Attached is a copy of a report on the March 7, 1985 radiological emergency preparedness exercise held in conjunction with the Pennsylvania Department of Corrections, the State Correctional Institution at Graterford and FEMA. As you can see from the report, we feel that the results of the exercise were very positive and that it resolved one of the problems identified in Category "A" Deficiency #2, as noted in the September 19, 1984 Exercise Evaluation Report of the July 25, 1984 Liverick EEP exercise.

A copy of this report will be provided to the Pennsylvania Emergency Management Agency.

Attachment: 1

On Thursday, March 7, 1985, a tabletop exercise was held to test emergency response procedures at the State Correctional Institution, Graterford, in the event of an accident at the Liberick Generating Station. Participating in the exercise were the Pennsylvania Department of Corrections (including Graterford and the support institutions [redacted] and the Pennsylvania Emergency Management Agency (PEMA).

At 1115, notification of an alert at Liberick was received by the Department of Corrections from PEMA via commercial telephone. The contents of the message were forwarded by the Department to Graterford and the support institutions, by telephone, taking approximately 10 minutes to complete the notification of the various institutions. Redundent communications took place through the use of the Commonwealth Law Enforcement Assistance Network, a teletype system tied into all the various institutions from the department's central office.

At 1145, the tabletop exercise commenced with the attached objectives being implemented. The Department of Corrections and each institution established a command post from which they ran their respective emergency responses. Emergency teams were in attendance, utilizing facilities that provided adequate space, lighting and telephones. Excellent status boards were on hand and kept up-to-date throughout the exercise.

The Commissioner, Department of Corrections, coordinated the overall response while the Deputy Warden at Graterford was responsible for his institution.

Copies of the plans were available and consulted on a regular basis. It was evident that the various participants were very knowledgeable concerning their duties and performed their roles in a most conscientious and professional manner. Continuous coordination took place between the department and Graterford and the department and the support institutions. The Alert was received at 1254, the Site Emergency at 1329 and the General Emergency at 1436.

Good coordination took place between the Graterford Public Information Officer, the Department of Corrections and PEMA. The Graterford PIO simulated monitoring the local radio and television stations, especially KTK, Montgomery County's EIS station. The inmates were informed about the situation at Liberick and received updates on an hourly basis.

Personnel were placed on 12-hour shifts, which loading teams were assembled, inmate and medical records and food were packed. An advance team was sent from Graterford to [redacted] to prepare for inmate relocation. The Department of Corrections instructed Graterford to issue XI and directivity to staff personnel. When relaying the information to Graterford the term XI, rather than XI was utilized causing some initial confusion. A lock-down of the inmates occurred at 1510 and, upon direction of the Governor, evacuation commenced as called for in the Graterford EEP.

The various support institutions simulated arranging for the necessary fuel, security vans, drivers and other equipment, and having it sent to Graterford. Preparations were made to house arriving inmates. Average travel time from the support institutions to Graterford is approximately 2 - 2-1/2 hours.

During the exercise, at the Alert stage, Graterford informed the Department of Corrections of certain needs in the area of ambulances. The department informed Graterford that the ambulances had been dispatched at that emergency. However, this is at variance with the department's EERP (page 2-1-7) which does not call for the dispatch of ambulances until notification of evacuation.

The exercise concluded at approximately 1600 upon the simulated relocation of inmates to support institutions and [REDACTED]

General "B" Recommendations:

1. Personnel involved in radiological emergency response activities should become totally familiar with the terminology used during an emergency to avoid confusion.
2. Ambulances should be dispatched to Graterford at an early stage (as was done during the exercise) to avoid long delays, potentially 2 hours or more, if an evacuation is ordered.

OBJECTIVES

1. To demonstrate the ability to alert and mobilize personnel and resources in a timely manner.
2. To demonstrate the adequacy of the decisionmaking process at the Department and Institution levels.
3. To demonstrate the adequacy of communication systems within the Department of Corrections and among designated facilities and field activities.
4. To demonstrate that internal message and information flow (collection, analysis, and dissemination) is effective and timely.
5. To demonstrate the capability to relocate select categories of inmates to support institutions, if the situation so dictates.
6. To demonstrate the operational knowledge and support from elected or appointed public officials regarding plan familiarity, operations process and decisionmaking.
7. To demonstrate the capabilities of the Department of Corrections and the risk institution to implement emergency response plans to protect the health and safety of employees and inmates.
8. To demonstrate the abilities of the Department of Corrections, the risk institution and the support facilities to effectively utilize external resources when local capabilities and resources have been exceeded.



PENNSYLVANIA EMERGENCY MANAGEMENT AGENCY
P.O. BOX 3321
HARRISBURG, PENNSYLVANIA 17105-3321



THIS LETTER IS ONE SENT TO ALL BUS COMPANIES PROVIDING THE
DEPARTMENT OF CORRECTIONS WITH BUSES.

Gentlemen:

Some of your employees may be involved in driving buses carrying inmates from the State Correctional Institution at Graterford in the event of an accident at the nuclear generating plant located in Limerick, Montgomery County. Because of this possibility, these drivers may want to take some training regarding the proper use of dosimetry.

The Pennsylvania Emergency Management Agency (PEMA) hereby offers to you and your employees a 2-hour course explaining the proper use of dosimetry. We are prepared to conduct this course at a location and time to be selected by you and your employees. We ask only that you coordinate this scheduling with us to avoid any conflicts with our regular schedule of activities.

You may write to me at the address listed above, or you may telephone me at 717-783-8150.

With kind regards, I am

Sincerely,

Donald F. Taylor
Director
Office of Training and Education

DFT:tj1 (Tel: 717-783-8150)

"Exhibit B"

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

BEFORE ADMINISTRATIVE JUDGES:

Helen F. Hoyt, Chairperson

Dr. Richard F. Cole

Dr. Jerry Harbour

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

Docket Nos. 50-352-OL
50-353-OL

ASLBP No. 81-465-07 OL

April 12, 1985

MEMORANDUM AND ORDER
ON GRATERFORD PRISONERS PROPOSED CONTENTIONS

I. History of Intervention by Inmates of the State
Correctional Institution at Graterford (SCIG)

On September 18, 1981, the Philadelphia Chapter of the National Lawyers' Guild (Guild) filed a petition with the Board to intervene in these proceedings on behalf of the inmates at SCIG. The Board's Order of October 14, 1981 required the filing by the Guild of a Supplemental Memorandum in Support of the Petition to Intervene. The Board's Special Prehearing Conference Order on June 1, 1982 admitted the inmates as a party to this proceeding and on April 20, 1984 the Board ordered that contentions based on the SCIG emergency plan would be filed by the Graterford inmates 20 days after they received this separate emergency plan. On December 13, 1984, the Commonwealth of Pennsylvania (Commonwealth) provided to the Graterford Prisoners' counsel a sanitized

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FOIA-85-304

A-24

copy of the Pennsylvania Bureau of Correction Radiological Emergency Response Plan for the Graterford Prison (Plan 1). Deleted from Plan 1 was that information the Bureau of Correction described as necessary because of security reasons. On December 20, 1984, the counsel¹ for the inmates filed a Motion for Order Requiring Full Disclosure by Pennsylvania Emergency Management Agency (PEMA) of the Evacuation Plan for State Correctional Institution at Graterford. The thrust of the motion was that the sanitized version of Plan 1, did not state information sufficient to permit framing of proposed contentions or to determine the adequacy of the state's plan. The Board heard oral argument on the motion for full disclosure on January 29, 1985. In attendance and stating the Commonwealth's position on full disclosure was Mr. Erskind DeRamus, Deputy Commissioner of Corrections for Commonwealth.

¹ It should be noted that throughout the emergency evacuation hearings in Philadelphia, counsel for the Graterford inmates did not attend the hearings on anything like a regular basis and did not participate or hear the detailed testimony of the Applicant's panels of witnesses or the testimony of the Montgomery County Emergency Coordinator. Several of Mr. Love's stated concerns in the two conferences of February 27 and March 22, 1985 had been the subject of testimony earlier in the offsite emergency planning hearings. The Board had to rely on the parties in attendance to keep the inmates counsel advised when a request was made from the bench that Mr. Love be present at a Board hearing to attempt to set schedules. Atomic Safety and Licensing Boards, it should be remembered, sit away from Commission offices and lack administrative support capabilities.

The Board denied the inmates motion for full disclosure in relying on Mr. DeRamus representations and, in particular, the failure of Mr. Love to specify the information needed, based on expert opinion, beyond that provided in Plan 1 as a precondition to compelling further disclosure.²

On February 8, 1985, the Graterford inmates filed a "Notice of Appeal," which was dismissed without prejudice by the Appeal Board on February 12, 1985. The Appeal Board indicated the inmates had not yet exhausted their options before this Board, including the filing of their contentions and declined to direct certification of the Licensing Board's ruling denying full disclosure. The Appeal Board noted the desirability of finding a middle ground to accommodate the competing interests at stake.

On February 15, 1985, the inmates filed contentions based on the Plan 1.

On February 27, 1985, the Board held one of two conferences where for the first time counsel and his expert stated their requests for

² The Board orally denied the Motion of January 29, 1985 from the Bench (Tr. 20,479-81) and issued a Memorandum and Order on February 5, 1985 repeating its oral decision. We note here that in spite of the Board's repeated requests for the inmates counsel to specify the information he needed the Board's orders were mostly ignored and during the two conferences the Board held with the parties on February 27, 1985 and March 22, 1985 Mr. Love's demands merely accelerated as each expressed concern was answered. As the parties attempted to relay a requested piece of information, inmates counsel made additional or new demands not previously expressed to the Board.

information. At the February 27 conference and the second conference on March 22, 1985, the Commonwealth's senior officials charged with the responsibility for the inmates and their evacuation entered into the conference³ and each of the parties attempted to comply with every request for information made by inmates counsel and their expert. It should also be noted that on March 18, 1985 the Commonwealth provided Mr. Love and his expert a copy for examination under the Board's protective order of the new revision (Plan 2) of the SCIG ~~emergency~~ plan which was virtually the entire plan.

At the March 22 progress conference, the Board granted the parties an opportunity to respond to the remaining Graterford contentions (Tr. 20,697-98) not withdrawn during the conference. A response date of April 5, 1985 was established. The Applicant, Commonwealth, and the NRC Staff filed responses. Counsel for the inmates did not.

II. The Graterford Inmates Contentions and the Stated Specific Bases for Contentions

The contentions were stated in a pleading entitled Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan Filed February 15, 1985.⁴ As stated the contentions are as follows:

³ Glen R. Jeffes, Acting Commissioner, Department of Corrections, Commonwealth of Pennsylvania Department of Corrections and John Patten, Director, Pennsylvania Emergency Management Agency.

⁴ We find these contentions to be the sole issue of the inmates. We
(Footnote Continued)

- A. There is no reasonable assurance that the evacuation plan will protect the staff and inmates at the State Correctional Institution at Graterford; and
- B. There is no reasonable assurance that the evacuation plan will provide a safe and secure evacuation from the State Correctional Institution at Graterford.

Specific Basis for Contentions⁶

- D. Medical Services. There is no reasonable assurance that medical services will be provided to individuals contaminated by radiation. Inmates cite as a basis for this 10 C.F.R. § 50.47(b)12.
- G. Training. There is no reasonable assurance that SCIG personnel drivers (once identified) and the Pennsylvania State Police will receive any training in preparedness for a nuclear emergency at SCIG. Inmates cite as a basis for this contention 10 C.F.R. § 50.47(b)15.
- J. General Concept of Evacuation. 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 inmates and SCIG personnel during said evacuation.

(Footnote Continued)

reject any attempt by the inmates to "reserve the right to file additional contentions . . ." if access to an unsanitized plan was granted. Although Plan 2 is not totally unsanitized, it is virtually the complete plan. We further note that an examination of the entire conference record discloses that every concern discussed by the inmates counsel fell into one of the areas in the stated contentions filed February 15, 1985. Further, these concerns were responded to by the responsible officials at the conferences.

⁵ The original pleading contained three contentions. The third was dropped at the conference on March 22, 1985 (Tr. 20,677).

⁶ Basis remaining after conference on March 22, 1985 (Tr. 20,677-94).

III. Legal Principles Governing the Admission of Contentions⁷

Contentions may be admitted in a Commission licensing proceeding if they fall within the scope of issues set forth in the Federal Register notice of opportunity for hearing in this case (46 Fed. Reg. 42557 (August 21, 1981)) and applicable Commission case law. See, e.g., Northern States Power Co. (Prairie Island, Unit Nos. 1 and 2), ALAB-197, 6 AEC 188, 194 (1973), affirmed, BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974); Duquesne Light Co. (Beaver Valley, Unit No. 1), ALAB-109, 6 AEC 243, 245 (1973); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-215, 8 AEC 13, 20 (1974).

Pursuant to 10 C.F.R. § 2.714(b), intervenors are required to file "a list of contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity." 10 C.F.R. § 2.714(b); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 686 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1028 (1984). An intervenor who fails to file at least one contention that satisfies the requirements of § 2.714(b) will not be permitted to participate as a party. 10 C.F.R. § 2.714(b). A contention must be rejected where:

⁷ The Board accepts the Staff position on the legal principles and has incorporated them at this point in this Memorandum and Order.

- (1) It constitutes an attack on applicable statutory requirements;
- (2) It challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) It is nothing more than a generalization regarding the intervenor's particular view of what applicable policies ought to be;
- (4) It seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) It seeks to raise an issue which is not concrete.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); 10 C.F.R. § 2.758(a). The purpose of the basis requirement of 10 C.F.R. § 2.714(b) is (a) to assure that the hearing process is not improperly invoked because the subject sought to be put in issue suffers from any of the infirmities set forth in Peach Bottom, supra, at 20-21; (b) to establish sufficient foundation to warrant further inquiry into the subject matter; and (c) to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, supra, at 20-21; Byron, supra, at 687.

At the pleading stage of a proceeding, contentions need only identify the reasons for each contention. See, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980); Byron, supra, at 688. Accordingly, in examining contentions and the basis therefore, a licensing board may not reach the merits of contentions. Id.; Peach Bottom, supra, at 20; Byron, supra,

at 688. Nevertheless, the basis for contentions must be sufficiently detailed and specific (a) to demonstrate that the issues raised are admissible and further inquiry into the matter is warranted; and (b) to put the parties on notice as to what they will have to defend against or oppose. This is especially important at the operating license stage, where a hearing is not mandatory, to assure that an asserted contention raises an issue which clearly is open to adjudication. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976); Gulf States Utilities Co. (River Bend, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974); River Bend, ALAB-444, 6 NRC 760, 768-69 (1977); Byron, *supra*, at 689.

In addition, a licensing board is not authorized "to admit conditionally for any reason, a contention that falls short of meeting the specificity requirements (emphasis original)" Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982).⁸ Section 2.714 of the NRC Rules of Practice do not permit "the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff." Id.

⁸ No party petitioned the Commission for review of ALAB-687. However, because of the potential pervasive impact of that decision on NRC practice, the Commission *sua sponte* took review on two issues not related to the quoted material, but rather to the good cause factor in 10 C.F.R. § 2.714(a)(1)(i) as applied to the admission of late-file contentions based on the institutional unavailability of licensing-related documents. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1044 (1983).

at 468. Moreover, a licensing board has no duty to recast contentions offered by a petitioner to remedy the infirmities of the type described in Peach Bottom, supra, for which they may be rejected, in order to make inadmissible contentions meet the requirements of 10 C.F.R. § 2.714.

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974).

Finally, a licensing board should apply all of the factors in 10 C.F.R. § 2.714(a)(1)⁹, including the Catawba Appeal Board's three part test for good cause¹⁰, in determining whether to admit contentions filed

⁹ 10 C.F.R. § 2.714(a)(1) provides that nontimely petitions to intervene or requests for hearing will not be entertained absent a determination by the Licensing Board that the petition or request should be granted based upon a balancing of the following factors:

- (i) good cause, if any, for failure to file on time;
- (ii) the availability of other means to protect petitioner's interest;
- (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record;
- (iv) the extent to which existing parties will represent the petitioner's interest; and
- (v) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

¹⁰ The Catawba Appeal Board's three part test for good cause in filing a late-filed contention is where it "(1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with
(Footnote Continued)

late because they are based solely on information available in relevant documents that were unavailable until a short time before the contentions were filed. Duke Power Co., et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

IV. The Late-Filed Aspect of the Contentions

As noted above in 10 C.F.R. § 2.714(a)(1), there is a five part balancing test that a Licensing Board must review if a late contention is to be admitted. Although inmates counsel has touched on several of these in the conferences, counsel did not further plea the issue in the opportunity provided all parties to respond on April 5, 1985 to the proposed contentions. The Board's review of the § 2.714(a)(1) tests follows:

1. Good Cause. This factor weighs in favor of the inmates. No contention could have been proffered earlier in view of the Commonwealth/Department of Corrections failure to submit an evacuation plan for SCIG. As the NRC Staff has noted and the Board had previously held, the inmates could not formulate contentions until the SCIG plan was issued. The counsel for the inmates did formulate and timely file with the Board contentions after receipt of the Commonwealth plan.

(Footnote Continued)

the requisite degree of promptness once the document comes into existence and is accessible for public examination." Duke Power Co., et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982); 17 NRC 1043-44.

2. -Availability of Other Means. We agree that at this stage there is no other means the inmates have to formally litigate the issue of the SCIG evacuation plan. However, we find that throughout the two conferences the responses by the state's officials, these free and complete exchanges in response to the inmates requests for information concerning the evacuation plan, exceeded mere discovery and constituted an informal litigation or other means for the inmates concerns to be satisfied without the inmates having to present any case of their own. We find that in fact the inmates have been provided another means of presenting their concerns.

3. Assist in Development of a Sound Record. The third test is whether a late filing party may assist in development of a sound record. As the Board has previously noted, we have sought to determine from this party what special expertise it would bring to this proceeding. It has repeatedly failed and there is no reason to expect that this party will exercise its responsibility to "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." ¹¹ In reviewing the inmates responses at the conferences and the total of all its pleadings in this proceeding, we find little if any indication of a desire to assist in developing this record. Although we have the inmates named

¹¹ Mississippi Power and Light Co., et al. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

expert, Major John Case, except for a limited participation in the two conferences, we do not know what the character of his testimony would be. We find that ample information in this record which permits the Board to determine that this factor weighs against admission of these late-filed contentions.

4. Representation by Existing Parties. There is no other party in this proceeding who directly represents the interests of this intervenor. However, because of the unique responsibility the Commonwealth has for the inmates through two state agencies, Pennsylvania Emergency Management Agency and the Department of Corrections, there has been and will continue to be an admitted party, PEMA, who under Commonwealth statutes is charged with emergency protection of all Commonwealth citizens as well as those confined in state institutions. To find that there is no party representing these inmates' interests is to cast an unfounded doubt on Commonwealth's agencies in the exercise of their responsibilities and is not supported by this record. We note also that the Commonwealth Department of Corrections has routine as well as emergency responsibilities to provide for all needs for these inmates confined in an institution beyond those the Commonwealth must provide for all its citizens. Whether any inmate contention is admitted in this proceeding does not change the relationship of the Commonwealth Department of Corrections to the health and safety responsibilities it has for the evacuation of the SCIG inmates in event of a radiological emergency at Limerick.

5. Delay and Broadening of the Issues. The admission of any late-filed contention at this point would delay and broaden the issues since hearings on all admitted offsite emergency planning contentions were completed on January 29, 1985 and the Board is well into completing its decision. This factor weighs against the petitioner.

Balancing the Factors. We find a balancing of these above factors does not support admission of these late-filed contentions.

V. Principle Bases for Denial of these Contentions

These proposed late-filed contentions and the new concerns articulated by counsel for inmates at the two conferences¹² lacked, as we have noted, specificity and basis. We emphasize that there were attempts to obtain participation by the inmates counsel and urged him to discharge his duty to specify with as much particularity as possible the basis for the contentions. Mr. Love indeed by his silence stonewalled the Board's urging to outline the concerns of his clients and ignored the Board's order to specify the areas of concerns after Plan I had been filed. Further, we find no regulatory requirement that support organization individuals, such as the Guards Union, have an opportunity

¹² Among these is inmates counsel's attempt to introduce the Prison Guard Union into the proceeding (Tr. 20,624-25).

to provide input into the emergency planning process as inmates counsel has sought here.

The potential for a "panic" or "riot" situation when inmates learn of a radiological emergency involves no litigable issue. Although counsel for inmates sought to provide this as a basis for some unspecified part of the contention, there was an absence of any showing that the prison authorities would not be prepared to handle any potential disturbances regardless of its cause. A bare allegation will not suffice. No basis has been shown to litigate the adequacy of security measures already in place to prevent or settle any such disturbances.

Another of those unspecified trial balloons counsel for inmates raised was the estimated time for evacuation (ETE). As was pointed out to counsel on several occasions during the conferences, there is no time mandated within which an evacuation must be accomplished (Tr. 20,643-44). There has been no showing here that the NRC regulations require that evacuation times for a prison fall within the estimated time for the general public. As Commonwealth's counsel points out, the matter of the ETE was known to inmates counsel at the time he filed his proposed contentions. Further, counsel has not made any showing that a different estimate would provide benefit to the inmates by providing better safety.

The Medical Services is still another of inmates basis lacking in specificity. There is no reference in Annex E, Appendix 13, regarding medical and health support in the Commonwealth for radiological

emergencies, nor any demonstration that existing procedures and resources are inadequate to treat contaminated injured members of the public including Graterford inmates. This Board has treated much of counsel's concerns in its Second Partial Initial Decision and we find that our prior rulings on hospital accreditation represents the law of the case and even if we were inclined to open up the issue again we note a lack of the requisite specificity and bases for doing so.

We note here that since the March 22, 1985 conference, the parties have provided the inmates with documents requested during both conferences in a continuing effort to meet every legitimate request of their counsel. These documents include the FEMA review of the Remedial Exercise at Graterford State Correctional Institution in Support of the Limerick Generating Station; PEMA letter to all bus companies providing Department of Corrections with buses, offering training to bus drivers regarding the proper use of dosimetry; and an Affidavit of Roger E. Linneman on his evaluation of the Montgomery County Hospital, Norristown, Pennsylvania, plans and preparations for handling radiation exposure cases as well as radioactive contaminated and injured patients.

We have thus provided the forum for the parties to reach a middle ground for their competing interests; presided over a broad discovery exercise; attempted to meet the legitimate concerns of the inmates counsel; and we have determined that we may now reach a conclusion on these contentions.

We find that:

1. A balancing of the factors for late-filed contentions favors denying admission. However, foremost in our consideration and decision here is the lack of specificity and basis for the inmates contentions. We, therefore, dismiss those two remaining contentions of the SCIG inmates as filed on February 15, 1985 and amended during conference of the parties on March 22, 1985 and dismiss the SCIG inmates as a party to this proceeding.

2. As provided for in our protective order of March 20, 1985 any party retaining copies of those documents or notes described in that protective order will surrender them to counsel of Department of Corrections at Camp Hill, Pennsylvania, within 10 days from the service date of this order.¹³

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD



HELEN F. HOYT, CHAIRPERSON
Administrative Judge

¹³ The Board has this date returned its two copies of Plan 2 for SCIG to Mr. Otto.

Response due 5/1/85

MONTGOMERY COUNTY LEGAL AID SERVICE

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PLEASE REPLY TO: Norristown

April 16, 1985

Docket and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: In the Matter of Philadelphia Electric Company
(Limerick Generating Station, Units 1 and 2)
NOS 50-352 and 50-353

Dear Sir:

Enclosed please find the original and three (3) copies of Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification, in reference to the above-mentioned matter.

Sincerely,

Angus R. Love, Esquire

ARL/mf
Encls.
cc: Service List

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FOIA-85-304

A-25

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of :
PHILADELPHIA ELECTRIC COMPANY :
(Limerick Generating Station,
Units 1 and 2) : NOS. 50-352 and 50-353

INTERVENOR GRATERFORD INMATES' SUPPLEMENTAL PETITION
FOR REVIEW OF APPEAL BOARD ORDER DISMISSING
PETITION FOR DIRECTED CERTIFICATION

I. INTRODUCTION

On February 21, 1985, Intervenor Graterford Inmates filed with the Commission pursuant to 10 C.F.R. 2.786, a Petition for Review of an Appeal Board Order of February 12, 1985, dismiss it without prejudice, the Notice of Appeal filed with the Appeal Board by the Inmates regarding an interlocutory discovery ruling by the Licensing Board set forth in an Order of February 5, 1984. The matters which brought this issue before the Nuclear Regulatory Commission are as follows: On September 18, 1981, the Graterford Inmates filed a Petition to Intervene in the above-captioned matter. On December 13, 1984, the Inmates' attorney received from the Commonwealth of Pennsylvania via the Pennsylvania Bureau of Corrections, an unclassified copy of the radiological emergency response plan for Graterford (heretofore to be

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referred to as Plan 1). After a review of the said plan by the inmates, their counsel and their expert, Major John Case, field director of the Pennsylvania Prison Society, a decision was made to request full disclosure of the Graterford plan. To this end, the Inmates filed a Motion requesting full disclosure which was docketed on December 19, 1984. On January 29, 1985, the Licensing Board, after hearing testimony from concerned parties, denied the Inmates' request for full disclosure of the plan. The Inmates then moved for a stay of their obligation to file contentions within twenty (20) days of the Licensing Board's refusal to request further disclosure. This stay was requested due to a prior Board Order of April 20, 1984, which granted the Inmates twenty (20) days after receipt of the evacuation plan for Graterford in order to submit specific contentions regarding such. The Inmates then appealed the Order of the Atomic Safety and Licensing Board which rejected said appeal on February 12, 1985. The Inmates then moved with the previously mentioned Petition for Review, which was filed on February 21, 1985 before this Honorable Commission.

II. Dispute Additional Disclosures of the Radiological Emergency Response Plan for Graterford, the Intervenors have been Denied the Right to base their Contentions upon Additionally Disclosed Information.

Pursuant to the Atomic Safety and Licensing Appeal Board's suggestion in their February 12, 1985 rejection of the Inmates' appeal, all parties concerned have met twice in an attempt to work out a solution per the Appeal Board's recommendation. Using the auspices of a protective order, the Inmates' counsel and their retained expert, Major John Case, field director of the Pennsylvania Prison Society were permitted to review a second document entitled, The Emergency Radiological Response Plan (heretofore referred to as Plan 2). Said review was conducted at the State Correctional Institute at Graterford, Pennsylvania on March 18, 1985. Present at that time were Angus R. Love, counsel for Inmates, Major John Case, designated expert, and Theodore Otto, counsel for the Bureau of Corrections. Initially, the Inmates note that the second plan represented considerable more detail than the first plan. The first plan was 27 pages long, and the second plan was 86 pages long.

A second meeting was held in response to this issue on March 22, 1985 with all parties concerned meeting in Harrisburg, Pennsylvania. Initially, it was the Inmates' intention to drop the present action as they were satisfied with the further disclosure brought forth by the review of Plan 2. However, during the discussions of the meeting on March 22, 1985, it became apparent that the Inmates would not be allowed to update their previously filed contentions which were based only upon the

information received by the review of Plan 1. Thus, the Inmates continue to request that this Appeal be heard by the Honorable Commission for the previously mentioned reasons and for the reasons cited herein. The purpose of requesting further disclosure of the plan was to obtain a better understanding of said plan as it relates to the Inmates. The initial plan was so vague and uncomprehensive that the Inmates had little or nothing upon which to file their initial contentions. Those contentions were primarily based upon the requirements embodied in 10 C.F.R. 50.47 regarding emergency planning. These contentions were filed only after a stay request allowing the matter to be litigated prior to the filing of any contentions was denied by the Licensing Board on January 29, 1985. The Inmates are now told by the Licensing Board that their original contentions will be the only contentions which will be taken into consideration by said Board.

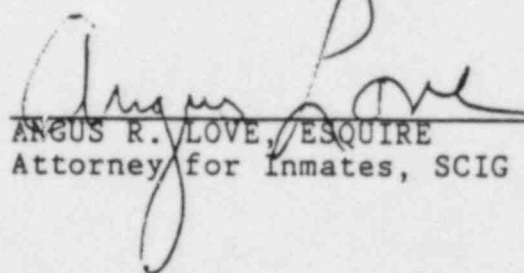
"The contentions were stated in a pleading entitled Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan Filed February 15, 1984.⁴

"Footnote 4. We find these contentions to be the sole issue of the inmates. We reject any attempt by the inmates to 'reserve the right to file additional contentions...' if access to an unsanitized plan was granted. (See Memorandum and Order on Graterford Prisoners Proposed Contentions ASLBP No. 81-465-07 OL April 12, 1985.)"

The Inmates protest that the additional disclosure and discussion of said issues will not be given consideration by the Licensing Board, thus they must continue to pursue this appeal.

A possible compromise on this issue was suggested during the meeting by the NRC staff in the person of Donald Hassel, who suggested that the Inmates be allowed to respecify the bases for their contentions in light of the additional disclosure. The Licensing Panel rejected this possible compromise in addition to the Inmates' request to refile contentions. Thus, the Inmates have been denied the right to refile their contentions and the right to respecify the bases for their contentions, despite the allowance of further disclosure, i.e. a review of the Plan 2. For these reasons, the Inmates have no other option but to continue to pursue their request for full disclosure and to supplement said request with a provision regarding the right not only to review the additional information, but to update their initial contentions based upon a review of the second plan. For these reasons the Inmates respectfully request this Board to instruct the Licensing Board to permit contentions based upon the additional information received.

Respectfully submitted,


ANGUS R. LOVE, ESQUIRE
Attorney for Inmates, SCIG

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of :
PHILADELPHIA ELECTRIC COMPANY :
(Limerick Generating Station,
Units 1 and 2) : NOS. 50-352 and 50-353

CERTIFICATE OF SERVICE

I, Angus R. Love, attorney for the Inmates at the State Correctional Institute at Graterford, hereby certify that a true and accurate copy of the Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification, in reference to the above-captioned matter, was mailed first class, postage prepaid, on April 16, 1985, to the following list:

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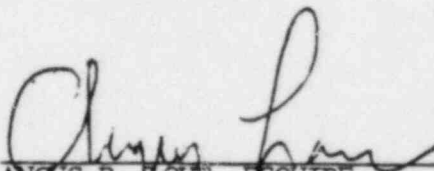
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Montgomery County Legal Aid
Counsel for Inmates, SCIG

10

MONTGOMERY COUNTY LEGAL AID SERVICE

HARVEY F. STRAUSS
EXECUTIVE DIRECTOR

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5/23/85

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PLEASE REPLY TO: Norristown

April 18, 1985

Docket and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: In the Matter of Philadelphia Electric Company
Limerick Generating Station, Units 1 and 2
Nos. 50-352 and 50-353

Dear Sir:

Enclosed please find the original and three (3) copies of Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions, in reference to the above-captioned matter.

Sincerely,

Angus R. Love, Esquire

ARL/mf
Encls.

cc: Service List

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Regular Mail

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of :
PHILADELPHIA ELECTRIC COMPANY :
Limerick Generating Station :
Units 1 and 2 : NOS. 50-352 and 50-353

NOTICE OF APPEAL FROM THE LICENSING BOARD'S MEMORANDUM
AND ORDER ON GRATERFORD PRISONERS' PROPOSED CONTENTIONS

I. INTRODUCTION

The inmates of the State Correctional Institute at Graterford, through their counsel, Angus R. Love, Esquire, hereby request a review by the Atomic Safety and Licensing Appeal Board of a recent decision by the Atomic Safety and Licensing Board issued on April 12, 1985, entitled Memorandum and Order on Graterford Prisoners' Proposed Contentions. The inmates request a review of said Order which denied all contentions which were filed on their behalf before the Licensing Board. The inmates note that they currently have an appeal pending before the Nuclear Regulatory Commission which involves similar issues to the issues raised in this appeal. The reason for the first appeal was a request for further disclosure of the Radiological Emergency Response Plan for Graterford. Initially, the inmates' counsel was shown a plan entitled, The Unsanitized Plan, also known as Plan 1, which contained little, if no useful information in determining the viability of the evacuation plan. The inmates

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requested further disclosure in their appeal. Such disclosure was finally permitted after a suggestion by this Appeal Panel that the parties attempt to work under the auspices of a protective order of the court. A second less sanitized version of the plan, called Plan 2, was made available to the inmates and counsel under a protective order of the court on March 18, 1985. When the inmates appealed the initial refusal to disclose any information beyond the contents of Plan 1, they requested a stay of their requirement to file their contentions within twenty days of receipt of Plan 1. The Licensing Board ruled against the stay and ordered the inmates to file their contentions within the mandated twenty days. The inmates did so on February 15, 1985. After obtaining the desired additional disclosures of Plan 2 on March 18, 1985, the inmates, through counsel, requested that they be allowed to update or restyle their contentions based upon the additional information obtained in Plan 2. At a conference on March 22nd, Helen Hoyt, Chairman of the Atomic Safety and Licensing Board refused to allow the inmates to add any further information to their contentions and held them to the February 15th filing. The inmates contend that this ruling goes against the grain of one of the most fundamental legal principles of our society, which is due process of law. Thus, they will continue to appeal this denial which is currently pending before the Nuclear Regulatory Commission. The remainder of this appeal will deal with the denial of the inmates' February 15th contentions as they were presented in the Board's Memorandum and Order of April 12, 1985.

II. HISTORY OF THE CASE

On September 18, 1981, the inmates at the State Correctional Institute at Graterford, through their attorney, filed a petition with the Licensing Board to intervene in the above-captioned matter. On October 14, 1981, the Board required the filing of a supplemental memorandum to address additional concerns. On June 1, 1982, the Board admitted the inmates as a party to this proceeding after the filing of their supplemental memorandum. On April 20, 1984, the Board further ordered the inmates to file contentions within twenty days of receipt of the Radiological Emergency Response Plan for Graterford. On December 13, 1984, the inmates, through their counsel, Angus R. Love, who had replaced Don Bronstein, received a sanitized copy of said plan, heretofore referred to as Plan 1. Plan 1, which is attached to the inmates initial appeal to this Board, was approximately 27 pages in length and was so censored as to be virtually unreadable. At this point the inmates, after consultation with their expert, Major John Case, field director of the Pennsylvania Prison Society, decided to appeal the decision and request for further disclosure. As part of the appeal, the inmates requested a stay of their obligation to file contentions within twenty days pursuant to the Board's order of April 20, 1984. Said stay was denied by the Board on January 29, 1985. The inmates filed their contentions on February 15, 1985 based upon information available in Plan 1. As the Licensing Board pointed out in Footnote 4 of page 4 of the order of April 15, 1985:

"We find these contentions to be the sole issues of the inmates. We reject any attempt by the inmates to reserve the right to file additional contentions...if access to an unsanitized plan was granted."

This appeal concerns the Appeal Board's dismissals of the originally filed contentions of February 15, 1985. The appeal currently pending before the Nuclear Regulatory Commission will concern itself with the inmates' attempt to refile their contentions or to restyle the basis for their contentions based upon a viewing of the second plan.

III. ARGUMENT- The Intervenor Inmates at the State Correctional Institute at Graterford Should Be Permitted to Participate as a Party before the Licensing Board in the Above-Captioned Matter.

In order to continue to participate as a party as mandated by 10 C.F.R. 2.714(b), an intervenor must file at least one contention that satisfies the aforementioned requirements. In order for a contention to be accepted, it must fall within the scope of issues set forth in the Federal Register Notice of Opportunity for Hearing. See 46 Federal Register 42557, August 21, 1981. See also Duquesne Light Company (Beaver Valley, Unit No. 1), ALAB-109, 6 AEC 243-245 (1973). Pursuant to 10 C.F.R. 2.714(b), said intervenor is required to file "a list of contentions which petitioners seek to have litigated in the matter, and the basis for each contention set forth with reasonable specificity." See Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 686 (1980). An intervenor that fails to file at least one contention that satisfies the requirements of 2.714(b) will not be permitted to participate as a party.

An intervenor's contention in order to be admitted must also meet the specificity requirements. See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460,467 (1982). In addition to the aforementioned requirements that a contention must meet, it must also meet all the factors in 10 C.F.R. 2.14(a)1, including the three-part test for good cause as outlined in the Catawba Appeal Board's decision on whether to admit contentions filed late because they are based solely on information available in relevant documents that were unavailable until a short time before the contentions were filed. See Duke Power Company et al (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1,041, 1,045 (1983). This involves a five-part balancing test by the Licensing Board in order to determine if said contention should be admitted. These five factors include good cause, availability of other means, assist in developing of a sound record, representation of existing parties, delay and broadening of the issues. After a review of these five factors, the Board should balance these various factors in determining whether or not to admit a late filed contention. Thus, this is the applicable law with which the inmates' contentions should be judged.

The inmates initially presented three contentions in their February 15th filing. The first reads: "There is no reasonable assurance that the evacuation plan will protect the staff and inmates at the State Correctional Institute at Graterford." The second contention reads: "There is no reasonable assurance that the evacuation plan will provide a safe and secure evacuation from the State Correctional Institute at Graterford." The third contention regarding the

return to Graterford has been dropped by agreement of parties. Following the discussions of two closed conferences with all concerned parties in Harrisburg, the inmates were satisfied on a number of issues that the February 15th filing had raised, and thus dropped all bases for the above-mentioned contentions except their insistence that there is no reasonable assurance that medical services will be provided to individuals contaminated by radiation; that there is no reasonable assurance that SCIG personnel, bus drivers and the Pennsylvania State Police will receive any training in preparedness for a nuclear emergency at SCIG, and finally, 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 inmates and SCIG personnel during said evacuation. The inmates contend that their two contentions and the three specific bases for contentions meet the above-mentioned requirements regarding the admissibility of these contentions and of themselves as an intervenor in the licensing process.

The inmates contend that the Licensing Board has failed to apply the proper standard in determining the admissibility of their contentions. At the pleading stage of a proceeding, contentions need only identify the reasons for each contention. See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980); Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30 12 NRC 683, 688 (1980). Accordingly, in the Licensing Board's examination of the contentions and the basis therefore, the Board may not reach the merits of contentions. See Philadelphia Electric Company (Peachbottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 through 21 (1974). It is the

inmates allegation that the Licensing Board has overstepped its authority and gone to the merits of the inmates' contentions prior to determining the admissibility of such in accordance with established caselaw. Furthermore, the inmates contend that they have met the aforementioned requirements as to the admissibility of their contentions. With regard to the standards applicable to late filed contentions, the inmates point out the following:

1. Good cause. The first factor the Board must consider is good cause for failure to file on time. 10 C.F.R. 2.714 Al(i). The inmates point out that they were granted intervenor status on October 14, 1981. At that time they were fully ready to pursue this matter in its entirety. Unfortunately, they waited over three years until December 13, 1984 before receiving a copy of the evacuation plan for SCIG. The inmates contend that this delay was through no fault of their own and should not be held against them in this present litigation. Upon receipt of the filing, the inmates did, in accordance with the Board's order of April 20, 1984, file their contentions within the twenty day time period as mandated by the Board's order. Thus, the inmates contend that they have satisfied this initial requirement.

2. Availability of other means. The second factor for consideration before the Board is the availability of other means to protect the petitioners' interests. See 10 C.F.R. 2.714(a)1(ii). It is the inmates' contention that there are no other available means for protecting their interests. The inmates take issue with the Board's ruling, in particular, their assertion on page 12 that two state agencies, the Pennsylvania Emergency Management Agency and the

Department of Corrections, will represent the inmates' interests. In light of the fact that the Department of Corrections was the party responsible for the development of the emergency radiological response plan, the inmates fail to see how these persons can be representative of their complaints about a plan that was developed by the Bureau itself. With regard to the Pennsylvania Emergency Management Agency, the inmates contend that this organization has little or no experience or contact with the correctional field and thus does not have standing to represent their interests.

3. Assist in Development of a Sound Record. The inmates contend that their participation in this proceeding and their retention of Major John Case, field director of the Pennsylvania Prison Society, will aid in the development of a sound record in this licensing process. They stress the unique nature of this particular intervenor in that a maximum security facility such as Graterford has never been included in the evacuation planning requirement for the 10 mile radius surrounding a nuclear power plant. The presence of a 2,500 man maximum security facility within the 10 mile radius presents a challenging problem for the emergency planners to resolve. The inmates contend that they should have some input into this unique situation.

4. Representation by Existing Parties. The inmates contend that there are no other parties who may directly represent the interests of the Graterford prisoners in this proceeding. See previously mentioned comments regarding the Board's assertion that PEMA and the Bureau of Corrections will represent their interests in this proceeding.

5. Delay and Broadening of the Issues. The inmates point out with regard to this issue that there have been many of their concerns which have already been resolved and a few more which were on the verge of resolution prior to the entry of the Board's order of April 12, 1985. While the inmates are well aware of the Applicant's desire to go to full power, they must insist that their rights not be denied due to delays which were beyond their control. The inmates were ready to proceed in 1981, however, a three year delay was caused by the Bureau of Corrections due to their failure to develop a suitable plan in an adequate time frame. The Board insists that the admission of any late filed contentions at this point would delay and broaden the issue since hearings on all off-site emergency planning contentions were completed by January 29, 1985. In view of the fact that the inmates did not submit their contentions until February 15, 1985 in compliance with the Board's order, the inmates find it hard to believe that they are delaying this process further. Such an assertion defies all logic and rational thought.

It is the duty of this Appeal Board to balance these five factors in order to determine whether or not the inmates have met the criteria for the filing of late contentions. If it is found that the factors weigh in the favor of the inmates, the Court must then look to the specific bases with which the contentions are framed. Section 2.714 of the NRC's Rules of Practice do not permit "the filing of a vague, unparticularized contention, followed by an endeavor to flush out through discovery against the applicant or staff." Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460,

468 (1982). The inmates contend that the matters they have presented to the Licensing Board are not vague, unparticularized contentions, but are specific concerns raised in response to the first Radiological Emergency Response Plan. The inmates' two primary contentions involve the lack of a reasonable assurance that the evacuation plan will protect inmates and staff, and secondly, that said plan will not provide a reasonable assurance that the evacuation will be safe and secure. In order to further specify and particularize these two admittedly general contentions, the inmates submitted numerous specific bases for these contentions. Although many of these are no longer at issue, the three mentioned in the Board's decision, including medical services training, and the general concept of evacuation provide additional data regarding the merits of their claims. In particular, the medical services claim contends that there are no medical services as mandated by 10 C.F.R. 50.47(b)12 for the treatment of individuals contaminated by radiation. A debate has arisen regarding the standards with which hospitals are charged and the inmates contend that this debate should continue when the merits of their contentions are discussed. The inmates are at loss to understand how one can get any more specific in this regard. The second basis which is still pending for their contentions regards the training of bus drivers. The inmates contend that the civilian bus drivers should be afforded the same opportunity as civilian bus drivers evacuating school children and other such persons in the EPZ. This would involve the opportunity for them to undergo training with regard to radiological preparedness in the event of nuclear emergency. Once again the inmates fail to

see how they could be any more specific in this regard. The third basis for the contentions entitled, General Concept of Evacuation, is admittedly broader than the first two, however, this basis was in response to the first plan, page E-1-A-1 which was approximately 90% censored, thus giving the inmates absolutely no idea what the general concept of evacuation was. Thus, the inmates contend that they have met the specificity requirements and should be allowed to proceed in this matter.

The inmates further contend that they also meet the requirements of 10 C.F.R. 2.714(b) which states that a contention must be rejected where:

1. It constitutes an attack on applicable statutory requirements;
2. It challenges the basic structure of the Commission's Regulatory process, or is an attack on the regulations;
3. It is nothing more than a generalization regarding the intervenors' particular view of what applicable policies ought to be;
4. It seeks to raise an issue which is not proper for adjudication in the proceeding, or does not apply to the facility in question;
or,
5. It seeks to raise an issue which is not concrete.

See Philadelphia Electric Company (Peachbottom Atomic Power Station, Units 2 and 3) ALAB-216, 8 AEC 13, 20 through 21 (1974); 10 C.F.R. Section 2.758(a). In that we are at the pleading stage, contentions need only identify the reasons for each contention. See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station Unit 1), ALAB-590, 11 NRC 542, 548 (1980).

Furthermore, the basis stated for each contention need not "detail the evidence which will be offered in support of each contention." See Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Inmates contend that they have met this test and that they have been open and frank in their discussions regarding not only the contentions themselves, but have gone further and discussed the various merits of their claims (see transcripts of two in-camera proceedings with all parties involved, in Harrisburg, Pa. on February 27, 1985, and on March 22, 1985). Clearly, there is no attempt to attack the applicable statutory requirements nor the basic structure of the regulatory process. The issues raised are concrete and are properly before the Board, per the Board's own order, and do in fact represent the inmates' concerns regarding the Bureau's evacuation plan and how it applies to their safety. Thus, the inmates contend that they have satisfied these requirements, therefore their contentions should be admitted.

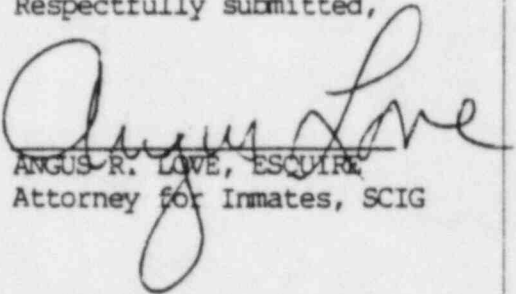
IV. CONCLUSION

The inmates contend that the Licensing Board's decision of April 12, 1985 has prematurely cut off their opportunity to participate in the licensing process regarding the above-captioned matter. They further contend that the Licensing Board has failed in its duty to analyze their contentions according to the established caselaw and applicable regulations of the Nuclear Regulatory Commission. The obvious discussions regarding the merits of these contentions should be disregarded as this issue is not properly before the Licensing Board.

The inmates deeply regret that they have had to wait since 1981 to have the opportunity to participate in this licensing procedure, however, they point out that this occurrence was no fault of their own. In fact, the delay is primarily due to the Bureau of Corrections' failure to compile the requisite evacuation plan until December of 1984. The inmates contend that they have met the specificity requirements regarding their contentions, that they have met the late filing balancing test regarding their contentions, and that they have fully complied with the regulations of 10 C.F.R. 2.714(b). The inmates once again point out the unique nature of this particular problem. The emergency planning requirements which were enacted in response to the Three Mile Island accident and are embodied in 10 C.F.R. 50.47, authorize participation of concerned individuals within the 10 mile EPZ regarding evacuation plans in the event of a nuclear emergency. The State Correctional Institute at Graterford represents a 2,500 inmate maximum security facility within the Pennsylvania state correctional system and is located 8.3 miles from the nuclear facility. As mandated by the regulations, the Bureau of Corrections has developed an evacuation plan for the institution. Due to the inherent difficulties in running an institution such as Graterford, the inmates request a voice in the development of the radiological evacuation plan and request the opportunity to provide input into the decision-making process. As this is the first such instance that has arisen since the development of 10 C.F.R. 50.47, the inmates request the Appeal Board to give this matter serious consideration. The fact

that the Applicant is anxious to proceed to full power should not cut short this important issue. For these reasons the inmates request that the Appeal Board overturn the Board's decision and allow them to participate as a party in this proceeding.

Respectfully submitted,



ANGUS R. LOVE, ESQUIRE
Attorney for Inmates, SCIG

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of :
PHILADELPHIA ELECTRIC COMPANY :
Limerick Generating Station :
Units 1 and 2 : NOS. 50-352 and 50-353

CERTIFICATE OF SERVICE

I, Angus R. Love, attorney for the Inmates at the State Correctional Institute at Graterford, hereby certify that a true and accurate copy of the Notice of Appeal from the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions in reference to the above-captioned matter, was mailed to the following list, first class, postage prepaid, on April 18, 1985.

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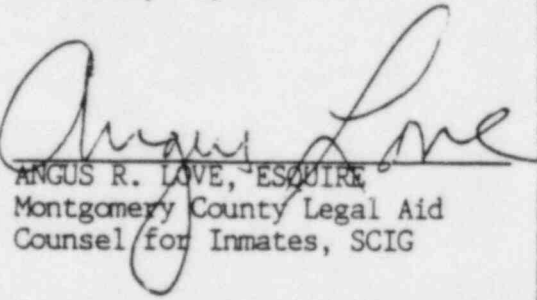
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'856247'

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

April 23, 1985

_____)
In the Matter of)

PHILADELPHIA ELECTRIC COMPANY)

(Limerick Generating Station,)
Units 1 and 2)
_____)

) Docket Nos. 50-352 OL
) 50-353 OL

ORDER

On April 18, 1985, the inmates of the State Correctional Institute at Graterford, intervenors in this operating license proceeding, filed an appeal from the Licensing Board's Memorandum and Order of April 12, 1985 (unpublished), dismissing all of their proposed offsite emergency planning contentions. See 10 C.F.R. § 2.714a. In an order issued today, the Secretary to the Commission, pursuant to 10 C.F.R. § 2.772, referred to us another pleading -- dated April 16, 1985, and filed by the inmates with the Commission -- which concerns a related matter. We will therefore consider simultaneously all of the Graterford inmates' arguments on appeal in connection with their emergency planning contentions.

~~85-426-143 (2pp)~~

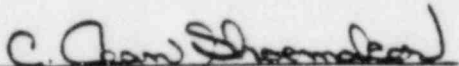
FOIA-85-304

A-27

Because the hearings in this case have been completed and applicant already has a low-power license, there is good cause for acting expeditiously on this matter. We therefore shorten the time for filing responses to the inmates' appeal. See 10 C.F.R. § 2.711(a). All replies shall be received by us no later than close of business (5:00 p.m.) on April 30, 1985.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

Dr. Gotchy did not participate in this order.



OFFICE OF THE
SECRETARY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

4/23/85

10

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

Dear Mr. Love:

This is in reference to your April 19, 1985 filing entitled, "Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification." This pleading requests action on your February 21, 1985 pleading to the Commission entitled, "Petition for Review of an Appeal Board Order of February 12, 1985." The February 12, 1985 Appeal Board Order dismissed what was, in effect, a petition for directed certification under 10 CFR 2.718(i) of an interlocutory order limiting discovery of the evacuation plans for the State Correctional Institution at Graterford, Pennsylvania.

The Commission completed all action on your February 21, 1985 pleading by allowing time for review of the Appeal Board Order to expire on March 26, 1985. Review was not appropriate because the issue of the scope of discovery was eliminated through agreement of the parties and because petitions for review of denials of petitions for directed certification are not permitted under 10 CFR 2.786(b)(1).

Your current pleading also requests review of a Licensing Board decision denying your request to use the information obtained from the additional disclosure of the evacuation plan to update your contentions. Petitions for review of such decisions should, in the first instance, be addressed to the Appeal Board.

Accordingly, by order of April 23, your April 19 filing improperly before the Commission entitled, "Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification" has been redirected, pursuant to 10 CFR 2.772(h), to the Appeal Board for its consideration.

85p425p123 (LP)

Sincerely,

Samuel J. Chilk
Secretary

FOIA-85-304

A-28

SERVED APR 23 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

85 APR 23 P3:18

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

Docket Nos. 50-352-OL
50-353-OL

ORDER

By this order, pursuant to the authority delegated to the Secretary under 10 CFR 2.772, the April 19 filing improperly before the Commission by Intervenor Graterford Inmates entitled "Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification" is redirected to the Appeal Board for consideration.

It is so ORDERED.



For the Commission

Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

this 23 day of April, 1985.

8504250128 (4pp)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Docket No.(s) 50-352-OL
50-353-OL

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this

23rd day of April 1985.

Reborah Rice
Office of the Secretary of the Commission

*LTR Chilk to Love w/order dtd 4/23/85

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-352
(Limerick Generating Station,) 50-353
Units 1 and 2))

NRC STAFF BRIEF IN RESPONSE TO "INTERVENOR GRATERFORD
INMATES' SUPPLEMENTAL PETITION FOR REVIEW OF APPEAL BOARD
ORDER DISMISSING PETITION FOR DIRECTED CERTIFICATION" AND
"NOTICE OF APPEAL FROM THE LICENSING BOARD'S MEMORANDUM
AND ORDER ON GRATERFORD PRISONERS' PROPOSED CONTENTIONS"

Donald F. Hassell
Counsel for NRC Staff

April 30, 1985

85-5070374
(38pp)

- FOIA-85-304

A-31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
Units 1 and 2)

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Docket Nos. 50-352
50-353

NRC STAFF BRIEF IN RESPONSE TO "INTERVENOR GRATERFORD
INMATES' SUPPLEMENTAL PETITION FOR REVIEW OF APPEAL BOARD
ORDER DISMISSING PETITION FOR DIRECTED CERTIFICATION" AND
"NOTICE OF APPEAL FROM THE LICENSING BOARD'S MEMORANDUM
AND ORDER ON GRATERFORD PRISONERS' PROPOSED CONTENTIONS"

Donald F. Hassell
Counsel for NRC Staff

April 30, 1985

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station*,
Units 1 and 2)

}
Docket Nos. 50-352
50-353
}

NRC STAFF BRIEF IN RESPONSE TO "INTERVENOR GRATERFORD INMATES' SUPPLEMENTAL PETITION FOR REVIEW OF APPEAL BOARD ORDER DISMISSING PETITION FOR DIRECTED CERTIFICATION" AND "NOTICE OF APPEAL FROM THE LICENSING BOARD'S MEMORANDUM AND ORDER ON GRATERFORD PRISONERS' PROPOSED CONTENTIONS"

I. STATEMENT OF THE CASE

A. Introduction

On April 12, 1985, the Atomic Safety and Licensing Board issued a memorandum and order rejecting the Graterford Prisoners' proposed contentions and dismissing the Graterford Prisoners as a party to this proceeding. On April 16, 1985, the Graterford Prisoners filed with the Commission a supplemental petition for review of an Appeal Board order of February 12, 1985, dismissing without prejudice the Graterford Prisoners' "Notice of Appeal" concerning an interlocutory discovery ruling set forth in the Licensing Board's memorandum and order of February 5, 1985. On April 18, 1985, the Graterford Prisoners filed a notice of appeal seeking Appeal Board review of the Licensing Board's April 12, 1985 memorandum and order. On April 23, 1985, the Appeal Board issued an order indicating that (1) the Secretary of the Commission had referred the Graterford Prisoners' April 16, 1985 pleading to the Appeal Board,

(2) the Appeal Board will consider simultaneously all of the Graterford Prisoners' arguments on appeal related to their emergency planning contentions, and (3) the time for filing responses is shortened and all replies shall be received no later than close of business on April 30, 1985. ^{1/} Pursuant to 10 C.F.R. § 2.714a and the Appeal Board's order of April 23, 1985, the NRC staff hereby files its brief in opposition to the Graterford Prisoners' appeal.

B. Background and Reference to Rulings

On September 18, 1981, the Philadelphia Chapter of the National Lawyers' Guild (Guild) sought to intervene in this proceeding on behalf of certain inmates at the Graterford prison (designated "Graterford Prisoners"). In response to an Order by the Board dated October 14, 1981, the Guild filed a Supplemental Memorandum in support of its petition to intervene. The Board's Special Prehearing Conference Order of June 1, 1982 admitted the Graterford Prisoners as a party to this proceeding. ^{2/} On April 20, 1984, the Board issued an order acknowledging that the Graterford Prisoners were unable to present contentions during the prehearing conference since the emergency plan for the State Correctional Institution at Graterford (SCIG) was not available and granting the

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished), slip op. (April 23, 1985).

^{2/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1442-47 (1982).

Graterford Prisoners twenty days from the time they receive the plan to submit any contentions based upon the plan. ^{3/}

On December 13, 1984, the Commonwealth of Pennsylvania (Commonwealth) provided to the Graterford Prisoners' counsel a "sanitized" copy of the Pennsylvania Bureau of Correction Radiological Emergency Response Plan for the Graterford prison (Plan 1), which had certain information deleted for security reasons. On December 20, 1984, the Graterford Prisoners filed a motion ^{4/} requesting the Licensing Board to require full disclosure of the emergency response plan for SCIG, alleging that the "sanitized" version (Plan 1) provided to them by the Commonwealth did not provide sufficient information to allow them to either form a judgment concerning the adequacy of the plan or propose contentions concerning the plan for litigation in the Limerick offsite emergency planning hearings. The Applicant, the Commonwealth and the NRC staff filed responses generally opposing full disclosure, except that the Staff indicated that the Licensing Board should require the Graterford Prisoners to specify the information needed, based on expert opinion, beyond that provided in the "sanitized" version (Plan 1) as a pre-condition to compelling further

^{3/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1029-30 (1984).

^{4/} Motion for Order Requiring Full Disclosure by Pennsylvania Emergency Management Agency of the Evacuation Plan for State Correctional Institute at Graterford.

disclosure. ^{5/} The Graterford Prisoners filed a supplemental motion, indicating that their expert required full disclosure in order to make a judgment regarding the viability of the plan. ^{6/} On January 29, 1985, the Licensing Board heard oral argument on the Graterford Prisoners' motion for full disclosure of the SCIG plan and examined Mr. Erskind DeRamus, the Commonwealth's Deputy Commissioner of Corrections regarding the matter. The Board orally denied from the Bench the Graterford Prisoners' motion for full disclosure of the plan and permitted them 20 days in which to file contentions based on the "sanitized" version of the plan (Plan 1). Tr. 20,479-81. It also denied Graterford Prisoners' motion for a stay of the Board's decision denying the motion pending appeal. Tr. 20,842. On February 5, 1985, the Licensing Board issued a "Memorandum and Order Regarding Graterford Prison" confirming the rulings it made from the bench on January 29, 1985. The Licensing Board denied the motion for full disclosure citing, among other things, the Graterford

^{5/} Applicant's Response to Graterford Inmates Motion for an Order Requiring Full Disclosure by PEMA on the Evacuation Plan for the State Correctional Institute At Graterford (December 28, 1984); Response of the Commonwealth of Pennsylvania to Graterford Inmates' December 20, 1984 Motion for Full Disclosure of Graterford RERP and Request for Additional Time to File Memorandum in Support of Said Response (December 31, 1984); Memorandum in Support of Response of the Commonwealth of Pennsylvania to Graterford Inmates' December 20, 1984 Motion (January 18, 1985); [NRC Staff] Answer to Motion of the Inmates of the State Correctional Institute at Graterford for Full Disclosure of the Evacuation Plan for State Correctional Institute at Graterford (January 2, 1985).

^{6/} Supplemental Motion Of The Inmates At SCIG Regarding Full Disclosure Of The Evacuation Plan For SCIG (January 28, 1985).

Prisoners' failure to specify the information needed. Memorandum and Order at 1 (February 5, 1985).

On February 8, 1985, the Graterford Prisoners' filed a "Notice of Appeal" ^{7/}, which was dismissed without prejudice by the Appeal Board on February 12, 1985. The Appeal Board indicated that at the time the Graterford Prisoners sought review by the Appeal Board they had not yet exhausted their options before the Licensing Board, including the filing of their contentions. Memorandum and Order at 2 (February 12, 1985). While declining to direct certification of the Licensing Board's ruling denying full disclosure, the Appeal Board provided guidance to the Licensing Board and parties regarding the desirability of finding a middle ground to accommodate the competing interests at stake. Id. at 3. The Appeal Board directed the Licensing Board's attention to NRC decisions regarding the use of protective orders to protect discoverable yet sensitive information. Id. The Licensing Board implemented the Appeal Board's guidance by scheduling an in camera "conference on full disclosure" of the emergency plan for the Graterford Facility that was held on February 27, 1985. ^{8/}

^{7/} Although the Inmates styled their filing before the Appeal Board a "Notice of Appeal," the Appeal Board construed it as a petition for directed certification. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order (unpublished), slip op. at 1-2, 4, (February 12, 1985).

^{8/} Memorandum and Order (Conference on Full Disclosure of Evacuation Plan for the Graterford Maximum Security Facility) (unpublished) slip op. (February 19, 1985); Tr. 20,484-606.

On February 15, 1985, the Graterford Prisoners filed contentions based on the "sanitized" plan (Plan 1) ^{9/} and on February 21, 1985, they filed a petition for Commission review of the Appeal Board's February 12, 1985 Memorandum and Order. On March 8, 1985, the NRC staff and the Applicant filed answers, which opposed the Graterford Prisoners' petition for Commission review. ^{10/} On March 26, 1985, the Commission completed all action on the Graterford Prisoners' February 21, 1985 petition for review by allowing the time for review of the Appeal Board February 12, 1985 order to expire. ^{11/}

On March 15, 1985, the Commonwealth of Pennsylvania Department of Corrections filed its response to Mr. Love's and his expert's request for information that was raised during the February 27, 1985 conference. ^{12/} Also, on that date, the Licensing Board scheduled another in camera session, which was held on March 22, 1985, to review the progress that had been made in resolving the discovery dispute between the Commonwealth

^{9/} Proposed Contentions Of The Graterford Inmates With Regard To The Evacuation Plan (February 15, 1985) ("Proposed Contentions").

^{10/} NRC Staff's Answer In Opposition To Intervenor Graterford Inmates' Petition For Review Of Appeal Board Order Dismissing Petition For Directed Certification (March 8, 1985); Applicant's Answer To Graterford Prisoners' Petition For Review (March 8, 1985).

^{11/} See, Letter from Samuel Chilk, Secretary of the Commission to Angus R. Love (April 23, 1985).

^{12/} 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, attached to letter to the Docketing and Service Section, Office of the Secretary, U.S. N.R.C., dated March 15, 1985.

and the Graterford Prisoners. ^{13/} On March 18, 1985, the Commonwealth provided Mr. Love, the representative for the Graterford Prisoners, and his expert a copy for examination under the the Board's protective order ^{14/} of the new version of the emergency plan (Plan 2) for the SCIG, which was virtually the entire plan. Tr. 20,612-13. During the March 22, 1985 conference, counsel for the Graterford Prisoners' withdrew one of the three proposed contentions and determined that most of the bases supporting the contentions had been satisfactorily resolved.

(Tr. 20,677-91). At that March 22, 1985 conference, the Licensing Board granted the parties an opportunity to respond to the Graterford Prisoner contentions not withdrawn during the conference. Tr. 20,697-98. The Board established a response date of April 5, 1985. Id. On April 4, 1985, the Applicant and the Commonwealth filed answers opposing the admission of the Graterford Prisoners' proposed contentions. ^{15/} On April 5, 1985, the NRC staff filed a response opposing the admission of certain

^{13/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order (Conference On Graterford Maximum Security Facility), (unpublished), slip op. (March 15, 1985); Tr. 20,490, 20,610. Subsequently, the Licensing Board ruled that the transcript of the February 27, 1985 in camera conference be opened and confirmed its oral ruling that the transcript of the March 25, 1985 in camera session would not be sealed. See, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum and Order (Opening Transcript of February 27, 1985 In Camera Conference on Graterford RERP) (unpublished), slip op. at 2, (March 27, 1985).

^{14/} Philadelphia Electric Company, (Limerick Generating Station, Units 1 and 2), Protective Order (unpublished) slip op. (March 20, 1985).

^{15/} Applicant's Answer To Proposed Emergency Planning Contentions Of The Graterford Prisoners (April 4, 1985); Answer Of The Commonwealth Of Pennsylvania To Proposed Contentions Of The Graterford Inmates With Regard To The Evacuation Plan (April 4, 1985).

issues and not objecting to the admission of other issues. ^{16/} On April 12, 1985, the Licensing Board issued a Memorandum and Order that rejected the Graterford Prisoners' remaining proposed contentions and dismissed the Graterford Prisoners as a party to this proceeding. ^{17/}

On April 16, 1985, the Graterford Prisoners filed with the Commission a Supplemental Petition For Review Of Appeal Board Order Dismissing Petition For Directed Certification, which took issue with the Licensing Board's decision of April 12, 1985. ^{18/} On April 23, 1985, this Supplemental Petition, which was improperly filed before the Commission, was redirected to the Appeal Board for consideration by Order of the Secretary of the Commission. ^{19/} In accordance with 10 C.F.R. § 2.714a, the Graterford Prisoners, on April 18, 1985, filed its notice of appeal seeking review of the Licensing Board's April 12, 1985 decision. ^{20/}

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- ^{16/} NRC Staff Response To Graterford Prisoners Proposed Contentions (April 5, 1985).
- ^{17/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order On Graterford Prisoners Proposed Contentions (unpublished), slip op. at 16, (April 12, 1985).
- ^{13/} Intervenor Graterford Inmates' Supplemental Petition For Review Of Appeal Board Order Dismissing Petition For Directed Certification (April 16, 1985) ("Supplemental Petition").
- ^{19/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished) slip op. (April 23, 1985).
- ^{20/} Notice Of Appeal From The Licensing Board's Memorandum And Order On Graterford Prisoners' Proposed Contentions (April 18, 1985) ("Notice of Appeal").

II. STATEMENT OF ISSUES ON APPEAL

A. Whether the Licensing Board properly exercised its discretion in not requiring full disclosure of the SCIG radiological emergency response plan.

B. Whether the Licensing Board applied the proper standards in determining that the proposed contentions were not admissible.

C. Whether the Licensing Board properly rejected the Graterford Prisoners' Request to refile their contentions and respecify the bases for their contentions.

III. ARGUMENT

A. The Licensing Board Did Not Abuse Its Discretion In Not Requiring Full Disclosure of The SCIG Plan

The Graterford Prisoners' current request for full disclosure of the SCIG plan (Plan 2) ^{21/} is without merit. In its Memorandum And Order of April 12, 1985, the Licensing Board did not require any further disclosure of the SCIG plan (Plan 2) that had been examined by counsel for the Graterford Prisoners and his expert under protective order. ^{22/} The Board stated that "[a]lthough Plan 2 is not totally unsanitized, it is virtually the complete plan." ^{23/} This statement by the Board describing the status of disclosure of the SCIG plan is undisputed. Indeed, the

^{21/} Supplemental Petition at 5.

^{22/} See, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order On Graterford Prisoners Proposed Contentions (unpublished) slip op. (April 12, 1985).

^{23/} Memorandum And Order On Graterford Prisoners' Proposed Contentions at 5, fn. 4.

statement is directly supported by counsel for the Graterford Prisoners' examination of Plan 2. After examining Plan 2, Mr. Love characterized the disclosure of Plan 2 as follows: ". . . we were very pleased . . . to see the plan virtually in its entirety." Tr. 20,612-13, see also, Tr. 20,658. Moreover, during the March 22, 1985 conference, counsel for the Graterford Prisoners repeatedly stated that he was satisfied with the information that had been disclosed regarding the new "sanitized" version of the SCIG plan (Plan 2). Tr. 20,613, 20,657-58, 20,697, see also, Supplemental Petition at 3. Further, when questioned by the Board on what further discovery he wanted, counsel for the Graterford Prisoners only identified the Federal Emergency Management Agency (FEMA) report of the exercise that was held at the SCIG on March 7, 1985. Tr. 20,622, 20,659, 20,661. As the Licensing Board noted, the FEMA report of the March 7, 1985 exercise at SCIG has been provided to the counsel for the Graterford Prisoners. ^{24/} The only reasons the counsel for Graterford Prisoners offers for seeking further disclosure of Plan 2 is because of the denial of their alleged rights to refile their contentions and to respecify the bases for their contentions. Supplemental Petition at 5. Although the denial of these alleged rights may be an issue, standing alone, which the appellant believes warrants appellate review, that issue as framed by the appellant does not establish a basis for requiring further disclosure of the new "sanitized" version of the SCIG plan

^{24/} Memorandum And Order On Graterford Prisoners' Proposed Contentions at 15; Letter from D. F. Hassell to the Licensing Board dated April 2, 1985, with enclosures.

(Plan 2). The appellant has failed to either explain or show any nexus between the denial of these alleged rights and the need to obtain additional disclosure of Plan 2. Essentially, the attempt to seek further disclosure of Plan 2 appears to be grounded on nothing more than the Graterford Prisoners dissatisfaction with the Board's denial of certain other relief that they believe they are entitled. In fact the record below is devoid of any effort on the part of appellant to seek further disclosure of Plan 2 beyond that examined by appellant on March 18, 1985 and disclosed during the March 22, 1985 conference. In summary, given the Commonwealth's security reasons for deleting information from the SCIG plan, ^{25/} the Staff submits that the Graterford Prisoners' reasons for seeking further disclosure are unpersuasive and unsound for the following reasons: (1) they were satisfied with the disclosure of information for Plan 2 that has already taken place, (2) they have failed to show any need for further disclosure in order to either refile their contentions or respecify the bases of their contentions and (3) they have taken the position they would not go beyond the information contained in the transcripts of the two conferences in either refiling their contentions or respecifying the bases for their contentions (Tr. 20,694). The Staff is of the view that where, as here, the information sought involves sensitive security information, a decision to disclose should at bottom depend on a balancing of the need for the information as weighed against the negative effects that might be created from disclosure. In

^{25/} See, Jeffes Affidavit at 4-5 attached to Letter from Z. Ferkin to A. Love, dated December 13, 1984.

the present case, the Licensing Board has properly exercised its discretion in providing a meaningful accomodation of the competing interests at stake here. Memorandum And Order at 3 (February 12, 1985). Thus, it did not abuse its discretion in not requiring further disclosure of the SCIG plan (Plan 2) in that the appellant has not established here or below that it either needs further disclosure or is entitled to further disclosure.

B. The Licensing Board Correctly Applied The Proper Standard In Determining That The Proposed Contentions Were Not Admissible And Thus Did Not Abuse Its Discretion

1. Introduction

As the Licensing Board correctly stated: "a licensing board should apply all of the factors in 10 C.F.R. § 2.714(a)(1) ^{26/}, including the

^{26/} Section 2.714(a)(1) provides that nontimely petitions to intervene or requests for hearing will not be entertained absent a determination by the Licensing Board that the petition or request should be granted based upon a balancing of the following factors:

- (i) good cause, if any, for failure to file on time;
- (ii) the availability of other means to protect petitioner's interest;
- (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record;
- (iv) the extent to which existing parties will represent the petitioner's interest; and
- (v) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

Catawba Appeal Board's three part test for good cause, ^{27/} in determining whether to admit contentions filed late because they are based solely on information available in relevant documents that were unavailable until a short time before the contentions were filed." Memorandum And Order On Graterford Prisoners Proposed Contentions at 10, citing Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). Furthermore, at least one contention must be found acceptable by the Board - both as to basis and specificity - in order for an Intervenor to be permitted to participate as a party. See, 10 C.F.R. § 2.714(b). These standards for judging the admissibility of the Graterford Prisoners' proposed contentions are not in dispute. In fact, the appellant acknowledges that these are the standards to be applied. Notice of Appeal at 4-5. Thus, the issue confronting the Appeal Board in this case is whether these standards were properly applied by the Licensing Board. See, Notice of Appeal at 6.

The Commission has observed that 10 C.F.R. § 2.714(a) grants Licensing Boards "broad discretion" in disposing of untimely petitions. ^{28/} The Appeal Board has made clear that it is not inclined to "substitute its judgment for that of the Licensing Board insofar as the outcome of the

^{27/} The Catawba Appeal Board's three part test for good cause requires that the late-filed contention: "(1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination." Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982); 17 NRC 1043-44.

^{28/} Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

balancing of the Section 2.714(a) factors is concerned." ^{29/} Moreover, it is settled that the Appeal Board will not overturn a licensing board's evaluation of the lateness factors of Section 2.714(a) unless that analysis reveals it has abused its discretion. ^{30/} Consequently, the appellant has a substantial burden on this appeal. cf. WPPSS No.3, ALAB-747 at 1171. Within this framework ^{31/} we now turn to the decision below and to the reasons why, in the Staff's judgment, the outcome reached by the Licensing Board in applying and balancing the Section 2.714(a) factors was not an abuse of discretion.

2. Application Of Lateness Factors To Late-Filed Contentions

At the outset, the Staff observes that the Graterford Prisoners had the burden below of addressing each of the 10 C.F.R. § 2.714(a)(1) factors

^{29/} Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395-96 (1983); Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3) ALAB-747, 18 NRC 1167, 1171 (1983).

^{30/} Detroit Edison Company, et al. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1762-3 (1982), [citations omitted].

^{31/} Since the Commission has determined that the lateness factors of 10 C.F.R. § 2.714(a) are to be applied in determining the admissibility of late filed contentions based on information from documents unavailable until shortly before the contentions were filed, the Staff submits that the standards of appellate review of a Licensing Board decision applying the Section 2.714(a) lateness factors to untimely intervention petitions should likewise govern appellate review of a Licensing Board decision applying the same factors to late filed contentions that are based on information from documents that were unavailable until a short time before the contentions are filed.

governing the admissibility of late-filed contentions and demonstrating that, on balance, these factors favor admission of its untimely contentions. ^{32/} Before the Licensing Board, however, the Graterford Prisoners did not address all of the five factors that 10 C.F.R. § 2.714(a)(1) required the Board to consider in determining the admissibility of late-filed contentions. Proposed Contentions at 1-2. In its brief on appeal, however, the appellant addressed all of Section 2.714(a)(1) factors and makes certain additional arguments for the first time on appeal. Notice of Appeal at 7-9. Such new arguments are clearly improper in that the Appeal Board has held that, in the absence of "a serious substantive issue", it will not entertain arguments that have been raised for the first time on appeal. ^{33/}

Nevertheless, the Staff submits that the Graterford Prisoners have failed to demonstrate on appeal that a balancing of the Section 2.714(a)(1) factors favors admission of their late-filed contentions thus warranting Appeal Board reversal of the Licensing Board's April 12, 1985 decision.

a. Good Cause

In its Memorandum and Order of April 12, 1985, the Licensing Board found that the first factor, good cause for the late filing, weighed in favor of the appellant. Memorandum And Order On Graterford Prisoners'

^{32/} Duke Power Company, et al. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980).

^{33/} Public Service Electric And Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 69 (1981); see also, Houston Lighting And Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980).

Proposed Contentions at 10. The appellant argues that it has met this factor. Notice of Appeal at 7. Consequently, the Licensing Board's application of the first factor in 10 C.F.R. § 2.714(a) and its application of the Catawba standard is not at issue on appeal.

b. Availability of Other Means

For the second factor required to be considered under 10 C.F.R. § 2.714(a), availability of other means to protect petitioner's interest, the Licensing Board found that "in fact the [Graterford Prisoners] have been provided another means of presenting their concerns." Memorandum And Order On Graterford Prisoners' Proposed Contentions at 11. While it acknowledged that at this juncture there is no other means that the appellant has to formally litigate the issue of the SCIG plan, ^{34/} the Board reasoned that there had been a full and complete exchange of information between state officials and appellant that exceeded mere discovery, during the two conferences that were held in February and March, in response to the appellant's request for information regarding the SCIG plan. Id. Moreover, the Board noted earlier that during these meeting efforts were made to accomodate the concerns raised by the appellant. Id. at 4-5. As a consequence, it explained that this process "constituted-

^{34/} This fact was properly considered by the Board since the Appeal Board has previously held that factor two weighed in favor of a tardy petitioner where absent admission to the operating licensing proceeding the petitioner is not assured of an adjudicatory hearing on the claims it seeks to raise. Detroit Edison Company, et al. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982). As the Staff argues above, however, based on the record in this case the Board has not abused its discretion in weighing this factor against the Graterford Prisoners.

an informal litigation or other means for the inmates concerns to be satisfied without the inmates having to present any case of their own." Id.

The appellant contends on appeal that there are no other means available for protecting its interests. Notice of Appeal at 7. However, the appellant references that part of the Licensing Board decision dealing with the fourth factor (representation by existing parties) under 10 C.F.R. § 2.714(a) and frames its argument in terms of the fourth factor. Notice of Appeal at 7-8. Thus, the Staff will address the appellant's position regarding the Board's decision under the fourth factor in that section of its brief covering that issue. Nevertheless, although the Staff conceded below that factor two weighed in favor of the appellant, ^{35/} the Staff submits that the Licensing Board's determination and reasoning on factor two (availability of other means) was adequately supported by the record in this proceeding and thus was not an abuse of discretion. As the Board noted, during the two conferences held with the parties on February 27, 1985 and March 22, 1985, the Commonwealth's senior officials ^{36/} charged with the responsibility for the inmates and their evacuation participated in the conference and attempted to comply with every request for information made by the Graterford Prisoners'

^{35/} NRC Staff Response To Graterford Prisoners Proposed Contentions at 12 (April 5, 1985).

^{36/} Glen R. Jeffes, Acting Commission, Department of Corrections, Commonwealth of Pennsylvania Department of Corrections and John Patten, Director, Pennsylvania Emergency Management Agency.

counsel and their expert. ^{37/} Further, as noted by the Board, on March 18, 1985, the Commonwealth's Department of Corrections provided Mr. Love and his expert a copy for examination of the new "sanitized" version of the SCIG plan (Plan 2) which was virtually the entire plan. Memorandum And Order On Graterford Prisoners' Proposed Contentions at 4; Tr. 20,612-13. As a consequence of this exchange of information, the Graterford Prisoners withdrew one of their three contentions and withdrew almost all of the bases for their three contentions because they were satisfied that the concerns reflected in their bases had been satisfactorily resolved by the Commonwealth. Tr. 20,676-91. Thus, the record clearly reflects that the Commonwealth, through the Department of Corrections and PEMA, has been in fact an alternative means whereby the concerns of the Graterford Prisoners regarding the SCIG emergency plan have been addressed and resolved. Accordingly, the Staff submits that there has not been a showing based on the total record of this matter that the result reached by the Board on this factor is either unreasonable or a result that abuses the "broad discretion" that Section 2.714(a) confers upon Licensing Boards in individual circumstances. ^{38/}

^{37/} Memorandum And Order On Graterford Prisoners' Proposed Contentions at 4; Tr. 20,484-20,606; Tr. 20,607-20,721; 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, attached to letter to the Docketing and Service Section, Office of the Secretary, U.S. N.R.C., dated March 15, 1985.

^{38/} See, Nuclear Fuel Services, 1 NRC at 275.

c. Assist In Development Of A Sound Record

With respect to whether a late filing party may assist in the development of a sound record (factor three), the Licensing Board correctly determined that this factor weighed against the admission of the Graterford Prisoners' late-filed contentions. Memorandum And Order On Graterford Prisoners Proposed Contentions at 12. In reaching this determination, the Board properly sought to determine from the Graterford Prisoners what special expertise it would bring to this proceeding ^{39/} and noted its "responsibility to 'set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony", citing Grand Gulf. ^{40/} The Appeal Board has made clear that this is the proper standard to be used in applying the third factor. ^{41/} Before the Licensing Board, the Graterford Prisoners (Mr. Love) had identified the particular issues it planned to cover (Proposed Contentions at 3-9) and indicated that it has retained the services of an expert (Major John Case) and identified his background. ^{42/} Nevertheless, the Board found that the appellant has

^{39/} Cf., South Carolina Electric and Gas Co., et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 892-94 (1981).

^{40/} Memorandum And Order On Graterford Prisoners Proposed Contentions at 11; Mississippi Power and Light Co., et al. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

^{41/} WPPSS-3, ALAB-747, 18 NRC at 1177; Shoreham, ALAB-743, 18 NRC at 399.

^{42/} Proposed Contentions at 2; Supplemental Motion Of The Inmates At SCIG Regarding Full Disclosure Of The Evacuation Plan For SCIG at 2 and Attachment (January 28, 1985).

repeatedly failed to meet this standard. Memorandum And Order On Graterford Prisoners Proposed Contentions at 11. This determination is not challenged by the Graterford Prisoners on appeal. See, Notice of Appeal. The Board explained that in reviewing the appellant's total participation in the proceeding, it found little indication of a desire to assist in developing a record. Memorandum And Order On Graterford Prisoners Proposed Contentions at 11. Furthermore, the Board acknowledged that the Graterford Prisoners had identified an alleged expert but noted its total lack of knowledge of what the character of his testimony would be. Id. at 11-12. The Staff submits that the Board's reasoning and the result it reached were sound given that it was confronted with a record where the appellant had neither identified its prospective witnesses nor provided any information regarding the nature of the testimony of its prospective witnesses. The Staff argued below that the Board did not have enough information in the record to conclude that the appellant had satisfied its burden of showing that the third 10 C.F.R. § 2.714(a) factor favored admission of its late-filed contentions. ^{43/} On appeal, the appellant merely contends that "their participation in this proceeding and their retention of Major John Case, field director of the Pennsylvania-Prison Society, will aid in the development of a sound record in this licensing process." Notice of Appeal at 8. This argument is not sufficient to warrant a determination by the Appeal Board that the Licensing Board abused its discretion in applying the third factor since the argument

^{43/} NRC Staff Response To Graterford Prisoners Proposed Contentions at 13.

amounts to nothing more than "vague assertions regarding the petitioner's ability." See, Grand Gulf, ALAB-704, 16 NRC at 1730.

d. Representation By Existing Parties

For the fourth 10 C.F.R. § 2.714(a) factor (representation by existing parties), the Licensing Board determined that there is no other party who directly represents the interests of the Graterford Prisoners. Memorandum And Order On Graterford Prisoners Proposed Contentions at 12. The Graterford Prisoners contend on appeal, as it did below, that there is no other party who might directly represent their interests in this proceeding. Proposed Contentions at 2; Notice of Appeal at 8. The appellant takes issue with what it asserts is the Licensing Board's ruling that the "two state agencies, Pennsylvania Emergency Management Agency and the Department of Corrections, will represent the inmates' interests" Notice of Appeal at 7-8. However, this assertion by the appellant is erroneous. The Board did not make a finding on ruling that the two state interests will represent the inmates' interest in this proceeding. Moreover, the Board did not find that this factor (representation by existing parties) weighed against the admission of the Graterford Prisoners late-filed contentions. There was also no finding of compatibility on the issues between the intervenor and any other party. Thus, although there is language in the Board's opinion regarding the unique responsibilities of those two state agencies as related to the inmates, the Licensing Board's determination that "there is no other party in this proceeding who directly represents the interests of this intervenor [Graterford Prisoners]" results in the conclusion that factor four weighed in favor of admission of the proposed late-filed contentions.

e. Delay And Broadening Of The Issues

With regard to the fifth factor (broaden the issues or delay the proceeding), the Licensing Board found that this factor weighed against the Graterford Prisoners since the admission of the proposed late-filed contentions would delay and broaden the issues because the hearings on all admitted offsite emergency planning contentions were concluded on January 29, 1985 and the Board is well into completing its decision on those issues. Memorandum And Order On Graterford Prisoners Proposed Contentions at 13. The appellant did not address this factor below. See, Proposed Contentions. However, on appeal the appellant argues that it finds it hard to believe that a consideration of their proposed contentions would further delay the licensing process since they submitted their contentions on February 15, 1985 in compliance with the Board's order. Notice of Appeal at 9. The appellant has failed to offer any reason to suggest that the Board improperly reached its decision on this factor. The Board was manifestly correct in deciding that the admission of appellant's late-filed contentions would broaden and delay the proceeding because the issues will be presented for the first time where none existed before.

f. Balancing The Factors

The Licensing Board concluded that a balancing of the five lateness factors of 10 C.F.R. § 2.714(a) does not support admission of these late-filed contentions. Given that the Board correctly found that factors two (availability of other means), three (assist in development of record) and five (broaden or delay issues) weighed against admission of the appellant's late-filed contentions, the Staff submits that, while

it may have reached a conclusion different from the Board on certain of the standards, the Board's conclusion in balancing the five factors against admission of the appellant's late-filed contentions did not constitute an abuse of the "broad discretion" conferred by Section 2.714(a).

3. Bases and Specificity

With respect to that area of the Licensing Board's April 12, 1985 decision concerning the specificity of the bases for the Graterford Prisoners' proposed contentions, ^{44/} the appellant raises three issues on appeal. Notice of Appeal at 10-11.

First, the appellant argues that its basis, which states "[t]here is no reasonable assurance that medical services will be provided to individuals contaminated by radiation" citing 10 C.F.R. § 50.47(b)(12), meets the basis and specificity requirements of 10 C.F.R. § 2.714(b). Notice of Appeal at 10-12; Proposed Contentions at 8. Appellant further argues that the Licensing Board improperly reached the merits in deciding on whether to admit its contentions. Id. at 12. Thus it argues its contentions should be admitted. Id.

The Staff submits that the Licensing Board properly disposed of the medical services issue based on the record in this proceeding and that such disposition does not constitute an impermissible consideration of the merits of the proposed contention. The agreements with hospitals provided by the Department of Corrections indicate that the hospitals

^{44/} Memorandum And Order On Graterford Prisoners Proposed Contentions at 13-15.

are accredited by the Joint Committee on Hospital Accreditation (JCHA). ^{45/} During the March 22, 1985 conference, counsel for the Graterford Prisoners narrowed his medical services bases by contending that JCHA accreditation is not satisfactory to achieve the requirements of the emergency planning regulations. Tr. 20,670. Although the Staff took the view below that as narrowed the issue was reasonably specific in accordance with 10 C.F.R. § 2.714(b), the Staff can not conclude that the Board abused its discretion in rejecting this issue. Toward the end of the March 22, 1985 conference, the appellant stated that this concern would be satisfactorily resolved by an affidavit from Dr. Linnemann on the capability of the hospital that routinely provides treatment to handle contaminated injured individuals. Tr. 20,720. As the Licensing Board noted, the Affidavit of Roger E. Linnemann describing his evaluation of the Montgomery County Hospital's plans and preparations for handling radioactive contaminated and injured patients has been provided to the appellant. ^{46/} The Board was clearly entitled to rely on the representations of counsel for the Graterford Prisoners, which are undisputed, as to what was necessary to resolve their issue regarding medical services. Consequently, the Board was correct in rejecting the medical issue as lacking in basis and specificity once the affidavit of Dr. Linnemann had been provided. Furthermore,

^{45/} See, 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, (Exh. F) (March 15, 1985).

^{46/} Memorandum And Order On Graterford Prisoners Proposed Contentions at 15; Applicant's Answer To Proposed Emergency Planning Contentions Of The Graterford Prisoners (Affidavit of Roger E. Linnemann, M.D.)

the Board was correct in noting that much of Mr. Love's concerns had been treated in its Second Partial Initial Decision and finding that its proper rulings on hospital accreditation represents the law of the case. Memorandum And Order On Graterford Prisoners' Proposed Contentions at 15; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 444, 533, 535 (1984). ^{47/}

Second, the appellant contends that civilian bus drivers to be used for implementing the SCIG plan should be afforded the same opportunity for training as civilian bus drivers evacuating school children and other such persons in the EPZ. Notice of Appeal at 10. It argues that this issue meets the specificity and basis requirements and should be admitted. Notice of Appeal at 10-12. The Staff submits that the appellant's arguments are simply without merit. The Graterford Prisoners (Mr. Love) stated below that this concern would be satisfactorily resolved if the Commonwealth of Pennsylvania acting through PEMA sent a letter to the civilian bus companies, which are to be used for an evacuation, that offers the type of training received by bus companies within the EPZ. Tr. 20,690. This is undisputed by the appellant. The Commonwealth agreed to provide such a letter and in fact did do so, as noted by the

^{47/} Given the nature of the medical services concerns raised by the Graterford Prisoners and the Board and parties' resolution of this matter, it was not necessary for the Board below nor for this Board to address the recent Court of Appeals' decision in GUARD v. NRC, 753 f.2d 1144 (D.C. Cir. 1985) and the deficiencies found therein.

Licensing Board in its decision. ^{48/} Again, the Staff submits that the Licensing Board was entirely correct in relying on the representations of counsel as to what was necessary to resolve this issue. Accordingly, the Board was correct in rejecting this issue as lacking in basis and specificity once the letter called for by the appellant had been provided.

Finally, the appellant argues that its bases regarding the general concept of evacuation met the basis and specificity requirements and should have been admitted. Notice of Appeal at 11-12. That basis states:

J. General Concept of Evacuation. There is no reasonable assurance that the general concept of evacuation as outlined in Attachment A page E-1-A-1 [SCIG Plan 1] will provide for the safety and security of inmates and SCIG personnel during said evacuation. Proposed Contentions at 9.

With regard to the issue of "general concept of evacuation," the Graterford Prisoners (Mr. Love) had determined at the March 22, 1985 conference that their concerns had been resolved, except for its additional concerns regarding the estimated time of evacuation, panic and the participation of the guard union. Tr. 20,691. These three additional concerns were all explicitly addressed by the Licensing Board in its April 12, 1985 decision. Memorandum And Order on Graterford Prisoners Proposed Contentions at 13-15. However, the appellant on appeal has not challenged the Licensing Board's disposition of these particular matters. Moreover, the appellant itself concedes that, as pleaded in its February 15, 1985 filing of proposed contentions, the basis "general concept of evacuation" is admittedly broad.

^{48/} Memorandum And Order On Graterford Prisoners Proposed Contentions at 15; Answer Of The Commonwealth Of Pennsylvania To Proposed Contentions Of The Graterford Inmates With Regard To The Evacuation Plan (April 4, 1985)(Exh. B).

Notice of Appeal at 11. Since the Graterford Prisoners had indicated that there concerns had been resolved regarding the general concept of evacuation, the Licensing Board was entirely correct in determining (Memorandum And Order at 13) that it lacked specificity and basis. The Staff submits that this bases is not sufficiently specific to put the parties on notice "so that they will know at least generally that they will have to defend against or oppose." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

4. Conclusion

For the foregoing reasons, the Staff urges the Appeal Board to affirm the Licensing Board's rejection of the Graterford Prisoners' proposed late-filed contentions on the grounds that (1) they failed to satisfy a balancing of the fine lateness factors of 10 C.F.R. § 2.714(a) and (2) they failed to meet the specificity and basis requirement of 10 C.F.R. § 2.714(b).

C. The Licensing Board Properly Rejected The Graterford Prisoners' Request To Refile Their Contentions And Respecify Their Contentions

In its Memorandum And Order of April 12, 1985, the Licensing Board rejected any attempt on the part of the Graterford Prisoners (Mr. Love) to "reserve the right to file additional contentions" provided they were granted access to an unsanitized version of the SCIG plan. Memorandum And Order On Graterford Prisoners Proposed Contentions at 4-5, fn. 4. Moreover, the Licensing Board did not permit the Graterford Prisoners a further opportunity to modify either their contentions or the basis for their contentions. See, Memorandum And Order On Graterford Prisoners

Proposed Contentions. The appellant complains on appeal that it is being held to only its original contentions and thus "additional disclosure and discussion of said issues will not be given consideration by the Licensing Board." Supplemental Petition at 4. Further, the appellant argues that it has been "denied the right to refile their contentions and the right to respecify the basis for its contentions, despite the allowance of further disclosure, i.e., a review of the Plan 2." Supplemental Petition at 5.

The Graterford Prisoners' argument that they were in effect denied the opportunity to update their previously filed contentions based on Plan 1 is without merit. Specifically, in its Memorandum and Order of April 12, 1985, the Licensing Board determined that the late-filed contentions and the new concerns articulated by counsel for the inmates lacked basis and specificity. ^{49/} The Licensing Board, in fact, considered all of the concerns articulated by the Graterford Prisoners in rejecting their contentions and dismissing them as a party. ^{50/} Moreover, the Licensing Board considered new concerns of the inmates (i.e., evacuation time estimate, panic guard union and JCHA accreditation) that had not been set forth in the original filing of February 15, 1985. See Proposed Contentions; Memorandum And Order On Graterford Prisoners Proposed Contentions at 13-15. Thus, the Board had in fact treated the Graterford Prisoners contentions as if they had been amended.

^{49/} Memorandum And Order On Graterford Prisoners Proposed Contentions at 13.

^{50/} Id. at 13-15.

The Graterford Prisoners now cite the Licensing Board's April 12, 1985 support of their argument that they were precluded from having their additional concerns considered by the Licensing Board. Supplemental Petition at 4. However, the very footnote relied upon by the Graterford Prisoners indicates that the Licensing Board believed that it was considering their "additional concerns" and a review of the two transcripts indicates that all of their concerns were addressed by the Board. Memorandum And Order On Graterford Prisoners Proposed Contentions at 4-5, fn. 4. Accordingly, the Staff submits that there was no need for the Licensing Board to allow a further opportunity to either refile contentions or respecify the basis for contentions since the Board permitted the appellant that opportunity during the March 22, 1985 conference.

The Graterford Prisoners do not indicate what matters they believe they were denied an opportunity to present to the Licensing Board after reviewing the SCIG plan (Plan 2). See also, Tr. 20,672. It is true that generally after the completion of discovery a contention may be modified or mooted depending on subsequent events. ^{51/} Similarly, the Commission contemplates that through settlement conferences and discovery, contentions may be eliminated from a proceeding. ^{52/} The Staff submits that the Licensing Board's action in permitting the Graterford Prisoners new concerns to be treated as modifying their original filing and

^{51/} Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

^{52/} Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981).

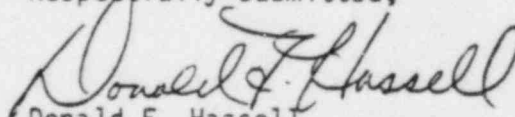
addressing those matters in its decision is consistent with Commission policy on discovery. ^{53/}

Finally, the Staff would note that the appellant has mischaracterized the nature of the Staff's suggestion concerning another filing by the Prisoners, which was for the purpose of focusing matters to assist parties in responding to the contentions as modified. Supplemental Petition at 5; Tr. 20,703-04.

IV. CONCLUSION

Based on the foregoing reasons, the Staff submits that the Licensing Board properly exercised its discretion in (1) denying the Graterford Prisoners' late-filed contentions for failure to satisfy either the lateness factors under 10 C.F.R. § 2.714(a) or the basis and specificity requirements of 10 C.F.R. § 2.714(b) and (2) rejecting the Graterford Prisoners request to refile its contentions and their basis. Accordingly, the Appeal Board should affirm the results reached in the Licensing Board's decision of April 12, 1985.

Respectfully submitted,


Donald F. Hassell
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of April, 1985

^{53/} Also, the Graterford Prisoners withdrew one of their contentions and most of the bases of their contentions since the further disclosure and exchange of information had resolved those concerns. Tr. 20,677-91. This process was also in accord with the Commission policy on discovery.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-352
(Limerick Generating Station*,) 50-353
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO "INTERVENOR GRATERFORD INMATES' SUPPLEMENTAL PETITION FOR REVIEW OF APPEAL BOARD ORDER DISMISSING PETITION FOR DIRECTED CERTIFICATION" AND "NOTICE OF APPEAL FROM THE LICENSING BOARD'S MEMORANDUM" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of April, 1985:

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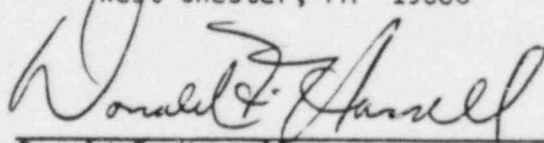
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

May 1, 1985
(ALAB-806)

In the Matter of)

PHILADELPHIA ELECTRIC COMPANY)

(Limerick Generating Station,)
Units 1 and 2))

Docket Nos. 50-352 OL
50-353 OL

Angus R. Love, Norristown, Pennsylvania, for
intervenor, inmates of the State Correctional
Institution at Graterford, Pennsylvania.

Troy B. Conner, Jr., Robert M. Rader, and Nils N.
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Philadelphia Electric Company.

Theodore G. Otto, III, Camp Hill, Pennsylvania, and
Zori G. Ferkin, Harrisburg, Pennsylvania, for
intervenor, the Commonwealth of Pennsylvania.

Donald F. Hassell for the Nuclear Regulatory Commission
staff.

DECISION

This appeal involves the continuing efforts by a group
of inmates at the State Correctional Institution at
Graterford, Pennsylvania, intervenors in this operating
license proceeding, to litigate emergency planning issues of
concern to them. Specifically, we have before us a request
that we set aside Licensing Board rulings (a) dismissing the
inmates as a party to the case because they failed to file
sufficiently specific emergency planning contentions in a

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timely fashion, and (b) declining to permit them to reformulate those contentions to take account of the prison emergency plan recently made available to their counsel by the Commonwealth of Pennsylvania.¹ Applicant Philadelphia Electric Company (PECo), the Commonwealth, and the NRC staff oppose the appeal.

As explained below, we reverse the Licensing Board's rulings, reinstate the inmates as a party, and accord them a brief period of time to refile their contentions with the Board. We also remand this matter to the Licensing Board for further action consistent with this decision.

I.

The initial round of emergency planning contentions was filed by various parties, including the Graterford inmates, in 1981. The inmates' basic claim at that time was that plans to evacuate the prison in the event of a serious accident at the Limerick nuclear facility (located about

¹ See Notice of Appeal From the Licensing Board's Memorandum and Order on Graterford Prisoners' Proposed Contentions (April 18, 1985), and Intervenor Graterford Inmates' Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification (April 16, 1985) (hereafter, Inmates' Supplemental Petition). Counsel for the inmates filed the latter document before the Commission, but the Secretary, pursuant to his authority under 10 C.F.R. § 2.772(h), referred it to us by Order of April 23, 1985. Later that day, we entered an order calling for responsive briefs by April 30 directed to both of the inmates' filings.

eight miles from the prison) are inadequate.² At the applicant's urging, however, the Licensing Board deferred ruling on all the proposed emergency planning contentions because neither PECO's onsite plan nor the offsite plans of the Commonwealth and the local governments had as yet been issued.³ The Board admitted the Graterford inmates' contention conditionally, subject to respecification once the offsite emergency plan for the prison was made available.⁴

The Licensing Board took up offsite emergency planning issues again in 1983 when it appeared that the emergency plans would soon be available. It directed that contentions be submitted 45 days after the draft emergency plans were released.⁵ In due course, it ruled on the admissibility of a large number of offsite emergency planning contentions.⁶ As for the Graterford inmates, however, the Board once again put off consideration of the specifics of their contentions because the inmates had not as yet received a copy of any-

² See LBP-82-43A, 15 NRC 1423, 1446-47, 1520 (1982).

³ Id. at 1519-20.

⁴ Id. at 1520.

⁵ Licensing Board Memorandum and Order of May 16, 1983 (unpublished) at 5.

⁶ LBP-84-18, 19 NRC 1020 (1984).

emergency plan dealing specifically with the prison. The Board was nonetheless concerned that the Commonwealth's failure to develop and to distribute an emergency plan for the prison was already causing delay in the litigation of the case. Thus, it instructed the Commonwealth to make available to the inmates' counsel as promptly as possible a "form of the plan . . . close enough to the final form . . . to give the prisoners adequate grounds for deciding whether to file contentions, and if so, what contentions."⁷ The inmates were given 20 days from the time they received the plan to file their contentions.

The Commonwealth finally released a plan on December 13, 1984. Referred to as Plan 1, it was a highly "sanitized" version of the actual plan and excluded a considerable amount of information that the Commonwealth was reluctant to release for security reasons. The inmates promptly filed a motion with the Licensing Board requesting disclosure of the full plan, under a protective order. They alleged that the abridged version did not provide sufficient information to permit the formulation of adequate contentions. The Board denied the motion in an oral ruling on January 29, 1985.⁸ It confirmed that ruling in a written

⁷ Id. at 1030.

⁸ Tr. 20,479-81.

order issued on February 5 and directed the inmates to file contentions no later than February 18. Following a denial of their request that the Board stay its rulings pending appeal,⁹ the inmates sought our intercession by way of a petition for directed certification. At the same time, however, they proceeded to attempt to formulate litigable contentions.¹⁰

We dismissed the inmates' petition as premature.¹¹ We observed that discovery rulings, being interlocutory, were generally not reviewable until the end of the case. We also noted that, in any event, the inmates had not yet exhausted all their options: they had indicated that they would attempt to comply with the Board's direction to submit revised contentions. We urged the parties to work together to resolve the disclosure issues amicably and pointed out the efficacy of protective orders in handling sensitive, but disclosable, material. Our dismissal of the inmates' petition was expressly without prejudice to a new appeal if

⁹ Tr. 20,481-82.

¹⁰ Tr. 20,482.

¹¹ Appeal Board Memorandum and Order of February 12, 1985 (unpublished).

or when the effort to litigate the adequacy of the plan proved "finally futile."¹²

Efforts to resolve the disclosure problems went forward in tandem with efforts to particularize the inmates' specific substantive concerns in light of the limited information available. The inmates tendered a set of contentions based on Plan 1 on February 15, and the Licensing Board convened a conference of counsel on February 27 at which numerous matters involving the plan were clarified. Finally, on March 18, under a protective order issued by the Licensing Board, the Commonwealth provided counsel for the inmates and their "expert" with a copy of Plan 2 -- a version tantamount to the entire emergency plan.¹³

Four days later, Plan 2 was the topic of a conference of counsel convened by the Licensing Board. During the course of that March 22 conference, both the inmates and the Commonwealth clarified their respective positions on a number of issues. The inmates also indicated their satisfaction with the Commonwealth's substantive resolution of numerous matters and their corresponding willingness to

¹² Id. at 2 (emphasis in original).

¹³ Tr. 20,612-13.

withdraw the formal request for still further disclosure.¹⁴ Throughout the conference, the inmates requested a final opportunity to revise their contentions to take into account Plan 2 and the clarifications that were made at the February 27 and March 22 sessions. The Licensing Board repeatedly denied these requests¹⁵ and, on April 12, issued a decision dismissing the Graterford inmates as a party to the case. The Board determined that the February 15 contentions were insufficiently specific, and that the inmates had also failed to meet the criteria for filing late contentions.¹⁶

The inmates press two basic arguments on appeal. First, they contend that they have a right to refile their contentions and to respecify the bases for them, in light of the recently released Plan 2. Second, they claim that the Licensing Board failed in any event to apply properly the standards for determining the admissibility of their contentions. In this latter connection, they assert that the contentions should not have been dismissed as either late or insufficiently specific.

¹⁴ Tr. 20,613, 20,657. But see Tr. 20,675.

¹⁵ Tr. 20,640, 20,657-61, 20,674-75, 20,691-97, 20,702-06.

¹⁶ Licensing Board Memorandum and Order of April 12, 1985 (unpublished).

II.

A. The Licensing Board's refusal to permit the Graterford inmates to refile their contentions and to respecify the bases for them in light of Plan 2 was arbitrary. As noted earlier, the inmates have been a party to this case from the outset; their standing to intervene is not now at issue. The Licensing Board conditionally accepted their original contention for litigation in 1982, properly recognizing that a contention could not specifically challenge a plan not yet in existence.¹⁷ The Board explicitly recognized on at least one other occasion that particularization of contentions dealing with protection of the prison population must await the availability of "some adequate form" of the emergency

¹⁷ LBP-82-43A, *supra*, 15 NRC at 1520. We subsequently held that licensing boards are not empowered to accept contentions on a conditional basis. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 466 (1982). On review of that decision, the Commission held further that contentions based on materials not available until a later point in the proceeding should be adjudged by balancing all five factors governing late-filed contentions, found at 10 C.F.R. § 2.714(a)(1). CLI-83-19, 17 NRC 1041, 1045-47 (1983). The Licensing Board here, however, did consider the inmates' contentions in light of the five late-contention factors. See LBP-84-18, *supra*, 19 NRC at 1026-27; Licensing Board Memorandum and Order of April 12, *supra*, at 9-13. Thus, any error in the Board's initial conditional acceptance of the inmates' emergency planning contention is academic. But see pp. 11-18, *infra*.

plan.¹⁸ Our February 12 order likewise assumed that, following resolution of the disclosure issues and eventual release of a usable emergency plan, the Graterford inmates would be given a chance to reformulate their contentions. Indeed, there would have been no purpose in our encouraging efforts to resolve the disclosure issues by consent of the parties, and setting out the principles the Licensing Board was to apply in the event the issues could not be resolved by mutual agreement, if the Board was not going to accord the inmates an opportunity to hone their contentions and to respecify their bases in light of the information ultimately revealed.

The Licensing Board has apparently confused a party's request for discovery following admission of a contention with the inmates' legitimate request here for disclosure of the plan "close enough to the final form . . . to give [them] adequate grounds for deciding whether to file contentions, and if so, what contentions."¹⁹ Until an emergency plan complying with that requirement, i.e., Plan 2, was made available to the inmates (on March 18), their obligation to file contentions within 20 days was not

¹⁸ LBP-84-18, supra, 19 NRC at 1030.

¹⁹ Ibid.

triggered.²⁰ That being so, the Board's unexplained reversal of its previously consistent view -- that the Graterford inmates must be accorded a reasonable opportunity to reshape their contentions once an adequate form of the prison emergency plan was released -- is plainly arbitrary.²¹ The inmates are therefore entitled to refile contentions based on Plan 2.

²⁰ Contrary to the Commonwealth's suggestion, by no stretch of the imagination can Plan 1 be deemed sufficient to meet the Licensing Board's original requirement. See Response of the Commonwealth (April 29, 1985) at 1-2. Plan 2 is over 80 pages. Plan 1, only 27 pages in length, was so heavily censored as to be unusable. The Licensing Board, applicant, and the staff all acknowledged as much. See Tr. 20,432, 20,468, 20,474. Compare Tr. 20,640.

The fact that the inmates filed contentions on February 15 based on Plan 1 cannot reasonably be construed as a waiver of any future right to refile more specific contentions in the event of the disclosure of a more complete plan. The inmates sought a stay of their obligation to file by February 18 and that request was denied. As they saw it, they had no real option but to file then. See Tr. 20,697, 20,706. We find that to be eminently reasonable action, given that (i) the inmates had no particular expectation at that time that the Commonwealth would ever release more of the plan, and (ii) we encouraged them in our February 12 order to proceed with the filing.

²¹ The staff, which did not object below to the admission of some of the inmates' contentions, argues that the Licensing Board did effectively permit the inmates to revise their contentions during the March 22 conference. NRC Staff Brief (April 30, 1985) at 7-8, 28-29. To be sure, the inmates withdrew parts of their February 15 contentions (see note 37, *infra*), and some portions of the hearing transcript and Board memorandum and order suggest an attempt to make other parts of the contentions more specific in response to Board questioning. But at many more points,

(Footnote Continued)

B. Our decision that the inmates may reformulate their emergency planning contentions makes it unnecessary for us to decide if the Licensing Board erred in finding that the February 15 contentions lacked adequate bases and specificity.²² Whether any such contentions may properly be considered at this time under the late-filed contention criteria, however, must be determined. We therefore turn to the Board's decision that a balance of these factors favors denial of admission of the inmates' contentions.

As required by Commission precedent, the Licensing Board considered the following five factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.

(Footnote Continued)
 the Licensing Board was unambiguous in its denial of permission to the inmates to revise their contentions. See note 15, *supra*; Licensing Board Memorandum and Order of April 12, *supra*, at 4 n.4.

²² We also do not address the inmates' not fully articulated request for even more disclosure of the Graterford emergency plan. See Inmates' Supplemental Petition, *supra*, at 4-5. As we understand their point on this score, they are interested in fuller disclosure only as a consequence of the denial of the opportunity to submit revised contentions based on Plan 2. See, e.g., Tr. 20,657, 20,674-75. In view of our reversal of the Licensing Board's ruling, we assume that the inmates no longer seek complete disclosure.

- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.²³

We accord licensing boards wide latitude when they balance these factors.²⁴ In the instant case, however, we can find no justification for the balance struck, and thus the Board has abused its discretion.

To begin with, the Board found, and we agree, that the "good cause" factor weighs in favor of the inmates because no adequately based contention could have been proffered earlier.²⁵ The Board also recognized, with regard to factor two, that there is no other means by which the inmates could "formally litigate" their concerns about the prison emergency evacuation plan without the admission of their contentions. Nonetheless, it found against the inmates on this factor. In the Board's view, the discussions that had taken place during the course of the two Board-sponsored conferences "constituted an informal litigation" of the inmates' concerns -- i.e., another means by which their interest could be protected.²⁶ We find no rationale for the

²³ 10 C.F.R. § 2.714(a)(1), (b). See note 17, supra.

²⁴ Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

²⁵ Licensing Board Memorandum and Order of April 12, supra, at 10.

²⁶ Id. at 11.

Licensing Board's conclusion that informal negotiation among the parties (even under a board's aegis) is an adequate substitute for a party's right to pursue its legitimate interest in issues on which informal negotiation is unsuccessful. Moreover, we find no precedent -- and the Board cites none -- for its conclusion.²⁷ We therefore decide that the inmates have prevailed on factor two.²⁸

The Board unequivocally found against the inmates with respect to factor three -- the extent to which a petitioner may be expected to assist in the development of the record. Relying in part on our Grand Gulf decision,²⁹ the Board determined that the inmates had not sufficiently demonstrated that they possess either the expertise or the

²⁷ Cf. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985) (neither the formal participation by the NRC staff in a licensing proceeding nor the availability of staff review outside the hearing process constitutes an adequate protection of a private party's rights when considering factor two).

²⁸ PECO argues on appeal that the inmates, through their counsel, will have a chance to comment on the Graterford emergency plan at a public hearing held under the auspices of the Federal Emergency Management Agency (FEMA), as required by 44 C.F.R. § 350.10. Applicant's Brief (April 30, 1985) at 26-27. But this type of "town meeting" contemplated by the FEMA regulation in question is no more a means to "protect" the inmates' legitimate interest under section 189a of the Atomic Energy Act, 42 U.S.C. § 2239a, than either informal negotiation or NRC staff review.

²⁹ Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

desire to assist in developing the record. The Board was influenced in part by the inmates' asserted failure to date to come forward and to specify what the character of their testimony might be.³⁰ But we believe the Board took an unduly broad view of the inmates' responsibility at this stage of the case. Soon after Plan 1 was produced, the inmates engaged an individual to review the plan,³¹ tried to make reasonably clear (given the limited amount of information conveyed in Plan 1) the general issues with which they are concerned, and participated actively in those proceedings directly related to their interests.³² In the

³⁰ Licensing Board Memorandum and Order of April 12, supra, at 11-12.

³¹ We need not decide whether the inmates' "expert", Major John Case, would in fact qualify as an expert witness if he sought to testify. We do note, however, that Major Case was for 15 years the warden of the Bucks County Prison and for eight years Director of the Bucks County Department of Corrections. He is currently field director for the Pennsylvania Prison Society and has appeared as a witness in numerous state and federal court proceedings. See Vita of John D. Case, attached to Supplemental Motion of the Inmates at SCIG Regarding Full Disclosure of the Evacuation Plan for SCIG (January 28, 1985). We believe that the engagement of Major Case manifests both a willingness and ability to obtain the requisite expertise to participate effectively, in at least some areas of contention.

³² The Licensing Board is unduly critical of the inmates' failure to attend all of the hearings on offsite emergency planning issues. Licensing Board Memorandum and Order of April 12, supra, at 2 n.1. The Board recognized early on that the inmates had "a separable special interest" in this case not embraced within the more general emergency

(Footnote Continued)

circumstances, nothing more was required of them at this stage, and we can find no support for the Board's prediction that the inmates will be unwilling or unable in due course to assist in developing the record. The inmates therefore prevail on the third factor.

As for the fourth factor, the Board acknowledged that no other party to the proceeding directly represents the inmates' interest. The Board observed, however, that two Commonwealth agencies, the Pennsylvania Emergency Management Agency (PEMA) and the Department of Corrections, have emergency responsibilities to the inmates as well as the general public. The Board thus intimated that the participation of these agencies in this proceeding provides some indirect representation of the inmates' interest.³³

The Licensing Board's view, however, is at odds with the facts in this case. Both PEMA and the Department of Corrections have interests and responsibilities that transcend, and at times conflict with, those of the inmates

(note Continued)
 ning issues. See LBP-82-43A, *supra*, 15 NRC at 1520. It is thus unreasonable to expect their counsel to have provided hearing sessions not related to the inmates' interest. But once the prison issues surfaced, the inmates have actively participated. Moreover, the Licensing Board at one point acknowledged the spirit of cooperation of inmates' counsel. See Tr. 20,585.

alone. It is not surprising, therefore, that the inmates were separately admitted to this proceeding because of their "special" interest.³⁴ Indeed, as the recent dispute over the disclosure of the emergency plan makes plain, the relationship of the inmates to PEMA and the Department of Corrections is essentially an adversarial one. Thus, neither PEMA nor the Department of Corrections can be reasonably expected to represent all of the inmates' interests and, as a result, the inmates prevail as well on factor four.

Finally, the Board found that the admission of the inmates' emergency plan contentions would delay the case and broaden the issues because hearings on all previously admitted contentions have now been completed and the Board is in the process of drafting its decision.³⁵ Plainly, the admission of any contentions at this stage poses the potential for some delay. However, this factor cannot be controlling in the special circumstances of the case.

First of all, any delay likely to result at this stage cannot be laid at the feet of the Graterford inmates. They entered this case in 1981 and, as far as we can tell, were prepared to go to hearing at that time. The inmates'

³⁴ LBP-82-43A, supra, 15 NRC at 1520.

³⁵ Licensing Board Memorandum and Order of April 12, supra, at 13.

efforts to litigate their concerns in a timely fashion were thwarted because the Commonwealth was unable to complete preparation of its prison evacuation plan until late last year. It would be the ultimate "Catch 22" to weigh the delay factor heavily against the inmates in this circumstance.

Moreover, it is far from certain that any additional delay occasioned by consideration of the inmates' concerns would be substantial. Consensual resolution of some or all of the inmates' remaining concerns may still be possible.³⁶ If not, the record suggests that the Board could hold a hearing on any contentions promptly and over a relatively short period.³⁷ Summary disposition may also be appropriate.³⁸

³⁶ Over the past two months, the Commonwealth and the inmates have cooperated in a largely successful effort to resolve or to narrow their substantive differences. It appears to us that some additional effort by the parties, undertaken in this same spirit, may well resolve some, if not all, of the few remaining areas of conflict without the need for litigation. Commission policy favors such legitimate efforts to reach a good faith, mutually satisfactory resolution of issues. See 10 C.F.R. § 2.759. See also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

³⁷ Tr. 20,698-02. We note in this regard that the inmates have already stated that the plan is satisfactory in a number of respects. See, e.g., Tr. 20,681-83.

³⁸ See 10 C.F.R. § 2.749.

In sum, we hold that the balance of the five factors weighs overwhelmingly in the inmates' favor. Thus, when the inmates refile their contentions, the Licensing Board is to determine only whether they have adequate bases and specificity.³⁹

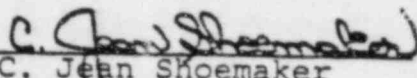
The Licensing Board's March 22 oral ruling denying the request of the Graterford inmates to submit revised contentions, and its Memorandum and Order of April 12 dismissing the Graterford inmates' contentions, are reversed. The inmates are reinstated as a party to this proceeding. They may file revised emergency planning contentions (with specific bases) by no later than May 15, 1985. This matter is remanded to the Licensing Board for further action consistent with this opinion.⁴⁰

³⁹ See 10 C.F.R. § 2.714(b). In this connection, we note that consideration of the substantive merits of any contention is not appropriate. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980); Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 216-17 (1974).

⁴⁰ The Board now has before it applicant's February 7, 1985, request for an exemption from certain of the requirements of 10 C.F.R. § 50.47, in order to permit full power operation during the pendency of any litigation concerning the Graterford inmates' contentions. We offer no views on the propriety of such exemption. We note only that the Licensing Board will obviously need to take this decision into account when ruling on applicant's request.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 6, 1985

Helen F. Hoyt, Chairperson
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry Harbour
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
PHILADELPHIA ELECTRIC COMPANY
(Limerick Generating Station, Units 1 and 2)
Docket Nos. 50-352 and 50-353

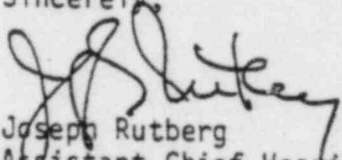
Re: Draft Protective Order and Affidavit of Non-Disclosure

Dear Administrative Judges:

I am enclosing with this letter a redraft of the documents provided to the parties who attended the prehearing conference in Harrisburg, Pa. The changes reflect comments received from Robert Rader, counsel to Philadelphia Electric Company and changes made by the Staff.

In the event that it is determined that a protective order and non-disclosure affidavit are required it will be necessary to fill in the blank spaces that now exist in the attached drafts. This can be accomplished through the cooperation of the parties.

Sincerely,


Joseph Rutberg
Assistant Chief Hearing Counsel

Attachments: As stated

cc: See page 2

~~8503110409 (2pp)~~

FDIA-85-304

A-17

cc: with attachments
Robert Rader
Zori G. Ferkin
Angus Love, Esq.
Theodore G. Otto, III

cc: without attachments
David Wersan
James Wiggins
Kathryn S. Lewis
Frank R. Romano
Ms. Phyllis Zitzer
Ms. Maureen Mulligan
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Docketing and Service Section
Atomic Safety and Licensing Board
Atomic Safety and Licensing
Appeal Board Panel

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-352
(Limerick Generating Station,) 50-353
Units 1 and 2))

PROTECTIVE ORDER

Counsel and representatives of the parties ^{1/} to this proceeding who have executed an Affidavit of Non-Disclosure in the form attached or are members of the NRC staff and subject to internal requirements concerning the treatment of "protected information" ^{2/} shall be permitted access to "protected information" upon the following conditions:

1. Only counsel and representatives of the parties who have executed an Affidavit of Non-Disclosure may have access to protected information. All executed Affidavits of Non-Disclosure or copies shall be provided to the Licensing Board and the parties.

2. Counsel and representatives who receive any protected information (including transcripts of in camera hearings, filed testimony or other documents that reveal protected information) shall maintain its confi-

^{1/} For the purpose of this Protective Order reference to parties is limited to the Graterford Inmates, Commonwealth of Pennsylvania, Philadelphia Electric Company, and the NRC staff.

^{2/} As used in this order, "protected information" has the same meaning as used in the Affidavit of Non-Disclosure, attached hereto.

6. There shall be a limit of two transcripts per party for any proceeding conducted on the record in which protected information is disclosed or discussed. Parties shall not photocopy these transcripts without the express prior approval of the Board.

7. Authorized persons may review at a designated facility the RERP as modified by Order of this Licensing Board. In addition, (a) any notes which authorized persons have made from their review of the RERP and (b) copies of pleadings and testimony containing protected information may be maintained by authorized persons at the following designated offices:

Staff:

At National Bank Bldg. Bethesda Md. 20854

Commonwealth of
Pennsylvania:

Counsel for Inmates:

Philadelphia Electric: Troy B. Conner, Jr., Esq.
Mark J. Wetterhahn, Esq.
Conner and Wetterhahn, P.C.
Suite 1050
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

8. Counsel for Inmates, in keeping protected information at the above-designated office, shall take such protective measures and procedures as follows:

(a) The building in which the protected information (i.e., notes and pleadings) will be maintained will qualify as a controlled access building in that it is either attended around the clock or locked at night;

(b) The protected information, when unattended, will be stored in a locked security storage container. ^{3/} Access to the security storage container will be positively controlled by use of keys or other comparable means; and

(c) While in use, the protected information will be under the sole control of an authorized person.

9. With respect to transportation of the protected information in question, procedures will be utilized which ensure compliance with this order. Specifically, documents containing protected information, when transmitted outside an authorized place of use or storage, will be enclosed in two sealed envelopes or wrappers, with the inner envelope or wrapper containing the name and address of the intended recipient and marked on both sides, top and bottom, with the words "PROTECTED INFORMATION." The outer envelope or wrapper will contain the intended recipient's name and address, with no indication that the document inside contains protected information. Protected information will be transported by registered or certified mail or by other courier methods or hand delivery which ensure that a receipt is obtained to verify delivery or by an individual authorized access pursuant to this order. Any authorized individual transporting the protected information in question will be instructed to retain the documents in his personal possession at all times.

^{3/} As used in Protective Order, a locked security storage container is as defined in 10 C.F.R. § 73.2(m).

11. Counsel, representatives, or any other individuals who have reason to suspect that documents containing protected information may have been lost or misplaced (for example, because an expected paper has not been received), or that protected information has otherwise become available to unauthorized persons, shall notify this Board promptly of those suspicions and the reasons for them.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Administrative Judge

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
PHILADELPHIA ELECTRIC COMPANY)	Docket Nos. 50-352
(Limerick Generating Station,)	50-353
Units 1 and 2))	

AFFIDAVIT OF NONDISCLOSURE

I. I, being duly sworn state:

1. As used in this Protective Order:

(a) "Protected information" is (1) any form of the Pennsylvania Bureau of Correction Radiological Emergency Response Plan (Appendix E-Annex 1) (RERP); and (2) any information obtained by virtue of this proceeding which is not otherwise a matter of public record and which deals with or describes features of the RERP.

(b) "Authorized person" is (a) a person designated by this Board from lists furnished by the parties who has executed an Affidavit of Non-Disclosure and filed it with the Board, including counsel for the inmates of the State Correctional Institute at Graterford (Counsel for Inmates) and any expert who has been determined to be qualified by the Licensing Board, (b) an employee of the Nuclear Regulatory Commission entitled to access to protected information, (c) any other person so designated by the Licensing Board as having a need to review the protected information. Nothing in this definition shall be deemed to deny or affect access by an officer, employee, or contractor of a party to information maintained in the normal course of business by that party.

or to deny or affect access to protected information by members of this Board, the cognizable Atomic Safety and Licensing Appeal Board, the Commission, their respective staffs, and appropriate law enforcement agencies.

(c) A "lead attorney or representative" is an individual designated by a party and approved by this Board to accept service of protected information, insure that it is distributed only to those persons authorized to receive it on behalf of that party, and to assume overall responsibility for the control and protection of sensitive information in the hands of that party.

(d) A "designated facility" [indicate secure locations]

(e) A "designated office" is one office approved by each party for the preparation of written pleadings and testimony containing protected information and for the storage of protected information in the hands of that party.

2. I shall not disclose protected information to anyone except another authorized person, unless that information has previously been disclosed in the public record. I shall safeguard protected information (including any portions of transcripts of in camera hearings, filed testimony or any other documents that contain such information) so that it remains at all times under the control of an authorized person and is not disclosed to anyone else.

3. I shall not photocopy any protected information by any means without the Board's express approval or direction except to the extent necessary to make required service on another party. So long as I

possess protected information, I shall continue to take these precautions until further order of the Board.

4. I shall similarly safeguard and hold in confidence any data, notes, or copies of protected information and all other papers which contain any protected information by means of the following:

(a) reviewing and using the document constituting the RERP (which shall not be photocopied or otherwise reproduced) only at a designated facility, and keeping any notes with respect to the document only at a designated office;

(b) preparing written pleadings and testimony containing protected information only at a designated facility or a designated office;

(c) keeping and safeguarding all such materials in a safe or locked filing cabinet to be located at all times in a designated facility or a designated office; and

(d) performing necessary typing or reproduction services or other secretarial work connected with the preparation of papers containing protected information at a designated facility or a designated office.

5. I shall use protected information only for the purpose of preparation for this proceeding or any further proceedings in this case dealing with emergency planning for the State Correctional Institute at Graterford, and for no other purpose.

6. [If affidavit is by lead attorney] I shall keep a record of all protected information in my possession and in the possession of any authorized person acting on behalf of the party I represent, including

any copies of that information made by or for them. At the conclusion of this proceeding, I shall account to the Board or to a Commission employee designated by the Board for all the papers or other materials containing protected information in my possession or the possession of any authorized person acting on behalf of the party I represent. When authorized persons have finished using the protected information, but in no event later than the conclusion of this proceeding, I shall deliver those papers and materials to the Board (or to Counsel of the Pennsylvania Department of Correction), together with all notes and data which contain protected information.

7. I shall not corroborate to any unauthorized person the accuracy or inaccuracy of information obtained outside this proceeding by using protected information gained through the hearing process.

[title]

II.

10

3/8/85

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)	
Philadelphia Electric Company)	Docket Nos. 50-352
(Limerick Generating Station,)	50-353
Units 1 and 2))	

APPLICANT'S ANSWER TO GRATERFORD
PRISONERS' PETITION FOR REVIEW

Seventeen identified prisoners have been admitted as a consolidated party to the captioned proceeding under the collective group designated as the Graterford Prisoners.^{1/} The Graterford Prisoners seek review of a Memorandum and Order entered by the Atomic Safety and Licensing Appeal Board ("Appeal Board") on February 12, 1985. That order dismissed without prejudice a petition filed by the Graterford Prisoners that sought directed certification of a Memorandum and Order entered by the Atomic Safety and Licensing Board ("Licensing Board") on February 5, 1985.^{2/}

The Licensing Board had ruled that the Graterford Prisoners were not entitled to full disclosure of the plan

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447 (1982).

^{2/} Limerick, supra, "Memorandum and Order Regarding Graterford Prison" (February 5, 1985).

8503120352 (OPP)

FOIA-85-304

for evacuating the Graterford Prison and for taking other protective action in the event of a radiological emergency at the Limerick Generating Station ("Limerick"), which had previously been released in a sanitized form. The Board ruled that, despite repeated directives to specify information allegedly needed by the Graterford Prisoners to formulate and litigate their contentions, beyond that which was disclosed in the sanitized version of the plan, they had not done so. The Board further ruled that security concerns outweighed the interest of the Graterford Prisoners in obtaining further disclosure of the plan.

The Appeal Board denied certification of that discovery order, holding that the Licensing Board's order did not meet the standard for obtaining interlocutory review and that the intervenor had not yet exhausted its remedies before the Licensing Board.^{3/} Nonetheless, the Board encouraged the parties, with the assistance of the Licensing Board, to attempt to find some middle ground that would accommodate the competing interests at stake. It noted that a protective order could be drafted to limit time and place of access to sensitive information.^{4/} The Graterford Prisoners then filed the instant petition for review.

^{3/} Limerick, supra, "Memorandum and Order" (February 12, 1985) (slip op. at 2).

^{4/} Id. at 3.

The petition should be dismissed for three reasons. First, the Commission's rules expressly exclude Commission review of "a decision or action on a referral or certification under §§2.718(i) or 2.730(f)."^{5/} Accordingly, no Commission review may be obtained on this matter until the Appeal Board is vested with jurisdiction over a final, appealable order issued by the Licensing Board with respect to the Graterford plan.

Second, the Licensing Board's discovery order which precipitated the appeal is now moot. On February 27, 1985, the Licensing Board convened a conference attended by counsel for the Graterford Prisoners, the Commonwealth of Pennsylvania, the Pennsylvania Department of Corrections (including Acting Commissioner Glen R. Jeffes), the NRC and Applicant to discuss fuller disclosure of the Graterford plan under a protective order. Significant progress was made, including a commitment by the Department of Corrections to release certain portions of the plan under protective order identified by counsel for the Graterford Prisoners as critical to their contentions.^{6/} Another

^{5/} 10 C.F.R. §2.786(b)(1).

^{6/} A more complete description of the precise undertakings cannot be made in the public record because the transcript has been placed under seal. See Limerick, supra, "Memorandum and Order (Conference on Full Disclosure of Evacuation Plan for the Graterford Maximum Security Facility)" (February 19, 1985) (slip (Footnote Continued)

conference has been scheduled for March 22, 1985, following review of the newly disclosed portions of the plan by counsel and appropriate representatives of the parties.^{7/}

Third, even assuming the Commission were to review the Licensing Board's discovery order which prompted this appeal, there has been no showing that the Board abused its discretion. The only issue at this point is whether publicly available documents exist which reasonably enable the Graterford Prisoners to formulate proposed contentions. Cf. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983). Clearly, they have received sufficient information from the previously released, sanitized plan to do so, because the Prisoners have proposed several contentions relating to transportation

(Footnote Continued)

op. at 2). Counsel for Applicant has read the contents of this pleading describing the conference to counsel for the Department of Corrections, who stated that he has no objection to the public disclosure of this information.

^{7/} At the time of the conference, the NRC staff offered a proposed form of protective order and affidavit of nondisclosure for consideration by the Board and parties. Objections to the form of those documents were due March 4, 1985. Applicant suggested minor changes. On March 6, 1984, Staff counsel submitted a redraft of the proposed form of protective order and affidavit which reflects the Staff's and Applicant's changes. No objections from other parties has been reported to or received by Applicant's counsel.

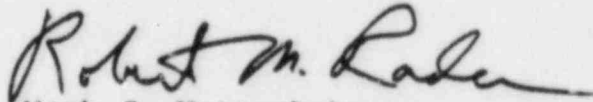
for an evacuation, sheltering, communications, radiological monitoring and supplies, and other matters.^{8/}

The Licensing Board has not yet determined, however, that the Graterford Prisoners have filed at least one admissible contention. It is therefore premature to decide what further disclosures, if any, to which the Graterford Prisoners would be entitled in order to litigate any admitted contention(s).

For the reasons discussed above, the petition for review should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Mark J. Wetterhahn
Robert M. Rader

Counsel for the Applicant

March 8, 1985

^{8/} See Proposed Contentions of the Graterford Inmates with Regard to the Evacuation Plan (February 15, 1985).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Graterford Prisoners' Petition for Review," dated March 8,, 1985 in the captioned matter have been served upon the following by deposit in the United States mail this 8th day of March, 1985:

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
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Ann P. Hodgdon, Esq.
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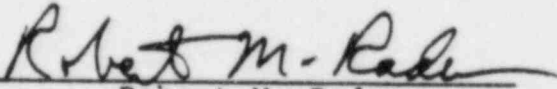
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Robert M. Rader

10 II
MONTGOMERY COUNTY LEGAL AID SERVICE

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POTTSTOWN, PENNSYLVANIA 19464
(215) 328-8280

PLEASE REPLY TO: Norristown

February 25, 1985

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

RE: In the Matter of Philadelphia Electric Company
(Limerick Generating Station, Units 1 and 2)
Docket Nos. 50-352, 50-353 and Graterford Inmates
Evacuation Plan

Dear Sir:

I am writing once again in reference to the Board's Order issued on February 8, 1985, entitled Order Setting Reply Date to Applicant's Motion for Exemption from the Requirements of 10 C.F.R. 50.47(a) and (b) as They Relate to the Necessity of Atomic Safety and Licensing Board Consideration of Evacuation Procedure Provisions of the Emergency Plan for the State Correctional Institute at Graterford. I at this time would like to withdraw my letter dated February 15, 1985, at which time I asked for an extension in which to answer the applicant's request for such an exemption. I mistakenly interpreted the Board's prior Order of February 8, 1985 and was unaware that a date has already been set upon which to file responses to the applicant's motion. I now am aware that March 18, 1985 is the date in which all motions will be due. I will comply with the Board's Order as written and respectfully request that the February 15th letter be disregarded and I apologize for this error.

Sincerely,

Angus R. Love, Esquire

ARL/mf

cc: Service List

850304-489
(12)

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