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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Appeal Board ⁸⁵ APR 30 11:57

Administrative Judges

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

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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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, 1st 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 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 cp. 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) (Exh. 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 1167, 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,

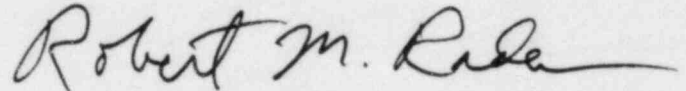
^{60/} See note 52, supra.

^{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.
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April 30, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Appeal Board

'85 APR 30 A11:58

In the Matter of

Philadelphia Electric Company

(Limerick Generating Station,
Units 1 and 2)

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Docket Nos. 50-352
50-353
OFFICE OF SECRETARY
DOCKETING & SERVICE
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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:

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