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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

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NRC STAFF BRIEF IN RESPONSE TO APPEALS
OF THE LICENSING BOARD'S MAY 24, 1985 ORDER

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June 14, 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,
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Docket Nos. 50-352
50-353

NRC STAFF BRIEF IN RESPONSE TO APPEALS
OF THE LICENSING BOARD'S MAY 24, 1985 ORDER

I. STATEMENT OF THE CASE

A. Introduction

On May 24, 1985, the Atomic Safety and Licensing Board issued an order implementing its grant of Applicant's motion for an exemption from the requirements of 10 C.F.R. § 50.47(a) and (b), and authorizing the Director of Nuclear Reactor Regulation (NRR) to issue a full power license for the Limerick Generating Station, Units 1 and 2. ^{1/} On May 30, 1985, the Graterford Prisoners filed a notice of appeal and request for a stay of the Licensing Board's May 24, 1985 Order. ^{2/} On the same day, Mr. Romano, the representative for the Air and Water Pollution Patrol Board (AWPP),

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) Board's Order Implementing Its Grant Of Applicant's Motion For Exemption From Requirement Of 10 C.F.R. § 50.47(a) and (b) For A Period Of Time Contentions Of Graterford Inmates Are Considered By The Board -- Authorization For Director Of Nuclear Reactor Regulation To Issue Full Power License (unpublished) slip op. 5-6, (May 24, 1985) ("Order Authorizing License").

^{2/} Notice of Appeal (May 30, 1985).

filed an appeal of that order. ^{3/} On June 2, 1985, Mr. Robert Anthony, representative of Friends of the Earth (FOE), also filed an appeal and request for a stay of the Licensing Board's May 24, 1985 Order. ^{4/} On June 3, 1985, the Atomic Safety and Licensing Appeal Board issued an order that (1) shortened the briefing period, (2) established June 12, 1985 as the date for filing briefs in support of the appeals, and (3) established June 21, 1985 as the date for filing briefs in opposition to the appeals. ^{5/} On June 5, 1985, the Appeal Board issued an order that acknowledged the filing of FOE's appeal and confirmed the abbreviated briefing schedule established in the Appeal Board's order of June 3, 1985. ^{6/} On June 7, 1985, FOE (Anthony) filed a brief in support of its appeal of the Licensing Board's May 24, 1985 Order. ^{7/} On June 12, 1985, the Appeal Board issued

^{3/} "Air and Water Pollution Patrol/Romano appeals the Board's Order Implementing Its Grant Of Applicant's Motion For Exemption From Requirement Of 10 C.F.R. § 50.47(a) And (b) For A Period Of Time Contentions Of Graterford Inmates Are Considered By The Board -- Authorization For Director Of Nuclear Reactor Regulation To Issue Full Power License" (May 30, 1985) ("AWPP's Appeal"). Although this filing is undated, the postmark on the envelope indicates a filing date of May 30, 1985.

^{4/} "Appeal By R. L. Anthony/FOE From ASLB's Order, 5/24/85, Implementing Its Grant Of Exemption To PECO Re: 10 C.F.R. § 50.47(a) and (b) For Graterford Prisoners' Contentions And Authorizing The Issuance Of A Full Power License; And Petition For Stay" (June 2, 1985) (FOE's Appeal").

^{5/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished), slip op. (June 3, 1985).

^{6/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished), slip op. (June 5, 1985).

^{7/} "Anthony/FOE Brief In Support Of An Appeal Of 6/2/85 From LB's Order Implementing Its Grant Of Exemption From 10 C.F.R. § 50.47(a) and (b) And Authorizing License" (June 7, 1985).

an order providing an additional abbreviation of the briefing schedule established in its July 3, 1985 Order. ^{8/} The Appeal Board reiterated that appellants briefs are to be filed on June 12, 1985 and establishing June 14, 1985 as the date for filing briefs in opposition to the appeals and stay requests. ^{9/} In accordance with the Appeal Board's orders of June 3 and 12, 1985, the NRC staff hereby files its brief in response to the appeals and requests for a stay of the Licensing Board's May 24, 1985 Order.

B. Background and Reference to Rulings

On February 7, 1985, the Philadelphia Electric Company (Applicant), pursuant to 10 C.F.R. § 50.12, filed a motion before the Licensing Board seeking an exemption from the requirements of 10 C.F.R. § 50.47(a) and (b) as they relate to the necessity of the Board to consider evacuation provisions of the emergency plan for the State Correctional Institution at Graterford (SCIG) ("Applicant's Motion"). ^{10/} On March 13, 1985, the Graterford Prisoners (Mr. Love) filed its answer opposing the Applicant's motion. ^{11/}

^{8/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished), slip op. (June 12, 1985).

^{9/} Id. at 2.

^{10/} 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 Plans For The State Correctional Institution Of Graterford (February 7, 1985) ("Applicant's Motion For Exemption").

^{11/} Graterford Inmates' Motion In Opposition 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 Provisions Of The Emergency Plans For The State Correctional Institution Of Graterford (March 13, 1985).

On March 15, 1985, answers opposing the Applicant's motion were filed by AWPP (Mr. Romano) and FOE (Mr. Anthony). ^{12/} On March 18, 1985, the NRC staff filed its answer, indicating that it was premature to consider granting the exemption at that time. ^{13/} Also, on March 18, 1985, the Commonwealth of Pennsylvania filed its answer indicating that it did not support the Applicant's motion. ^{14/}

During the March 22, 1985 conference on the Graterford matter, the Licensing Board provided the parties an opportunity to take additional positions or update their prior responses on Applicant's motion for an exemption. Tr. 20,672-74. The Board established a filing date of April 1, 1985. Tr. 20,673. On March 26, 1985, the Graterford Prisoners (Mr. Love) filed a supplemental motion in opposition to the Applicant's request for an exemption. ^{15/} On March 27, 1985, FOE (Mr. Anthony) filed an additional

^{12/} Letter from Mr. Romano, Chairman, Air & Water Pollution Patrol to the Licensing Board, dated March 15, 1985; Anthony/FOE Motion In Opposition To PECO's Motion For Exemption From 10 C.F.R. § 50.47 Provisions For Emergency and Evacuation Planning For Graterford Prisoners And Staff (March 15, 1985).

^{13/} NRC Staff Response To Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) and (b) (March 18, 1985).

^{14/} Commonwealth Of Pennsylvania Response 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 Provisions Of The Emergency Plans For The State Correctional Institution Of Graterford (March 18, 1985).

^{15/} Supplemental Motion Of The Graterford Inmates In Opposition To The Applicant's Request For An Exemption Under 10 C.F.R. § 50.12(a) and (b) (March 26, 1985).

statement in opposition to Applicant's request for an exemption. ^{16/} On April 1, 1985, the Applicant filed a reply ^{17/} in support of its request for exemption and the NRC staff filed additional views on Applicant's request for exemption. ^{18/}

On May 9, 1985, the Licensing Board issued an Order granting the Applicant's motion for exemption from the requirements of 10 C.F.R. § 50.47(a) and (b) for a period of time for the Board to consider any potential contentions ^{19/} of the Graterford Prisoners. ^{20/} The Board granted parties opposing the issuance of that Order an opportunity to submit comments within 10 days from the date of the Order. ^{21/} On May 14, 1985, the Staff was informed by the Board Chairman that comments from parties

^{16/} Additional Statement In Opposition To PECO's Motion To Exempt Graterford Prison From Requirements Of 10 C.F.R. § 50.47 on Emergency Planning, By R. L. Anthony/FOE (March 27, 1985).

^{17/} Applicant's Reply In Support Of Its Request For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) and (b) Relating To The Graterford Emergency Plan (April 1, 1985).

^{18/} NRC Staff Additional Views On Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) and (b) (April 1, 1985).

^{19/} On May 13, 1985, the Graterford Prisoners filed proposed revised contentions. See, Proposed Revised Contentions Of The Graterford Inmates With Regard To The Radiological Emergency Response Plan (May 13, 1985).

^{20/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order Granting Applicant's Motion For Exemption from Requirement of 10 C.F.R. § 50.47(a) and (b) for a Period of Time Any Potential Contentions of Remaining Party Are Considered by the Board (unpublished), slip op., (May 9, 1985) ("Order Granting Exemption").

^{21/} Id. at 8.

not opposing the May 29, 1985 Order would be considered if submitted within the time period established by the Order.

On May 17, 1985, the inmates filed exceptions to the Board's May 9, 1985 Order and a notice of appeal of that order. ^{22/} On May 20, 1985, the NRC staff filed its comments on the Board's Order of May 9, 1985. ^{23/} On May 21, 1985, the Appeal Board issued a memorandum and order dismissing, without prejudice, the Graterford inmates appeal of the Licensing Board's May 9, 1985 Order granting the Applicant an exemption from 10 C.F.R. § 50.47(a) and (b). ^{24/} The Appeal Board determined that the Licensing Board's May 9, 1985 Order was not final and thus not ripe for review. ^{25/} On May 22, 1985, the Applicant filed its response to other parties comments on the Board's May 9, 1985 Order. ^{26/}

On May 24, 1985, the Licensing Board issued an order implementing its May 9, 1985 Order granting the Applicant an exemption from the requirements of 10 C.F.R. § 50.47(a) and (b) for the time period necessary to receive and litigate any potential contentions proffered by the

^{22/} Exceptions To The Board's Order Granting The Applicant's Motion For Exemption From Requirement Of 10 C.F.R. § 50.47(a) and (b) (May 17, 1985); Notice Of Appeal (May 17, 1985).

^{23/} NRC Staff Comments On The Licensing Board's May 9, 1985 Order Granting Applicant An Exemption (May 20, 1985).

^{24/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum and Order (unpublished), slip op. at 1-2, (May 21, 1985).

^{25/} Id.

^{26/} Applicant's Response To Comments Of Other Parties Concerning The Board's Order Dated May 9, 1985 (May 22, 1985).

Graterford inmates. ^{27/} Further, the Board authorized the issuance of a full power operating license for Limerick Generating Station, Units 1 and 2 consistent with the Board's decisions in this case. ^{28/} As noted earlier, appeals of the Board's May 24, 1985 Order were filed by the Graterford inmates, AWPP (Romano) and FOE (Mr. Anthony).

On June 11, 1985, the Commission issued a memorandum and order that declined to make effective the Licensing Board's May 24, 1985 Order authorizing the issuance of a full-power operating license for the Limerick Generating Station. ^{29/} Finding that important questions concerning the Graterford inmates hearing rights had not been resolved, the Commission directed the Appeal Board to consider expeditiously the propriety of the Licensing Board's grant of an exemption. ^{30/} On June 12, 1985, the Licensing Board issued an order admitting and denying certain revised contentions of the Graterford Inmates. ^{31/}

^{27/} Order Authorizing License at 5-6.

^{28/} Id.

^{29/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), CLI-85-11, Memorandum and Order, slip op. at 1-2 (June 11, 1985).

^{30/} Id. at 2.

^{31/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ASLBP No. 81-465-07, Order Admitting Certain Revised Contentions Of The Graterford Inmates And Denying Others, (unpublished), slip op. (June 12, 1985).

II. STATEMENT OF ISSUES ON APPEAL

- A. Whether the Licensing Board Erred In Granting the Applicant An Exemption From The Requirements Of 10 C.F.R. § 50.47(a) and (b) Before Admitting Contentions
- B. Whether the Appellants Request For A Stay Of The Licensing Board's May 24, 1985 Decision Should Be Granted

III. ARGUMENT

- A. The Licensing Board Erred In Granting the Applicant An Exemption From The Requirements Of 10 C.F.R. § 50.47(a) and (b) Before Admitting Contentions

Under the Commission's emergency planning regulations, the offsite emergency response plans for a nuclear power reactor must meet the sixteen standards set forth in 10 C.F.R. § 50.47(b). See, 10 C.F.R. § 50.47(b). The failure of offsite plans to meet those standards may result in the Commission declining to issue an operating license. See, 10 C.F.R. § 50.47(c)(1). However, the regulations provide the Applicant an opportunity to demonstrate (1) that deficiencies in the plans are not significant for the plant in question, (2) that adequate interim compensating actions have been or will be taken promptly, or (3) that there are other compelling reasons to permit plant operation. Id. In its May 9, 1985 Order, the Licensing Board considered each of these criteria and determined that a balancing of the Section 50.47(c)(1) criteria favored granting the Applicant an exemption from the requirements of 10 C.F.R. § 50.47(a) and (b) "during the period in which the Board considers any additional contentions involving the Graterford inmates." Order Granting Exemption at 5-8. For the first criterion (i.e., deficiencies in the plans are not

significant), the Board found that the only deficiency of record ^{32/} related to Graterford was not significant since FEMA found that that Category A deficiency had been corrected based on FEMA's evaluation of the remedial exercise that was held at the State Correctional Institution at Graterford on March 7, 1985. Id. at 5-6. With regard to the second criterion (i.e., adequate interim compensating actions have been or will be taken), the Board noted that PEMA and the Department of Corrections have continued in taking actions to insure the successful operation of the SCIG plan if a radiological emergency occurred at Limerick. Id. at 5. Furthermore, the Board found that the resources needed for an evacuation of the SCIG have been identified and in most cases, have or will be obtained shortly (i.e., transportation, manpower, security equipment, communication equipment, medical services and monitoring). Id. at 6. Consequently, the Board found that the SCIG plan is an adequate interim action. Id. at 6-7. Since the SCIG plan had been through several exercises, the Board was able to determine that the plan would assure adequate protective measures for the Graterford inmates during the period of the exemption requested by the Applicant. Id. at 7. For the third criterion (i.e., other compelling reasons to permit plant operation), the Board identified three reasons. First, the Board found that the cost of delay are enormous. Id. Second, it found that the inmates right to proceed would not be dis-

^{32/} FEMA has found the means for dealing with mobility-impaired/transit-dependent individuals to be deficient since the State Institution, Graterford did not fully participate in the July 25, 1985 exercise. See, FEMA Exhibit E-4 (Admitted in evidence on January 24, 1985), Exercise Evaluation Report for the July 25, 1984 Exercise at p. 136 (September 25, 1984).

turbed by granting the exemption. Third, the Board found that further delays would impact on the restart of construction of Unit 2 which has been suspended until Unit 1 is placed in commercial operation. Id.

On May 24, 1985, after the expiration of the comment period established in its May 9, 1985 Order, the Licensing Board issued an order that implemented its grant of Applicant's motion for an exemption and authorized the Director of Nuclear Reactor Regulation to issue a full-power operating license for Limerick Generating Station, Units 1 and 2. See, Order Authorizing License. In its May 24, 1985 Order, the Board acknowledged receipt of the inmates' proposed revised contentions. Id. at 2.

On appeal, the Graterford inmates argue, citing Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), CLI-84-19, 20 NRC 1055 (1984) and Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984), that the Licensing Board failed to apply the appropriate legal standard for determining whether to grant an exemption since the Board's decision should have been based on the standards of Section 50.12 rather than § 50.47(c)(1) and thus is inconsistent with the precedent. Notice of Appeal at 8-10 (May 17, 1985). The Staff submits that the inmates' argument is unsound. Commission's Grand Gulf decision is inapposite. That decision provided guidance on the applicable standards when applying 10 C.F.R. § 50.12. It did address the situation of a and not the Licensing Board's use of the exemption authority under 10 C.F.R. § 50.47(c)(1). Further, while the Applicant in

this case did seek an exemption under 10 C.F.R. § 50.12 ^{33/}, which the Licensing Board acknowledged, ^{34/} there is nothing in the Commission's Grand Gulf decision that suggests it is inappropriate for a licensing board to consider the use of the exemption authority established by the Commission under 10 C.F.R. § 50.47(c)(1). ^{35/} More importantly, however, the "exigent circumstances" test, discussed in the Shoreham decision is not the proper standard to be applied in determining whether an exemption is warranted under 10 C.F.R. § 50.12(a). See, NRC Staff Additional Views On Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) And (b) at 5-6 (April 1, 1985).

The inmates also argue on appeal, as does FOE (Anthony), that the Licensing Board erred in granting the Applicant an exemption based on the first and second criterion of 10 C.F.R. § 50.47(c)(1) because the Board's action was premature since the inmates' proposed revised contentions had not been filed or considered. Notice of Appeal at 10-11; Appeal By R. L. Anthony/FOE at 1 (June 2, 1985). As the Staff noted before the Licensing Board the use of the exemption authority under 10 C.F.R. § 50.12(a) or 10 C.F.R. § 50.47(c)(1) would be inappropriate until the Board determined

^{33/} Applicant Motion For Exemption at 1.

^{34/} Order Granting Exemption at 4.

^{35/} 44 Fed. Reg. 75167-71 (December 19, 1979); see also, Statement of Policy on Emergency Planning Standard 10 C.F.R. § 50.47(b)(12), 50 Fed. Reg. 20,892, 20,893 (May 21, 1985).

that the inmates had proffered at least one admissible contention. ^{36/} There would be no necessity for the Licensing Board to act on an exemption unless the Board determined that inmates were to be entitled to a hearing on an admissible contention. Moreover, until the Board ruled on contentions it would not be in a position to judge whether the controverted issues raised questions of significant deficiencies in deciding whether to permit reactor operation as contemplated by the Commission when using the Section 50.47(c)(1) authority. See, Emergency Planning; Final Regulation, 45 Fed. Reg. 55402, 55403 (August 19, 1980).

The use of the Section 50.47(c)(1) authority in prior cases has in the past only occurred in the context of an ongoing contested license proceeding. ^{37/} Thus, the parties in those instances had an opportunity to challenge the basis relied on by the Boards in using the Section 50.47(c)(1) authority. On the other hand, none of these cases establish the proposition that an on the record adjudicatory hearing is required to consider the grant of an exemption under Section 50.47(c)(1).

While the Staff is of the view that the Licensing Board erred by acting prematurely in granting the Applicant an exemption pursuant to

^{36/} NRC Staff Response To Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) And (b) at 6-7, 9, 12 (March 18, 1985); NRC Staff Additional Views On Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) And (b) at 3, 4, 6, 8 (April 1, 1985).

^{37/} See, e.g., Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983); Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528 (1983).

10 C.F.R. § 50.47(c)(1) before deciding whether the inmates had proffered an admissible contention, the error did not result in significant harm to intervenors' opportunity to be heard on the issues in controversy. First, the Graterford inmates were provided an opportunity to challenge the factual predicates underlying the Licensing Board's grant of an exemption under Section 50.47(c)(1) prior to the grant of the exemption becoming final. Order Granting Exemption at 8. The inmates filed exceptions to the Board's May 9, 1985 Order that do not dispute any of the factual bases relied on by the Board in granting the exemption.^{38/} At the time of the Licensing Board's grant of the exemption on May 9, 1985, the only deficiency of record for Graterford involved the Category A deficiency found by FEMA which has been resolved. Second, the Licensing Board has found that only two narrow issues of the stated basis for inmates' proposed revised contentions are admissible and thus warrant consideration. See, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ASLBP No. 81-465-07 OL, Order Admitting Certain Revised Contentions Of The Graterford Inmates And Denying Others (unpublished), slip op. (June 12, 1985). The first issue admitted by the Board concerns the inmates allegation that there is no reasonable assurance that emergency response training will be offered to civilian personnel who will be involved in the emergency

^{38/} See, Exceptions To The Board's Order Granting The Applicant's Motion For Exemption From Requirement of 10 C.F.R. § 50.47(a) And (b) (May 17, 1985); Graterford Inmates' Motion In Opposition 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 Provisions Of The Emergency Plan For The State Correctional Institute Of Graterford (March 13, 1985).

response plans, such as civilian bus drivers and ambulance drivers. The inmates allege that there is no guarantee that the persons involved will receive notice of an opportunity to avail themselves of the training program offered by PEMA. Id. Appendix at 1-2. Further, they allege that the training is inadequate because it is not as comprehensive as the training offered to school bus drivers within the EPZ. Id. However, PEMA has notified civilian bus companies who will participate in an evacuation of SCIG that PEMA will provide their employees training in the use of dosimetry during a radiological emergency. See, Answer Of The Commonwealth Of Pennsylvania To Proposed Contentions Of The Graterford Inmates With Regard To The Evacuation Plan (April 4, 1985), Exhibit B. Further, the Commonwealth of Pennsylvania has stated its willingness (1) to discuss the possibility of providing more expansive training for these civilian bus drivers and (2) to offer training to employees of the private ambulance services that would be involved. See, Commonwealth Response To Proposed Revised Contentions Of The Graterford Inmates at 6-7 (May 24, 1985). Consequently, there remains little of substance to litigate for the first admitted contention, and nothing that can be reasonably characterized as a significant deficiency.

The second issue admitted by the Board is the inmates allegation that there is no reasonable assurance that the estimated time of evacuation of six-to-ten hours can be achieved. Limerick, ASLBP No. 81-465-07 OL, Appendix at 2. Specifically, the Board admitted that portion of inmates' allegations that challenges the sufficiency of the methodology used by the Department of Corrections to arrive at the six-to-ten hour evacuation time estimate in term of its failure to include the various sequential steps necessary

to accomplish the evacuation. Id. at 2-3. The Staff submits that this issue is also not substantial because neither the Commission's regulations nor the NUREG-0654 guidance require that the estimated evacuation times be achieved during an actual radiological emergency. The function of these time estimates is to provide the necessary framework for planning the various steps needed to carry out the range of protective actions which is to be addressed in the emergency plans, ranging from evacuation, to sheltering, to prophylactic intervention (KI). Thus, it is not the specific details of the time estimates which is significant but whether these estimates are sufficient to form an adequate basis for planning the protective actions addressed in the plan. In the case of Graterford, these estimates and plans have been developed under the supervision of the Department of Corrections. The Commissioner, Commonwealth of Pennsylvania Department of Corrections and the Department of Corrections developed the six-to-ten hour estimate, which ranges from the best to the worst of what can be accomplished by the Department of Corrections. Tr. 20,641-43. Nothing offered by the prisoners as part of the basis for their contention supports a challenge to the expertise of the Department of Corrections to provide adequate estimates, and, more important, nothing challenges the basic plans for the various protective actions. Since the Commission's requirements and guidance do not establish a minimum time within which an evacuation must be completed, the most that litigation of this issue would achieve is perhaps some adjustment to the estimate. The litigation would not result in any changes to the SCIG plan or procedures. Thus the issue raised by the contention cannot be reasonably characterized as posing a significant deficiency.

Accordingly, while the Staff believes that the Board erred in prematurely acting on the Applicant's request for an exemption before determining whether there were admissible contentions, the admitted contentions raise no issue involving a significant deficiency warranting withholding the exemption requested by the Applicant. Thus, had the Board first acted on the contentions, and then on the exemption, the Staff believes that the exemption determination would not have had a different result. Consequently, the premature action by the Licensing Board did not cause significant harm to Prisoners rights in this proceeding.

Finally, the inmates allege, citing Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443 (1984), that the Licensing Board improperly considered the costs of delays in deciding that there were other compelling reasons to permit plant operation. Notice of Appeal at 11, 12. The inmates' claim is not well founded. There is nothing in ALAB-789 that precludes a licensing board from considering cost of delay in determining whether to grant an exemption pursuant to 10 C.F.R. § 50.47(c)(1). Further, nothing in the statement of considerations accompanying the promulgation of 10 C.F.R. § 50.47(c) suggests it is improper to consider cost of delay in applying that provision of the rules. See, 45 Fed. Reg. 55402 (August 19, 1980); see also, 44 Fed. Reg. 75167 (December 19, 1979). Cost of delay has been considered as an appropriate factor to consider in some instances. Cf. Statement Of Policy On Conduct Of Licensing Proceedings, CLI-81-8, 13 NRC 452 (2981); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-808, slip op. at 10-11, ___ NRC ___, (June 11, 1985).

AWPP'S APPEAL OF THE LICENSING BOARD'S MAY 24, 1985 ORDER

AWPP's filed an undated Appeal of the Licensing "Board's [May 24, 1985] Order Implementing Its Grant Of Applicant's Motion For Exemption From [the] Requirement of 10 C.F.R. § 50.47(a) and (b) For A Period Of Time [During Which] Contentions Of Graterford Inmates Are Considered By The Board -- Authorization For Director Of Nuclear Reactor Regulation To Issue Full Power License," (Appeal) which was postmarked May 30, 1985. ^{39/} The Staff is of the view that the AWPP Appeal should be rejected by the Appeal Board because AWPP seeks to raise matters unrelated to the question of whether it was appropriate for the Licensing Board to issue the pending exemption. The Appeal Board in connection with the current appeals reminded "all parties, especially AWPP, that they should confine their arguments to the merits of the Licensing Board's May 9 and May 24 Orders" which granted applicant's exemption request." ^{40/} Thus, AWPP through its representative Frank Romano, has not confined its arguments to the question of an exemption. Instead, AWPP seeks to raise concerns about the use of sheltering of the Graterford prisoners and the general public as an option to evacuation in the event of a radiological emergency at

^{39/} On June 13, 1985, the NRC staff received a Brief from AWPP addressing the Applicant's motion for an exemption. Because this was received after June 12, 1985, the date set by the Appeal Board receipt by the parties, and the fact that the Staff was to file its response on June 14, 1985, the Staff does not address this pleading in its response. A review of the pleading indicates that it does not contain any information that would cause the Staff to change its position.

^{40/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order, (Unpublished), slip op. at 2, Fn. 1 (June 3, 1985).

Limerick. However, this concern is not tied in any manner to the question of the exemption from the requirements of 10 C.F.R. § 50.47(a) and (b).

In fact, AWPP has raised its concerns about evacuation and sheltering on two prior occasions, ^{41/} and the time for challenging or appealing those Licensing Board decisions has expired.

FOE'S APPEAL OF THE LICENSING BOARD'S MAY 24, 1985 ORDER

FOE, through its representative, Robert Anthony, filed its "Appeal By R. L. Anthony/FOE From ASLB's Order, 5/24/85, Implementing Its Grant Of Exemption To PECO Re: 10 C.F.R. § 50.47(a)(b) For Graterford Prisoners' Contentions And Authorizing The Issuance Of A Full Power License; And Petition For Stay," dated June 2, 1985. In addition, Mr. Anthony also filed "Anthony/FOE Brief In Support Of Our Appeal Of 6/2/85 From LB's Order Implementing Its Grant Of Exemption From 10 C.F.R. § 50.47(a)(b) And Authorizing License," dated June 7, 1985.

The FOE June 2, 1985 appeal raises the question of the appropriateness of the Licensing Board's determination that an exemption was war-

^{41/} On August 8, 1984, AWPP filed a late-filed contention regarding evacuation and the need for an actual evacuation of the Limerick EPZ. On September 14, 1984, the Licensing Board issued its Memorandum And Order Rejecting AWPP's New Contention On Evacuation. AWPP in a January 27, 1985 filing, which was two days before the close of the evidentiary record on all offsite emergency planning contentions in this proceeding, sought to have admitted a new late-filed contention on sheltering. In a Memorandum and Order dated February 19, 1985, the Licensing Board rejected the admission of the contention as untimely because (1) the information upon which the sheltering contention was based was available as early as December 1981, and (2) the contention did not survive the balancing of the § 2.714(c) criteria for late-filed contentions.

ranted with respect to Units 1 and 2. Unit 2, while erroneous, is clearly harmless. Inasmuch as the Director of Nuclear Reactor Regulation must make findings on matters specified in 10 C.F.R. § 50.57(a), which includes, among other things, "that construction of the facility has been substantially completed." A finding which in this instance cannot be made since Unit 2 construction has been suspended. This argument by FOE is without merit because the Licensing Board granted the Applicant's motion for an exemption, which only sought an exemption for Unit 1. See, Applicant's Motion For Exemption at 1; Order Granting Exemption. It appears that FOE has confused the Licensing Board's authorization for issuance of a full-power license for Limerick Units 1 and 2 with the Board's authorization of an exemption. The Licensing Board's recognition that Unit 2 construction has been suspended (Order Granting Exemption at 8) and that the request for exemption was limited to Unit 1 demonstrates that the Board's authorization of a full-power license for Unit 2 was an oversight and constitutes inadvertent error. The Staff intends to request that the Board modify the order clause set forth in its May 24, 1985 Order.

The FOE appeal also relies in part on the alleged failure of the Licensing Board to await the satisfaction of an operating license condition contained in the Third Partial Initial Decision that required additional traffic control points outside the EPZ. ^{42/} Appeal by R. L. Anthony/FOE at 1 (June 2, 1985). However, all of the parties to this proceeding were served by the NRC staff with copies of documents that

^{42/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) LBP-85-14, _____ NRC _____, Slip op, at 73-74 (May 2, 1985).

indicated that this license condition has been satisfied. ^{43/} Notwithstanding the satisfaction of the license condition, the FOE appeal is not responsive to the Appeal Board's June 3, 1985 Order that required the parties to "confine their arguments to the merits of the Licensing Board's May 9 and May 24 Orders". ^{44/}

The Staff believes that the Appeal Board should reject the "Anthony/FOE Brief in Support Of Our Appeal of 6/2/85 From Licensing Board's Order Implementing Its Grant Of Exemption From 10 C.F.R. § 50.47(a) and (b) And Authorizing License," dated June 7, 1985 because it, too, raises matters that are unrelated to the merits of the Licensing Board's May 9 and May 24 Orders. FOE, in Item 1, incorporates its "brief submitted to the [Appeal] Board, dated 6/6/85, on [the Licensing Board's] Partial Initial Decision on Offsite Emergency Planning For Limerick." Anthony-FOE Brief In Support At 1 (June 7, 1985). FOE attempts to tie its concerns about the validity of the Applicant's evacuation time estimate study and the boundaries of the EPZ to the exemption by concluding, "Since the evacuation plans for

^{43/} See, Letter dated June 5, 1985 from D. F. Hassell, Counsel for NRC Staff, to the Licensing Board forwarding a copy of a memorandum dated May 30, 1985 from R. W. Krimm, Office of Natural and Technological Hazards Programs, Federal Emergency Management Agency (FEMA) to Edward L. Jordan, Office of Inspection and Enforcement (NRC) and a memorandum dated May 14, 1985 from Paul Giordano, Regional Director of FEMA, Region III to Richard Krimm and a May 16, 1985 letter from J. L. Patten, Director, Pennsylvania Emergency Management Agency to P. Giordano. These documents indicate that FEMA has received verification that traffic control points and access control points have been established in satisfaction of the Licensing Board's operating license condition contained in the May 7, 1985 Third Partial Initial Decision.

^{44/} Order, slip op. at 2, Fn.1 (June 3, 1985).

the Graterford prisoners is dependent on the configuration of the EPA . . . these plans will have to be reworked in relation to revised evacuation for the total EPZ." Mr. Anthony has provided no basis that supports the proposition that either the configuration of the EPZ will be redrawn or that the SCIG evacuation plans will be revised. Therefore, FOE has failed to provide any arguments that are related to the merits of the Licensing Board's May 9 and May 24 Orders granting an exemption from 10 C.F.R. § 50.47(a) and (b).

FOE, in Item 2, incorporates a March 15, 1985 motion in opposition to the Philadelphia Electric Company Motion for an Exemption. Anthony/FOE Brief In Support at 1 (June 7, 1985).

The FOE filing dated March 15, 1985 is entitled "Anthony/FOE Motion In Opposition To PECO's Motion For Exemption From 10 C.F.R. § 50.47 Provisions For Emergency And Evacuation Planning For Graterford Prisoners And Staff" and it contains concerns about evacuation plans for the public and the population at SCIG and the need for additional discovery and evidentiary hearings. This document was also incorporated in Anthony/FOE/s May 16, 1985 "Statement . . . In Opposition To Granting Applicant's Motion For Exemption From 10 C.F.R. § 50.47 (a) and (b) Re: Evacuation Plan For Inmates", which was submitted in response to the Licensing Board's directive in its May 9th Order that "any parties opposing the issuance of such order [granting the exemption] to submit it[s] comments within 10 days from the date of this Order." May 9th Order at 8. None of the concerns expressed in the Anthony/FOE documents of March 15, 1985 or May 16, 1985 have been directed at the merits of the Licensing Board's May 9th Order;

instead, Anthony/FOE merely reiterates its ongoing concerns about the configuration and evacuation of the EPZ as a whole.

FOE alleges in Item 3 that there were inadequacies in the remedial "table top" exercise conducted for the Graterford Prison and that the exercise does not satisfy 44 C.F.R. § 350.2(j) regarding the number of personnel trained and involved. Anthony/FOE Brief In Support at 1 (June 7, 1985). There is nothing in 44 C.F.R. § 350.2(j) that addresses the goals of an emergency planning exercise. Mr. Anthony has failed to identify any deficiencies in the SCIG plan concerning inadequately trained personnel or insufficient numbers of responding personnel, and has, therefore, failed to relate any of these concerns to the exemption from 10 C.F.R. § 50.47(a) and (b).

FOE alleges in Item 4 that FEMA's lack of participation in the Graterford conferences or in the Protective Order of March 20, 1985 ^{45/} does not comply with 44 C.F.R. §§ 350.3(d) and 350.20(a) through (e). There is no regulation that requires FEMA to participate in a conference to resolve a dispute between parties. This matter is unrelated to the exemption granted by the Licensing Board in its May 9 and May 24 Orders.

In view of FOE's failure to relate any of the concerns raised in either its June 2 or June 7 filings to the Licensing Board's May 9 or May 24 Orders granting the Philadelphia Electric Company an exemption from the requirements of 10 C.F.R. § 50.47(a) and (b),^{46/} the Appeal Board should dismiss FOE's appeal.

^{45/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) Protective Order, Unpublished, dated March 20, 1985).

B. The Appellants' Request For A Stay Of The Licensing Board's May 24, 1985 Decision Is Moot

The Graterford Inmates and FOE/Anthony, in addition to appealing the decision of the Licensing Board of May 24, 1985 granting an exemption from the requirements of 10 C.F.R. § 50.47(a) and (b), also seek a stay of that decision. ^{46/} As the Appeal Board most recently stated in ALAB-808, dated June 11, 1985, "Stay motions are decided by weighing the following four factors set forth in 10 C.F.R. § 2.788(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies." ^{47/}

While the Graterford Inmates fail to directly address these factors, FOE/Anthony does address each factor and makes an effort to establish that, on balance, a stay is warranted. ^{48/} Although the Staff does not believe that an analysis of each of the § 2.788(e) factors against the arguments made by FOE would support a conclusion that a stay is warranted, the Staff believes that the determination of the appropriateness of a stay is moot. It is the effectiveness of the Licensing Board's May 24, 1985 Order which the

^{46/} See, the Appeal by R. L. Anthony/FOE at 1, (June 2, 1985) and Graterford Inmates' Notice of Appeal at 3 (May 30, 1985).

^{47/} ALAB-808, slip op. at 3.

^{48/} See the FOE/Anthony June 2, 1985 filing, Item 3, I-IV.

Graterford Inmates and FOE/Anthony seek to stay. In the Commission's most recent decision dealing with Limerick, it declined to make effective the Licensing Board's May 24, 1985 Order which, together with prior Licensing Board's decisions in this proceeding, authorized the Director of Nuclear Reactor Regulations to issue a full power operating license to Philadelphia Electric Co. ^{49/} In view of the fact that the Commission has declined to make this order effective pending (1) an Appeal Board determination that the exemption authorized in the May 24, 1985 order was proper or (2) an Appeal Board determination that the exemption was not properly issued and then resolution of the Graterford contentions by a Licensing Board decision ^{50/}, the Staff is of the view that the question of the appropriateness of a stay at this time is clearly moot.

^{49/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), CLI-85-11, ___ NRC ___, Slip op. dated June 11, 1985.

^{50/} Id. Slip op. at 2.

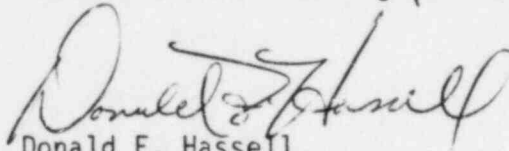
IV. CONCLUSION

For the foregoing reasons, the Staff opposes the appeals of Graterford Inmates, Anthony/FOE and AWPP (Romano).

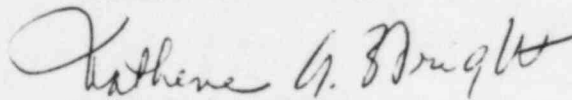
Respectfully submitted,



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Dated at Bethesda, Maryland
this 14th day of June, 1985

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO APPEALS OF THE LICENSING BOARD'S MAY 24, 1985 ORDER" 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, or as indicated by a double asterisk by hand-delivery, this 14th day of June, 1985:

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