

160

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

DOCKETED
USNRC

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

Docket Nos. 50-352 *OL* '85 MAY 29 A11:26
50-353 *OL*

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

APPLICANT'S BRIEF IN OPPOSITION TO REQUEST BY LIMERICK
ECOLOGY ACTION FOR A STAY OF THE LICENSING BOARD'S
SECOND AND THIRD PARTIAL INITIAL DECISIONS

Preliminary Statement

On May 16, 1985, Limerick Ecology Action ("LEA") moved the Atomic Safety and Licensing Appeal Board ("Appeal Board") for a stay of the Third Partial Initial Decision ("Third PID") on Offsite Emergency Planning, issued by the Atomic Safety and Licensing Board ("Licensing Board") on May 2, 1985.^{1/} On May 20, 1985, LEA supplemented its motion by further requesting a stay of the Second PID, which was issued on August 29, 1984.^{2/} In an Order dated May 22, 1985, the Appeal Board

1/ The Third PID decided all remaining issues in favor of Applicant necessary for authorization to issue full power operating licenses for the Limerick Generating Station ("Limerick"), except for any contention which might be admitted on behalf of the Graterford Prisoners. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-85-14, 21 NRC ____ (1985) (slip op. at 1).

2/ Limerick, supra, LBP-84-31, 20 NRC 446 (1984), appeal pending. The Second PID decided all issues in controversy necessary for authorization of low-power operating licenses for Limerick.

noted its receipt of the LEA motion, as supplemented, and clarified the time for filing replies.

For the reasons discussed below, Applicant Philadelphia Electric Company ("Applicant" or "PECO") opposes LEA's motion for a stay. LEA's arguments constitute no more than a synopsis of their appeals of the Second and Third PID's, with claims of procedural error and assertions that the Licensing Board incorrectly excluded or improperly weighed the evidence. Even if presumed valid, such arguments do not justify a stay. With regard to the Third PID, the Appeal Board held in San Onofre that to obtain a stay an intervenor must demonstrate apparent inadequacies in emergency planning significant enough to present a threat of undue risk to the public health and safety in the event of a serious accident.^{3/} For the same reason, no irreparable harm whatever has been shown. LEA's claims regarding the equities and the public interest simply restate its assertions of error. The stay should therefore be denied.

Argument

I. LEA Has Failed to Meet Its Burden for Obtaining a Stay of the Third PID Pursuant to 10 C.F.R. §2.788.

In determining whether to grant or deny an application for a stay, an Appeal Board is required to consider the four criteria set forth in 10 C.F.R. §2.788(e).^{4/} As the moving party, LEA bears the burden of

^{3/} Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130-31 (1982). LEA's arguments as to the Second PID are even more remote from any demonstrated threat to the public.

^{4/} The NRC has adopted the federal court standard stated in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. (Footnote Continued)

persuasion that it is entitled to relief.^{5/} LEA has totally failed to satisfy its burden.

As to the first criterion, the likelihood of prevailing on the merits, LEA merely states the arguments it intends to make on appeal of the Third PID or restates the arguments advanced in its appeal of the Second PID. Inasmuch as LEA does not seriously contend that any of the Licensing Board's findings are unsupported by the record, its claims of legal error boil down to disagreement with the sufficiency or weight to be given particular evidence, the credibility of witnesses with conflicting testimony, and the reasonable inferences to be drawn from the

(Footnote Continued)

1958). See generally Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 796-97 (1981); Environmental Radiation Protection Standards for Nuclear Power Operations, CLI-81-4, 13 NRC 298, 301 (1981); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1983). While not a jurisdictional prerequisite, LEA's failure, without good cause, first to seek a stay from the Licensing Board is a factor which this Board may take into account in denying the requested relief. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 11-12 (1976); see also Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 781 (1977); Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-25, 4 AEC 633, 634 (1971). In the instant case, LEA has based its request for a stay primarily upon the weight and sufficiency of evidence in the record underlying the Third PID. It should therefore have initially sought a stay from the Licensing Board.

^{5/} Farley, supra, CLI-81-27, 14 NRC at 797; Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978). Where, as here, LEA has failed to demonstrate irreparable injury absent a stay and to satisfy the other criteria, an overwhelming showing of likelihood of success on the merits is required. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1189 (1977).

evidence.^{6/} Even if LEA's allegations of error were, arguendo, ultimately sustained, there must be more than a mere showing of the possibility of legal error by a Licensing Board to warrant a stay.^{7/} Rather, there must be a demonstration of some significant planning deficiency which threatens undue risk to the public in the event of a serious accident.^{8/}

The specific points raised by LEA clearly fail to establish a likelihood of success on appeal, much less any significant threat to the public. LEA's request for a stay is premised on its basis misconception that "it is really the state of adoptability and implementability which the municipality or school district has actually achieved that can be reasonably relied upon to predict a state of adequate preparedness."^{9/} To assert that predictive findings must rest upon the demonstrated state of emergency preparedness is inherently self-contradictory and contrary to well-established precedent.^{10/} In effect, LEA attempts to reinstate the planning standard of actual preparedness under the Commission's

^{6/} The Appeal Board has criticized the use of such a broad brush approach in a stay request. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-356, 4 NRC 525, 540-41 (1976).

^{7/} Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-221, 8 AEC 95, 98 (1974); Peach Bottom, supra, ALAB-158, 6 AEC 999 (1973).

^{8/} See the discussion of ALAB-680 at page 2, supra.

^{9/} LEA Motion at 11-12.

^{10/} The cases interpreting the Commission's requirements for "predictive" findings on the adequacy of offsite emergency plans are amply discussed by the Licensing Board in its Third PID (slip op. at 4-10).

previous rule, which was expressly amended to substitute predictive findings in lieu of findings as to the state of offsite emergency preparedness.^{11/} Accordingly, LEA's assertions that the plans were not in final form or yet adopted at the time of the hearing provide no basis for a stay.^{12/}

While LEA alleges "significant deficiencies which exist at the municipal level,"^{13/} notwithstanding contrary findings by the Licensing Board and now by FEMA, nothing in the record demonstrates any deficiency of such significance as to prevent issuance of an operating license. For example, with regard to NRC Staff verification of additional traffic control points outside the EPZ, licensing boards have frequently

^{11/} Id. at 8-9.

^{12/} In the same vein, LEA confuses the role of adjudicatory boards in resolving issues in controversy and the separate, distinct role of the NRC Staff under 10 C.F.R. §50.47(a)(1) in making its independent findings as to emergency preparedness, taking due regard of interim findings by the Federal Emergency Management Agency ("FEMA"). The Board discussed this important distinction in its Third PID (slip op. at 4-7).

Even if the Appeal Board were to consider LEA's allegations regarding the lack of FEMA approval of the offsite plans at the time of the hearing, FEMA has subsequently advised the NRC that all Category A deficiencies (i.e., those which could preclude an affirmative FEMA finding as to the adequacy of planning) have been corrected. The only outstanding item requiring further FEMA verification is the need to implement a level of traffic control in the King of Prussia area sufficient to assure that traffic evacuating along Route 363 to the Pennsylvania Turnpike can continue to move upon reaching the EPZ boundary. See Memorandum from Richard W. Krimm, Assistant Associate Director, Office of Natural and Technological Hazards Programs, FEMA, to Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, Office of Inspection and Enforcement, NRC (May 21, 1985). The Third PID expressly conditions license issuance upon meeting this concern. See note 16, infra.

^{13/} LEA Motion at 12.

delegated responsibility to the Staff to verify compliance with licensing conditions imposed by the board.^{14/} The Licensing Board relied upon uncontradicted evidence that additional points could be easily designated,^{15/} and that their eventual designation had been a planning assumption of both the Pennsylvania Emergency Management Agency ("PEMA") and the counties with regard to the particular routes at issue.^{16/}

^{14/} E.g., Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1592 (1982), aff'd, ALAB-732, 17 NRC 1076 (1983); Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-82-70, 16 NRC 756, 854 (1982), aff'd, ALAB-781, 20 NRC 819 (1984); San Onofre, supra, LBP-82-39, 15 NRC 1163, 1289-90 (1982), aff'd, ALAB-717, 17 NRC 346 (1983).

^{15/} Third PID at 49.

^{16/} Id. at 67. Mr. Krimm's memorandum of May 21, 1985 states at page three that additional points have been designated by Montgomery County and are currently under review by PEMA and the Pennsylvania State Police. Accordingly, there is no basis for LEA's supposition that Pennsylvania officials might "attempt to use the HMM ETE as a basis for decisionmaking without the implementation of the corrective traffic control arrangements" ordered by the Licensing Board. LEA Motion at 7-8. To the contrary, the Licensing Board has expressly required that, prior to operation above 5% of rated power, the NRC Staff shall "receive verification of plans to implement a level of traffic control" in the subject area sufficient to assure a flow of evacuating traffic as assumed. Third PID at 304.

LEA's claim that "spontaneous evacuation outside the EPZ . . . would affect the ability of EPZ traffic to use Upper Merion evacuation corridors" (LEA Motion at 8) is simply a restatement of its concern regarding the establishment of traffic control points sufficient to maintain the flow of evacuating traffic. Contrary to LEA's implication, neither the testimony of Dr. Urbanik, the NRC Staff's expert witness, nor the Evacuation Time Estimates study itself relied upon the "car assignments" contained in the PEMA/PennDOT evacuation map (LEA Exh. E-16), nor did the testimony or exhibits relied upon by the Licensing Board depend upon any particular traffic levels designated in LEA Exh. E-16 for the King of Prussia corridors or shopping areas.

With regard to the issue of staffing each municipal emergency operations center ("EOC"), LEA again fails to appreciate the distinction between predictive findings and testimony as to the actual state of preparedness at the time of a hearing. In any event, FEMA now states that it "has determined that adequate staffing now exists in all risk municipalities to respond to a radiological emergency over an extended period of time."^{17/} This confirms the predictive finding of the Licensing Board and provides the necessary FEMA verification required by the Board.^{18/}

Alleged "communication problems" in Lower Providence Township^{19/} are based upon a misapprehension that all EOC staff must be summoned and report immediately upon declaration of an emergency. The Licensing Board found no reason for this concern.^{20/} The Board also disposed of an alleged discrepancy between estimates of transportation-dependent individuals in the United States Census and the offsite plans, finding that extensive efforts have been made for identifying such individuals

^{17/} Krimm Memorandum of May 21, 1985 at p. 3. Applicant is unable to understand LEA's argument regarding the number of PECO volunteers assigned to staff municipal EOC's. Nonetheless, LEA misconstrues the record. Applicant's expert consultant testified, and the Board found, that the document cited by LEA states that 400 PECO employees had volunteered their services to the municipalities. Ultimately, however, only about 50 of those volunteers were selected to staff the EOC's. Third PID at 233. The Licensing Board found that a certain amount of turnover is to be expected, resulting in the need for recruitment and retraining of new EOC staff members. Id. at 268.

^{18/} Id. at 236, 305.

^{19/} LEA Motion at 13.

^{20/} Third PID at 271.

within the Limerick EPZ, consistent with the requirements of NUREG-0654.^{21/} In particular, adequate planning has been made for the transportation needs of day care facilities.^{22/}

Contrary to LEA's allegations, the record completely supports the Licensing Board's findings that Montgomery County intends "to continue working toward the development of a workable plan," including the implementation of the latest draft plan to carry out its provisions, if necessary, prior to its formal adoption of a plan.^{23/} Finally, LEA's assertion of procedural error in the imposition of time constraints for its examination and cross-examination of witnesses is wholly without merit for the reasons discussed by the Board in rejecting the same claim by intervenor Friends of the Earth.^{24/} In any event, its procedural claim raises no substantive concern as to the public health and safety.

The second and most crucial factor regarding the grant or denial of a stay is whether the movant will be irreparably injured unless a stay

^{21/} Id. at 33-37. The Licensing Board also noted that there is no planning standard which even requires the transportation needs survey undertaken by all three risk counties for the Limerick EPZ and that "FEMA has never reviewed such surveys nor even seen them before." Id. at 178. Moreover, yet another survey will be conducted. Id. at 286.

^{22/} Id. at 170-81.

^{23/} Id. at 255. The Board heard extensive testimony from Mr. Bigelow, the Montgomery County Coordinator of Emergency Preparedness, who testified that the current draft Montgomery County plan is workable. Id. at 255. LEA's hypothesis that Montgomery County will not adopt a plan because it had previously opposed the licensing of Limerick (LEA Motion at 15) is untenable. As the Board found, the Montgomery County Commission Chairman expressly denied that earlier opposition or personal reservations would prevent adoption of a proper plan. Id. at 254-55.

^{24/} Third PID at 15-19.

is granted.^{25/} LEA has also failed to satisfy this criterion. Initially, it asserts that granting a stay "will not cause irreparable harm to the Applicant" because of the "lack of available and adequate cooling water in the Schuylkill River."^{26/} LEA then claims only in the most conclusory terms, without more, that its members will suffer "irreparable harm." Thus, LEA's claim that "[a]uthorization to exceed 5% power at Limerick prior to a verifiable resolution to the identified traffic control concerned [sic] addressed by the testimony of Dr. Urbanik and other witnesses would seriously endanger . . . part of the public" has absolutely no basis.^{27/}

As to the third factor, whether the granting of a stay would harm other parties, LEA asserts that, due to a lack of sufficient cooling water, Applicant is prevented "from embarking on a full power testing program at this time."^{28/} This allegation involves impermissible

^{25/} Farley, supra, CLI-81-27, 14 NRC at 797; Marble Hill, supra, ALAB-437, 6 NRC 630, 632 (1977).

^{26/} LEA's Motion at 2 (emphasis added). Nonetheless, LEA wrongly presupposes that adequate cooling water will not be available for the ascent-to-power program for Limerick. Its assumptions require speculation as to meteorological and hydrologic conditions in the Schuylkill River and Perkiomen Creek at the time withdrawals would be needed. LEA further speculates as to action by the Delaware River Basin Commission ("DRBC") upon the application of PECO for relief in the absence of available cooling water at certain times, given the existing conditions upon Schuylkill and Perkiomen withdrawals imposed by DRBC.

^{27/} LEA Motion at 7. As noted, the Licensing Board resolved this concern by imposing an appropriate condition to be met prior to operation above 5 percent of rated power. See note 16, supra.

^{28/} LEA Motion at 2.

speculation.^{29/} Moreover, LEA's allegation presumes facts outside the record and beyond the jurisdiction of the NRC. It is indisputable that the grant of a stay would have an adverse economic impact on PECO,^{30/} a factor which the Appeal Board has previously considered in denying a stay.^{31/} The actual economic harm which would result if the license were stayed must be compared against the generalized claims of injury which LEA asserts.

With regard to the fourth factor, whether the requested stay would serve the public interest, LEA asserts only that the public interest would be unaffected because electricity is available elsewhere. This unsubstantiated allegation fails to account for the public interest in obtaining economic, reliable supplies of energy, which is not necessarily satisfied simply if electricity can be obtained from an interconnecting source, nor does it account for the burden of the costs attributable to additional delay which will ultimately be borne by members of the public.

II. LEA's Supplemental Motion Regarding the Second
PID Does Not Satisfy the Criteria for a Stay.

On May 20, 1985, LEA filed a supplement to its May 16, 1985 motion in which it seeks a stay of the Licensing Board's Second PID, dated

^{29/} See note 26, supra.

^{30/} See Affidavit of V.S. Boyer, Senior Vice President, Nuclear Power, Philadelphia Electric Company (March 14, 1985) (\$49 million per month for each month of delay).

^{31/} Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977). See also Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 170-71 (1978).

August 29, 1984. LEA contends that the Second PID should be stayed because of an alleged failure to consider design alternatives to mitigate the risk of severe accidents in the environmental review for Limerick. This additional request for a stay is likewise without merit.

Preliminarily, it is noted that the Appeal Board and Commission have already considered the same request by LEA with respect to the issuance of low-power licenses for Limerick.^{32/} The Appeal Board dismissed the earlier request as untimely, but stated that even if the motion were timely, "it raises nothing that would warrant a change in our previous decision denying FOE's and Del-Aware's stay motions."^{33/} After the Appeal Board denied its request, LEA filed a similar motion with the Commission.^{34/} The Commission agreed that the request for a stay was untimely and further denied the request for suspension of authorization for low-power testing as without merit.

Accordingly, both the Appeal Board and Commission have previously determined that this aspect of LEA's stay request lacks merit.^{35/} Here

^{32/} See LEA's Motion for Stay of LBP-84-31, Suspension of Low-Power Facility Operating License NPF-27 and/or Prohibition of Low-Power Testing (December 10, 1984). LEA does not acknowledge in its May 20, 1985 supplemental motion that it previously requested a stay of the Second PID.

^{33/} Limerick, supra, ALAB Memorandum and Order (November 23, 1984) (slip op. at 3).

^{34/} As the Commission stated: "The primary basis for this motion is the alleged failure of the environmental review for the Limerick facility to consider design alternatives to mitigate the risk of severe accidents." Limerick, supra, "Order" (February 19, 1985) (slip op. at 2).

^{35/} The issue of design alternatives to mitigate the risk of severe accidents was appealed by LEA. See Brief in Support of Appeal of Limerick Ecology Action, Inc. at 2-10 (October 4, 1984).

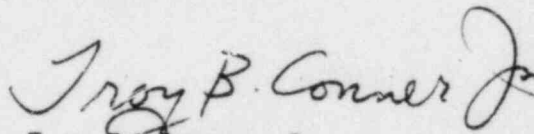
again, LEA's supplemental motion asserts only in the most conclusory fashion that it will be irreparably harmed by a stay and that the health and safety of the public must necessarily outweigh Applicant's interests.^{36/} Such allegations fail to meet the requirements for a stay for the reasons discussed above and in prior briefs opposing LEA's appeal of the Second PID and stay request.^{37/}

Conclusion

For the reasons set forth above, LEA's request for a stay of the Licensing Board's Second and Third PID's should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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

Counsel for the Applicant

May 28, 1985

^{36/} LEA's Supplemental Motion at 4.

^{37/} See Applicant's Brief in Opposition to the Appeals of Limerick Ecology Action, Inc., et al. at 2-19 (December 28, 1984); Applicant's Opposition to Limerick Ecology Action's Motion for Stay (December 24, 1984).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

DOCKETED
USNRC

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

Docket Nos. 50-352⁸⁵ MAY 29 A11:26
50-353

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Brief in Opposition to Request by Limerick Ecology Action for a Stay of the Licensing Board's Second and Third Partial Initial Decisions," dated May 28, 1985 in the captioned matter, have been served upon the following by deposit in the United States mail this 28th day of May, 1985:

Christine N. Kohl, Esq.
Chairman Atomic Safety and
Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

Gary J. Edles
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

Dr. Reginald L. Gotchy
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

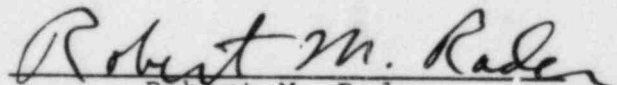
Thomas Gerusky, Director
Bureau of Radiation
Protection
Department of Environmental
Resources
5th Floor, Fulton Bank Bldg.
Third and Locust Streets
Harrisburg, PA 17120

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

Zori G. Ferkin
Commonwealth of Pennsylvania
Governor's Energy Council
P.O. Box 8010
1625 N. Front Street
Harrisburg, PA 17102

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

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


Robert M. Rader