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In the Matter of
Philadelphia Electric Company
Limerick Generating Station
Docket No. 50-352, 50-353 o L

July 11, 1984

Gentlemen,

In order to keep the Board and the parties to this proceeding informed about matters pertaining to the litigation on the installation of sirens and related zoning issues affecting this case, Limerick Ecology Action hereby transmits South Coventry Township's Memorandum in Reply to PEMA's Amicus Curiae Brief Regarding Annex E of the Pa. Disaster Emergency Operations Plan. This matter is still pending before Judge Leonard Sugarman in the Chester County Court of Common Pleas.

Respectfully submitted,

Maureen Mulligan
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IN THE COURT OF COMMON PLEAS
OF CHESTER COUNTY, PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY, : CIVIL ACTION - EQUITY

Plaintiff, :

v. :

SOUTH COVENTRY TOWNSHIP, et al, : NO. 84-01645

Defendants :

DEFENDANTS' MEMORANDUM IN REPLY TO
PEMA'S AMICUS CURIAE BRIEF REGARDING ANNEX E

Pennsylvania Emergency Management Agency ("PEMA") has filed an Amicus Curiae Brief in the above-captioned matter, arguing in support of PECO's position that Annex E (to the Pennsylvania Disaster Operations Plan formulated by PEMA) is not invalid or ineffective even though it has not been filed with the Legislative Reference Bureau pursuant to the Commonwealth Documents Law, 45 P.S. §§1102 - 1208, or published in the Pennsylvania Bulletin or Pennsylvania Code pursuant to the pertinent sections of the Publication Act, 45 Pa. C.S. §§702, 724 and 725.

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In its Brief, PEMA has argued, as it must, that Annex E is not subject to any publication and review requirement, nor even to any filing requirement, because it is neither a rule or regulation which is ineffective for any purpose unless filed with the Legislative Reference Bureau, 45 P.S. §1208, nor a general and permanent "statement of policy" which is required to be published in the Pennsylvania Bulletin and Pennsylvania Code, 45 Pa. C.S. §§702 and 724.

At the same time, PEMA argues that should PECO "fail to comply with a standard crucial to Annex E, PEMA would be obliged to take steps to gain compliance", including, but not limited to notifying the Federal Emergency Management Agency ("FEMA") of the inadequacy of the state's Disaster Operations Plan. (Amicus Curiae Brief, page 11). Presumably, PEMA would likewise take steps to gain compliance against the municipalities and other responsible entities and agencies assigned responsibilities under Annex E. Thus, while PEMA, in its brief, argues that it need not comply with the most basic filing and notice requirements for administrative promulgations in issuing Annex E, PEMA's own statement makes it plain that it would regard Annex E as having the force of law in the event of non-compliance.

In arguing that Annex E is not a rule or regulation, PEMA has characterized the provisions of Annex E as being in the nature of general guidelines rather than binding norms. An examination of Annex E reveals, to the contrary, that its provi-

sions purport to establish requirements and responsibilities for execution of emergency planning, notification and evacuation pursuant to the statutory mandate of the Emergency Management Services Code, 35 Pa. C.S. §7101, et seq. It has already been noted in Defendants' previous Memorandum that the section entitled "Purposes" demonstrates that it is intended to establish certain "requirements" and "procedures". E.g., Annex E, Article IV A, §§A, K and L, pages E-7 and E-8. Instances of such norm-setting emergency management provisions are found throughout Annex E. Indeed, both PEMA and PECO have argued that Section 14 of Appendix E to Annex E, on page E-4-2, places direct responsibility on PECO as operator of a nuclear facility to provide and maintain a siren-alert system within the plume exposure pathway.

In Appendix 7, Article 5, page E-7-3, PEMA delegates its primary notification responsibility to the parent county in the event of a communications breakdown. In Appendix 8, Article 6, page E-8-2, PEMA sets forth minimum design and testing requirements for prompt notification systems, including requirements that the county certify performance of bi-weekly silent tests and quarterly growl tests of the system.

In these design and testing criteria aspects, Annex E is quite similar in nature to FEMA's own standards for review of adequacy of radiological preparedness which FEMA, as the federal counterpart of PEMA, has codified at 44 C.F.R. 350.5. Similar

federal criteria are set forth in the joint NRC and FEMA document discussed in the principal Briefs of the parties and referred to as NUREG-0654-FEMA-REP.1 REV.1. Those federal agencies published this document in January 1980, and subjected it to public comment under Federal Register Notice 44 FR 9768 of February 13, 1980, prior to final publication in November 1980. Recognizing that the standards and criteria set forth in these documents are the agencies' own basis for reviewing and either accepting or rejecting the plans which are prerequisite to the issuance of an operating license, the federal agencies have properly treated these federal promulgations as the quasi-legislative documents that they are, and subjected them to the federal publication and review process required under the federal Administrative Agency Law 5 U.S.C. §551, et seq. The Nuclear Regulatory Commission, as a single agency, has similarly published and codified the planning standards set forth in its promulgation entitled "Emergency Planning and Preparedness for Production and Utilization Facilities" as Appendix E to Part 50 of the Code of Federal Regulations.

PEMA has apparently taken the position that Annex E is intended, in large part, to assign and sub-delegate their emergency management responsibilities to the Commonwealth agencies, municipalities and private entities named therein. This Annex E certainly does, in addition to setting forth more specific requirements and procedures. Nevertheless, this function of

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assigning responsibility is itself a regulatory, quasi-legislative function which goes beyond the mere establishment of guidelines. It must be recognized that the Emergency Services Management Code, which PEMA purports to implement through its disaster operations planning, establishes no more than the bare statutory framework and hierarchy for emergency management in Pennsylvania, leaving very broad discretion in PEMA, as the lead emergency planning agency, to flush out that statutory framework through just such a process of responsibility delegation, procedure-establishment, and standard-setting as PEMA has engaged in in Annex E and the other components of Pennsylvania's Disaster Operations Plan. Because of the large amount of legislative discretion vested by the legislature in PEMA, through the very basic statutory framework of the Emergency Management Services Code, Annex E does purport to represent the law that exists with regard to nuclear response and preparedness in the Commonwealth of Pennsylvania.

The role of PEMA as the governmental agency responsible for assigning the various emergency management responsibilities in Pennsylvania virtually parallels that of FEMA's function as administrator of the federal government's emergency management programs. It is, therefore, quite relevant that the body of federal "Radiological Emergency and Preparedness" regulations which FEMA filed for comment, published and codified in the Federal Code of Regulations at 44 C.F.R. 351, et seq., pursuant

to the federal Administrative Procedure Act, 5 U.S.C. §551, et seq. (1970), includes as its largest subject a set of regulations under the heading "Interagency Assignments", whereunder FEMA assigns and sub-delegates various emergency management responsibilities to other agencies of the federal government.¹

PECO has claimed that the legislative choice of a siren-alert system has been made by PEMA and is evidenced in Paragraph 14 of Appendix 4 to Annex E, and further that the responsibility for installation of such a system has been delegated to it by PEMA in that same paragraph. Clearly, no such decision was made by the legislature in the Emergency Management Services Code itself; and, if PEMA has done so in Annex E, then it has purported to make emergency management law of far reaching public impact, yet has done so without complying with the most basic filing and notice requirements of the Commonwealth Documents Law and the Publication Act.

1 Examples of this type quasi-legislative assignment of responsibilities by PEMA, as Pennsylvania's lead emergency management agency, are found throughout the unfiled and unpublished Annex E and are not limited to merely the prompt notification aspects of nuclear response and preparedness. For instance, in Appendix 13, the State Department of Health is directed to develop and maintain an emergency medical plan, to maintain and notify PEMA of current inventories, and to compile lists of local and backup medical facilities and of statewide ambulance resources available for use in radiological emergencies. Appendix 13, Article IV, Section A(1)(a), (f) and (g). In so doing, PEMA is clearly acting in a quasi-legislative fashion by flushing out the statutory framework of the Emergency Management Services Code with a more comprehensive body of regulations.

PEMA has placed heavy reliance on the case of Pennsylvania Human Relations Commission vs. Norristown School District, 473 Pa. 334, 374 A.2d 671 (1977), a case involving desegregation guidelines promulgated by the Pennsylvania Human Relations Commission. The reasoning of the forceful dissenting opinion by Justice Pomeroy (joined in by Chief Justice Eagan) in that case, must certainly prevail in the instant matter which does not present nearly so close a question. Justice Pomeroy in that opinion, sets forth the basic principles of administrative law which require that an agency, in the exercise of its quasi-legislative power, must strictly be held to the public notice and comment requirements "which facilitate the openness and accountability which should accompany legislative decision-making." Id. at 367, A.2d at 687. In response to the Court's efforts to uphold the desegregation order issued by the Pennsylvania Human Relations Commission in that case, Justice Pomeroy made the following observations, directly applicable in the present case:

I do not conceive it to be the function of a court to strive to release an administrative agency from the requirements of the Commonwealth Documents Law. The salutary purposes of that Act are too easily defeated when we sanction closed-door rule making in the guise of rendering policy guidelines. That this should occur in a case dealing with a subject of crucial importance to the community and where the need for informed and even-handed administrative decision-making is great is, in my view, most unfortunate.

Justice Pomeroy's opinion in Pennsylvania Human Relations Commission vs. Norristown School District becomes quite per-

suasive when the distinctions in the context of that case from the present one are noted. In Pennsylvania Human Relations Commission vs. Norristown School District, the effect of the Court's decision was to uphold a desegregation order issued by the Human Relations Commission on the basis that the Defendant School District was in violation of a specific section of the Pennsylvania Human Relations Act, being a statute administered by the Human Relations Commission. The "guidelines" issued by the Commission were not themselves the basis of the Order, but were merely an administrative tool which assisted the agency in gauging whether that specific statutory mandate had been violated. The context here is much different. PECO has not been ordered to comply with any specific provision of the Pennsylvania Emergency Management Services Code. Indeed, PECO could not be ordered under any existing provision of that Code to install and maintain a siren-alert system, as the only law that exists in that regard is that purportedly promulgated by PEMA itself in Annex E. Rather than being found in violation of some specific mandate of a legislative act, based on an agency's guidelines formulated in administration of that act, PECO is here attempting to justify its own planning and installation of a siren-alert system on the basis that PEMA, as an authorized state agency has, in Annex E itself, directed the establishment of a siren-alert system and PECO's installation of the same.

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That the pertinent provisions of Annex E are administrative regulations, is confirmed by the specific means of enforcement which PEMA regards itself as holding and, most clearly, by the remedies to achieve enforcement which have been created by the Legislature itself in the plain words of the Emergency Management Services Code. That PEMA itself regards Annex E as law is evidenced by its own comments that it would take steps to enforce compliance in the event of PECO's violation of any standards crucial to Annex E. According to PEMA, one of these measures would be to notify FEMA of the inadequacy of the state's Disaster Operations Plan. Presumably, it would take the position that if PECO, after issuance of its license, were to fail to maintain its sirens, it could be ordered to do so by PEMA or to suffer PEMA's recommendation to FEMA that its license be revoked because of the inadequacy of the off-site preparedness plans for Limerick. Yet, under no view of administrative power, would PECO have such an authority to take steps to gain compliance with a mere "guideline" which has been promulgated by an administrative agency but which is not anchored in any specific provision of the enabling statute or in any administrative regulation reporting to implement such statute.

Even more demonstrative of the regulatory nature of Annex E and dispositive of the issue of its inefficacy as a non-filed, non-noticed and non-published administrative promulgation, is the specific remedy for enforcement created by the Legislature

itself - a remedy which PEMA has failed to mention in its brief. Specifically, the Emergency Management Services Code, at 35 Pa. C.S.A. §7707 provides the following:

"Penalties

- (a) General Rule - any person violating any of the plans and programs adopted and promulgated by the Pennsylvania Emergency Management Counsel shall, upon conviction thereof in a summary proceeding the sentence to pay a fine not exceeding \$200.00 or imprisonment not exceeding thirty (30) days or both, for the first offense, and a fine not exceeding \$500.00 or imprisonment not exceeding ninety (90) days or both, for each subsequent offense." (Emphasis added).

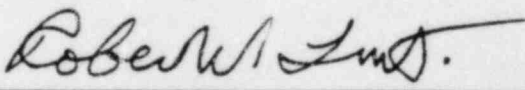
Annex E, PEMA's plan and program for nuclear emergency preparedness and response in Pennsylvania, is an agency-made promulgation, the violation of which will subject the offender to criminal penalties. As such, it must, a fortiori, be regarded as a "rule or regulation" which, in order to be effective for any purpose, must be filed with the Legislative Reference Bureau pursuant to 45 A.S. §1208.

CONCLUSION

The provisions of Annex E, to the extent they establish procedures requirements, requirements and standards of emergency management in Pennsylvania, constitute quasi-legislative promulgations by PEMA in implementation of its broad discretion in the emergency management area in Pennsylvania, pursuant to the mandate of the Emergency Management Services Code. Annex E, to that extent, is very similar to the promulgations by PEMA's

federal counterpart, FEMA, which promulgations have been published and subjected to public comment, and in large part codified, pursuant to the federal Administrative Agency Law. Insofar as Annex E may be regarded as embodying PEMA's decision to establish a siren-alert system as the means of prompt notification system to be employed for nuclear emergency alerts throughout the state of Pennsylvania, as well as PEMA's decision to delegate responsibility for the installation of such a system to the operators of the nuclear facilities, it must be clearly regarded as an exercise of PEMA's quasi-legislative, rule-making power and subject, as such, to the filing, notice and publication requirements of the Commonwealth Documents Law and Publications Act. That the Pennsylvania legislature itself intended Annex E, as PEMA's plan and program for nuclear emergency response, to have the force of law, is made manifest by the provision of the Pennsylvania Emergency Management Services Code imposing criminal penalties for its violation. Being the product of purported rule-making, Annex E is not effective for any purpose as it has not been filed with the Legislative Reference Bureau pursuant to 45 P.S. §1208.

Respectfully Submitted,

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