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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
Units 1 and 2)

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

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION
AND RESPONSE TO ORDER INVITING ANSWERS TO THE NRC STAFF'S
MOTION FOR RECONSIDERATION AND REQUIRING NRC STAFF AND FEMA BRIEF

I. VIEWS OF FEMA

INTRODUCTION

On August 15, 1984 the Atomic Safety and Licensing Board (Licensing Board or Board) issued an "Order Establishing Schedule for Offsite Emergency Planning Issues" in the captioned matter. The Licensing Board directed that the participating parties shall receive "by expedited means, the report on the Limerick exercise by the FEMA regional office, estimated to be issued on or about September 1, 1984." The NRC staff (Staff) moved the Licensing Board to reconsider that part of its Order on August 23, 1984.

At a meeting of the parties held in Philadelphia on August 29, 1984, counsel for the NRC staff reported on further discussions NRC counsel had held with the chairman of the Licensing Board to determine whether it would be possible for FEMA to release at least a portion of the draft report. NRC counsel's statements led FEMA to believe that a further informal communication to the Board might prove helpful to the expedition

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of the proceeding. This belief led FEMA's General Counsel to send a letter dated September 5, 1984, to the Board Chairman further elaborating on that agency's views as to the potential problems the Board's August 15, 1984 order would pose for that agency. This letter was distributed to the Board and all parties.

On September 6, 1984, the Board ordered the NRC staff and FEMA to file a joint brief in support of the NRC staff's August 23, 1984 motion for reconsideration.

DISCUSSION

The Board has placed FEMA in the anomalous position of defending against the production of a document (the Region III draft report on the July 1984 Limerick Exercise) which does not yet exist, pursuant to a sua sponte order of the Board (no party has requested the production of this document). The situation is unique in our experience and any analogy that may be made to another specific case will necessarily be of limited usefulness.

The Nature of the Draft Regional Report

Following an exercise, individual observers produce reports on the response activities they have observed during the course of the exercise. These reports are collated and synthesized, and form the basis of a draft regional report of exercise. The draft report is then reviewed by the Regional Assistance Committee (RAC). The draft regional report is then forwarded to Washington for review at FEMA's national office. The national

office staff review seeks to insure that the report reflects FEMA policy and is consistent with national standards. Following the national office review the report may be returned to the region for further work, or, if found to be satisfactory, the report will be approved by the responsible senior FEMA official and forwarded to the NRC staff, pursuant to the Memorandum of Understanding between the two agencies. It is at this point that the report of the exercise takes on the legal status of a FEMA interim finding. It is this finding and the report, which forms its basis, that becomes the subject of licensing litigation and that may give rise to an evidentiary presumption as to the state of offsite preparedness.

The Relevance of the Shoreham Appeal Board Decision

The Atomic Safety and Licensing Appeal Board (Appeal Board) decision involving the production of emergency plan review related materials in Shoreham^{1/} turned on whether there had been a legally sufficient invocation of executive privilege. In the present instance, executive privilege is not now an issue. Before the privilege can be invoked, it is necessary for the responsible agency head to examine the documents for which the protection of the privilege is sought, and, based on his evaluation, make a determination that such protection is appropriate. There is nothing for the head of FEMA to pass judgment on at this time, nor will there be until the Region III draft report becomes available. It is not even

^{1/} Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 20 NRC _____ Slip op. (June 13, 1984).

possible to state that FEMA has precedent for invoking the privilege as to this class of document, because such protection has never been necessary.^{2/} As stated in its September 6, 1984 letter, FEMA has never released draft regional reports, nor has it been asked to release such drafts.^{3/}

It is the FEMA position that if, after examination, the Director of FEMA should determine that invocation of executive privilege to protect the Region III draft is appropriate, and that the privilege is then properly invoked, the analytical approach adopted by the Appeal Board in its June 13, 1984 decision would apply to the instant case.

In particular, the balancing test applied by the Appeals Board in Shoreham (Slip op at 13, et seq.) would apply here.

^{2/} Without anticipating or foreclosing the judgment of the Director of FEMA, counsel for FEMA can inform the Board that it anticipates it may well recommend to the Director that executive privilege be invoked in case the Agency is ordered to produce the Region III draft exercise report, based on its experience with this class of material.

^{3/} The RAC Final Report mentioned in the Shoreham decision (ALAB-773, Slip op. at 6) was in fact a fully cleared report, reviewed by the FEMA national office and forwarded to the IIRC staff by the responsible senior FEMA official pursuant to the MOU. It was not in any sense a draft regional report. The term RAC final review is a colloquial term. The information contained in draft reports is sometimes made available to State emergency preparedness agencies to insure that necessary remedial actions are begun immediately even though a final determination may not have been made. This is particularly true in the case of operating fixed nuclear generating facilities. In the case of Limerick, which involves an NTCOL situation, the contents of the report will not be made available to the State prior to national office review. We have been advised by the Office of the General Counsel, Commonwealth of Pennsylvania, that the Commonwealth concurs in FEMA's position that the regional report not be released prior to the review of FEMA's Headquarters.

The Balancing Test In Shoreham Applied In The Instant Case

The draft report should be a candid document expressing the unchilled views of the region. It is a predecisional document subject to a final review at the national level. While the document in the instant case is not the same class of document that was the subject of the Appeal Board action in Shoreham, it is nevertheless a document to which most, if not all, the same considerations of protection should apply.

To subject this raw document to external scrutiny would have an adverse affect on FEMA's ability to make an effective review of plan and exercise reports for offsite safety at nuclear power plants nationwide.

No party to this case has sought these materials or claimed an overriding need for their production. Further, it is FEMA's intention to provide a panel of witnesses who will be able and willing to give a full account of how the final report on the July 1984 Limerick exercise was developed. These witnesses will be available to the Board and the parties for whatever cross-examination they may require on this issue.

CONCLUSION

Given the nature of the documents, and the probability of a legally sufficient claim of executive privilege, balanced against the lack of proffered need by the parties and the stated availability of alternative means to obtain information as to the development of the FEMA finding and report of the July 1984 exercise, the Board should not order the production of the Region III draft report.

II. VIEWS OF THE NRC STAFF

As discussed above, to date no party has requested a copy of FEMA's draft regional report on the emergency planning exercise at the Limerick facility, and indeed, it is the Staff's understanding that at present the document does not exist. Moreover, as FEMA has indicated, because of the absence of this document, no decision has been made by the Director of FEMA^{4/} as to whether he will assert a formal claim of "executive" or "deliberative process" privilege as to the production of such a document.^{5/}

However, when the FEMA regional report is prepared and if the Director of FEMA asserts a formal claim of privilege as to the production of that document, the law regarding the propriety of such a claim and the role of the Board in resolving such an assertion of privilege is clearly set forth in the Appeal Board's recent decision in the Shoreham proceeding.^{6/}

The propriety of the executive or deliberative process privilege has long been recognized by this agency.^{7/} However, as the Appeal Board observed in Shoreham, "[i]t is a qualified privilegewhich can be

^{4/} See page 3, supra.

^{5/} Neither the Staff's motion of August 23, 1984 nor the September 5, 1984 letter from FEMA General Counsel to the Board purport to assert such a claim of privilege.

^{6/} Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 20 NRC _____, Slip op 9-18 (June 13, 1984).

^{7/} Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units No. 1 and 2), ALAB-33, 4 AEC 701 (1971).

overcome by an appropriate showing of need." ALAB-773, supra, Slip op at 10. Thus here, as in Shoreham, "[a] balancing test must be applied to determine whether a litigant's demonstrated need for the documents outweighs the asserted interest in confidentiality" expressed by FEMA. Id.

In the present proceeding any claim of privilege asserted by FEMA would, of course, be the claim of that agency and not the claim of the NRC - notwithstanding the very close relationship which exists between the two agencies.^{8/} And FEMA, as the proponent of any such claim of privilege, must bear the burden of demonstrating that the privilege has been properly invoked. ALAB-773 supra., Slip op. at 10-11. However, once it has been determined that the claim has been properly invoked, this Board should, in striking a balance between the concerns expressed by FEMA and the perceived need - yet to be expressed - of any of the parties for the document in question, give a high degree of deference to the concerns and views of this independent federal agency. As the Appeal Board observed in considering the claim of privilege asserted by FEMA in the Shoreham proceeding, "Given the existence of the collaborative arrangement between the NRC and FEMA - which presumes due regard for the other agency's responsibilities - and FEMA's independent role with regard to offsite nuclear emergency planning and response, we believe [FEMA's] judgment is entitled to a high degree of deference." Id. at 22.

^{8/} See, Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness. 45 Fed. Reg. 82, 713 (1980).

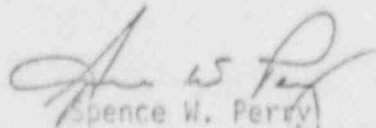
Similarly, this Board should weigh heavily, as did the Appeal Board in Shoreham, the fact that FEMA will be making witnesses available in this proceeding who can "give a full account of how the final report on the July 1984 Limerick exercise was developed." See page 5 supra.

Finally, the Staff is told that FEMA's interim findings regarding the Limerick facility will be released in early October, 1984. Should this release date occur as promptly as scheduled, this would satisfy a claim of need for the production of the draft regional report.

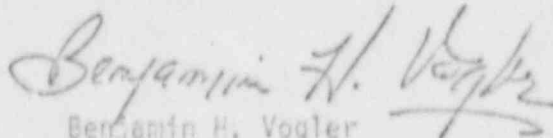
CONCLUSION

In view of the foregoing, the NRC staff submits that the Licensing Board should grant the Staff's Motion for Reconsideration as filed on August 23, 1984.

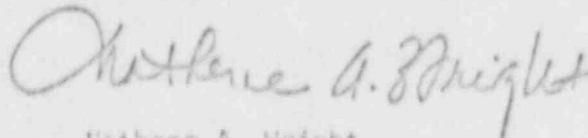
Respectfully submitted,



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Dated at Bethesda, Maryland
this 13th day of September, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND RESPONSE TO ORDER INVITING ANSWERS TO THE NRC STAFF'S MOTION FOR RECONSIDERATION AND REQUIRING NRC STAFF AND FEMA BRIEF" 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 13th day of September, 1984:

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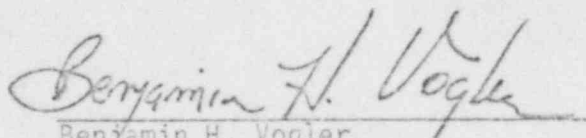
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