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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of  
  
PHILADELPHIA ELECTRIC COMPANY  
  
(Limerick Generating Station,  
Units 1 and 2)

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Docket Nos. 50-352  
50-353

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)

I. INTRODUCTION

On February 7, 1985, Philadelphia Electric Company (Applicant) filed with the Licensing Board, pursuant to 10 C.F.R. § 50.12, a motion 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). For the reasons discussed below, the NRC staff submits that the granting of such relief is premature at this time.

II. BACKGROUND

By a petition dated September 18, 1981, the Philadelphia Chapter of the National Lawyers' Guild (Guild) sought to intervene in this proceeding on behalf of certain inmates at the Graterford prison (designated "Graterford Prisoners"). In response to an Order by the Board dated October 14, 1981, the Guild filed a Supplemental Memorandum in support of

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its petition to intervene. In its Special Prehearing Conference Order of June 1, 1982, the Licensing Board admitted the Graterford Prisoners as a party to this proceeding. <sup>1/</sup> On April 20, 1984, the Board issued a special prehearing conference order in which it acknowledged that the Graterford Prisoners were unable to present contentions during the prehearing conference since they had not had available to them the separate emergency plan for the SCIG. <sup>2/</sup> Accordingly, the Board granted the Graterford Prisoners twenty days from the time they receive the plan to submit any contentions based upon the plan. <sup>3/</sup>

On December 13, 1984, the Commonwealth provided to the Graterford Prisoners' counsel a "sanitized" copy of the Pennsylvania Bureau of Correction Radiological Emergency Response Plan for the Graterford prison, which had certain information deleted for security reasons. On December 19, 1984, the Graterford Prisoners filed a motion <sup>4/</sup> requesting the Licensing Board to require full disclosure of the evacuation plan for the State Correctional Institution at Graterford, Pennsylvania, alleging that the "sanitized" version provided to them by the Commonwealth of Pennsylvania

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<sup>1/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1442-47 (1982).

<sup>2/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1029-30 (1984).

<sup>3/</sup> Id. at 1030.

<sup>4/</sup> Motion for Order Requiring Full Disclosure by Pennsylvania Emergency Management Agency of the Evacuation Plan for State Correctional Institute at Graterford (December 20, 1984).

did not provide sufficient information to allow them to form a judgment concerning the adequacy of the plan and to propose contentions concerning the plan for litigation in the Limerick offsite emergency planning hearings. The Applicant, the Commonwealth and the NRC staff filed responses generally opposing full disclosure, except that the Staff indicated that the Licensing Board should require the Graterford Prisoners to specify the information needed, based on expert opinion, beyond that provided in the "sanitized" version as a pre-condition to compelling further disclosure. <sup>5/</sup> The Graterford Prisoners filed a supplemental motion, indicating that their expert required full disclosure in order to make a judgment regarding the viability of the plan. <sup>6/</sup> On January 29, 1985, the Licensing Board heard oral argument on the Graterford Prisoners' motion for full disclosure of the SCIG plan and examined Mr. Erskind DeRamus, the Commonwealth's Deputy Commissioner of Corrections regarding the matter. The Board then orally denied the Graterford Prisoners' motion for full disclosure of the plan and permitted them 20 days in which to file contentions based on the

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<sup>5/</sup> Applicant's Response to Graterford Inmates Motion for an Order Requiring Full Disclosure by PEMA on the Evacuation Plan for the State Correctional Institute At Graterford (December 28, 1984); Response of the Commonwealth of Pennsylvania to Graterford Inmates' December 20, 1984 Motion for Full Disclosure of Graterford RERP and Request for Additional Time to File Memorandum in Support of Said Response (December 31, 1984); Memorandum in Support of Response of the Commonwealth of Pennsylvania to Graterford Inmates' December 20, 1984 Motion (January 18, 1985); [NRC Staff] Answer to Motion of the Inmates of the State Correctional Institute at Graterford for Full Disclosure of the Evacuation Plan for State Correctional Institute at Graterford (January 2, 1985).

<sup>6/</sup> Supplemental Motion Of The Inmates At SCIG Regarding Full Disclosure Of The Evacuation Plan For SCIG (January 28, 1985).

"sanitized" version of the plan. Tr. 20,479-81. It also denied Graterford Prisoners' motion for a stay of the Board's decision denying the motion pending appeal. Tr. 20,842. On February 5, 1985, the Licensing Board issued a "Memorandum and Order Regarding Graterford Prison," in which the Licensing Board confirmed the order it read from the bench on January 29, 1985. The Licensing Board denied the motion for full disclosure citing, among other things, the Graterford Prisoners' failure to specify the information needed. Memorandum and Order at 1. Consequently, the Licensing Board ruled that the Graterford Prisoners' should proceed to file their contentions on the "sanitized" plan. Id. at 3.

On February 8, 1985, the Graterford Prisoners' filed a "Notice of Appeal" <sup>7/</sup>, which was dismissed without prejudice by the Appeal Board on February 12, 1985. The Appeal Board indicated that at the time the Graterford Prisoners sought review by the Appeal Board they had neither exhausted their options before the Licensing Board nor yet filed their contentions. Memorandum and Order at 2. While declining to direct certification of the Licensing Board's ruling denying full disclosure, the Appeal Board provided guidance to the Licensing Board and parties regarding the desirability of finding a middle ground to accommodate the competing interests at stake. Id. at 3. The Appeal Board directed the Licensing Board's attention to NRC decisions regarding the use of protective orders to protect discoverable yet sensitive information. Id. The

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<sup>7/</sup> Although the Inmates styled their filing before the Appeal Board a "Notice of Appeal," the Appeal Board construed it as a motion for directed certification pursuant to 10 C.F.R. § 2.718(i).

Licensing Board implemented the Appeal Board's guidance by issuing an order noticing a "conference on full disclosure" of the emergency plan for the Graterford Facility for February 27, 1985. <sup>8/</sup> The in camera conference noticed by that order has taken place as scheduled and another in camera conference is scheduled for March 22, 1985 to discuss the progress that has been made with regard to resolving that dispute.

On February 15, 1985, the Graterford Prisoners filed contentions based on the "sanitized" plan and on February 21, 1985, they filed a petition for Commission review of the Appeal Board's February 12, 1985 Memorandum and Order. On March 8, 1985, the NRC staff and the Applicant filed answers, which opposed the Graterford Prisoners' petition for Commission review. <sup>9/</sup>

Pursuant to 10 C.F.R. § 50.12, the Applicant filed the subject motion with the Board seeking an exemption from the Commission's emergency planning requirements of 10 C.F.R. § 50.47(a) and (b). <sup>10/</sup> On February 8, 1985, the Licensing Board issued an order setting March 18, 1985 as the reply

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<sup>8/</sup> Memorandum and Order (Conference on Full Disclosure of Evacuation Plan for the Graterford Maximum Security Facility) (February 19, 1985).

<sup>9/</sup> NRC Staff's Answer In Opposition To Intervenor Graterford Inmates' Petition For Review Of Appeal Board Order Dismissing Petition For Directed Certification (March 8, 1985); Applicant's Answer To Graterford Prisoners' Petition For Review (March 8, 1985).

<sup>10/</sup> 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 And Licensing Board Consideration Of Evacuation Provisions Of the Emergency Plan For The State Correctional Institution Of Graterford (February 7, 1985).



date for a party to file an answer in support of or in opposition to the Applicant's motion. 11/

### III. DISCUSSION

In accordance with 10 C.F.R. § 50.12(a), the Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest. See, 10 C.F.R. § 50.12(a). Where there is an existing proceeding before a licensing board and an applicant, pursuant to Section 50.12, applies for an exemption from a health and safety standard that is related to matters being considered by the Board, the Commission has suggested that a proper procedural course to follow is for the Applicant to submit such an application to the presiding Atomic Safety and Licensing Board as was done here. 12/ More important, however, the Commission clearly views the use of the exemption authority under 10 C.F.R. § 50.12 as extraordinary. 13/ Viewed in this context, the Staff submits that the current posture of this case

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11/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order Setting Reply Date 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 Institutional Of Graterford (slip op. at 2) (February 8, 1985).

12/ See, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1155 (1984).

13/ Id. at 1156 n.3.

regarding the Graterford matter is such that it would be premature for the Licensing Board to determine whether to exercise the use of such authority since subsequent events could nullify the reason for requesting the exemption. The principle is well established that, apart from matters raised by a board under its sua sponte authority, the Licensing Board's authority is limited to deciding only those issues in controversy in a contested operating licensing proceeding. 10 C.F.R. §§ 2.104(c) and 2.760a; 10 C.F.R. Part 2, Appendix A, Section VIII; Cincinnati Gas & Electric Company, et al. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 768 n.12 (1983); Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-84-41, 20 NRC 1203, 1217 (1984); Virginia Electric And Power Company (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127, 1132 (1977). In this case, the Licensing Board has not yet determined, as the Applicant acknowledges <sup>14/</sup>, that the Graterford Prisoners have filed at least one admissible contention. While the Graterford Prisoners have filed proposed contentions <sup>15/</sup>, the other parties have not yet responded. Moreover, as noted earlier, the Appeal Board has provided guidance to the Licensing Board and parties concerning the desirability of reaching a middle ground to accommodate the competing interests concerning further disclosure of the SCIG plan. Memorandum and Order at 3. In implementing that guidance, the Licensing

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<sup>14/</sup> Motion at 3; See also Applicant's Answer To Graterford Prisoners' Petition For Review at 5 (March 8, 1985).

<sup>15/</sup> Proposed Contentions Of The Graterford Inmates With Regard To The Evacuation Plan (February 15, 1985).

Board issued a memorandum and order noticing a "conference on full disclosure" of the emergency plan for the Graterford Facility for February 27, 1985. <sup>16/</sup> The in camera conference scheduled by that memorandum and order has taken place and another in camera conference is scheduled for March 22, 1985 to discuss the progress that has been made for resolving that dispute. Consequently, subsequent events could result either in withdrawal of the Graterford Prisoners' contentions or a Board decision that the Graterford Prisoners' have not proffered an admissible contention. The occurrence of either one of these distinct possibilities would mean that there are no issues in controversy for the Licensing Board to decide. In that event, the substantive findings in this matter should be made by the NRC staff rather than by the Licensing Board. cf. Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-85-01, slip op. at 5-6, (February 12, 1985); Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-84-41, 20 NRC 1203, 1217 (1984).

Pursuant to the Presidential Executive Order of December 7, 1979, the Federal Emergency Management Agency ("FEMA") is to assume lead responsibility for all offsite emergency planning for fixed nuclear facilities. <sup>17/</sup> Under the Commission's emergency planning regulations, issuance of an operating license for a nuclear power reactor requires that the NRC find that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. 10 C.F.R.

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<sup>16/</sup> Memorandum and Order (Conference on Full Disclosure of Evacuation Plan for the Graterford Maximum Security Facility) at 1.

<sup>17/</sup> 45 Fed. Reg. 82713-14 (December 16, 1980).



§ 50.47(a)(1). With respect to the adequacy of offsite emergency planning, the NRC must base its findings on a review of the FEMA findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented.

10 C.F.R. § 50.47(a)(2). Thus, FEMA has been given a significant role in the context of the regulatory regime for emergency planning established by the Commission. While the emergency plan for SCIG has been completed and reviewed by the Pennsylvania Emergency Management Agency ("PEMA") as noted by the Applicant, the Staff observes that there is no indication of record that FEMA has either reviewed or evaluated that plan. Tr. 20,472-73. This circumstance is yet another important reason as to why in our view it would be premature for the Licensing Board to decide whether to use the "extraordinary" exemption authority contained in 10 C.F.R. § 50.12.

Accordingly, based on the foregoing reasons, the Staff submits that the current posture of this case is such that it would be inappropriate at this time for the Licensing Board to consider the use of the exemption authority under 10 C.F.R. § 50.12. As a consequence, we do not reach, nor is it necessary for the Board to reach, the question of the proper standard or test to apply (see Motion at 5-7) for granting exemptions pursuant to 10 C.F.R. § 50.12.

Although the Staff has urged above that the Applicant's motion is not ripe for Licensing Board consideration, the Staff, nevertheless, would

bring to the Board's attention several other observations with regard to Applicant's motion. <sup>18/</sup> The Applicant states:

While this matter is being considered [litigation of Graterford contentions found admissible], for the reasons discussed below, which establish that no exposure of the Graterford Prisoners could result from any event at Limerick except a core melt accident, in which any significant exposure is of the lowest probability, an exemption from the Commission's regulations to authorize full power operation is warranted. Motion at 5.

The import of this statement is that because the risk of exposure to the Graterford Prisoners is allegedly of the lowest probability an exemption from the Commission's emergency planning regulations is warranted. The Staff does not subscribe to such a proposition since the Commission explicitly took into account design basis and core melt accidents with their associated probabilities and consequences in promulgating the emergency planning regulations, requiring offsite plans for protective measures out to about 10 miles. See, Planning Basis For Emergency Responses to Nuclear Power Reactor Accidents, 44 Fed. Reg. 61123 (October 26, 1979); 10 C.F.R. Part 50, Emergency Planning, 44 Fed. Reg. 75168 (December 19, 1979). Furthermore, bottom-line figures from probabilistic risk assessments (PRAs) are not to be used alone for making safety findings in licensing proceedings. See Policy Statement on Safety Goals for the Operation of Nuclear Power

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<sup>18/</sup> The Staff notes that the Applicant states that the methodology and assumptions of the PRA were extensively litigated during a prior phase of this proceeding. Motion at 11-12. In this case, it is clear that the methodology was not extensively litigated since the Licensing Board held, in ruling on proposed contentions addressing the use of the PRA in regard to safety considerations, that the choice of methodology used in developing the PRA would not be litigated. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 72-73 (1983).

Plants, 48 Fed. Reg. 10772, 10775 (March 14, 1983); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 73 (1983).

In the statement of considerations accompanying the proposed emergency planning regulations, the Commission stated:

Both the Commission and EPA have formally endorsed the concepts in that EPA/NRC Report [NUREG-0396, EPA-520/1-78-016, 'Planning Basis For the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants']. . . . 44 Fed. Reg. 75168 (December 19, 1979).

Furthermore, in formally endorsing NUREG-0396 as the planning basis for emergency responses to nuclear power reactor accidents, the Commission stated:

NRC concurs in and endorses for use the guidance contained in the task force report [NUREG-0396]. In endorsing this guidance, the Commission recognizes that it is appropriate and prudent for emergency planning guidance to take into consideration the principal characteristics (such as nuclides released and distances likely to be involved) of a spectrum of design basis and core melt accidents. [emphasis supplied] 44 Fed. Reg. 61123 (October 23, 1979).

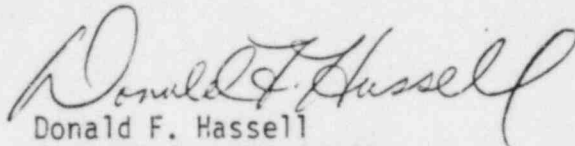
NUREG-0396 makes explicitly clear that core melt accidents and their associated risk of exposure were reviewed and considered in developing the planning basis for emergency response plans. NUREG-0396, EPA-520/1-78-016, Planning Basis For The Development of State And Local Government Radiological Emergency Response Plans In Support Of Light Water Nuclear Power Plants, at pp. 5-6 and Appendix I (December 1978). Thus the fact that the risk of exposure to persons within the 10 mile plume exposure emergency planning zone from a core melt accident may be low was considered by the

Commission <sup>19/</sup>; nonetheless, it imposed the emergency planning requirements from which the Applicant now seeks an exemption. Hence, Applicant's position that an exemption from the emergency planning regulations (§§ 50.47(a) and (b)) is warranted because the likelihood of significant exposure to the Graterford Prisoners is allegedly very low is not justified.

#### IV. CONCLUSION

For the foregoing reasons, the Staff submits that it would be inappropriate at this time for the Licensing Board to consider the Applicant's motion for an exemption from the requirements of 10 C.F.R. §§ 50.47(a) and (b).

Respectfully submitted,

  
Donald F. Hassell  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 18th day of March, 1985

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<sup>19/</sup> See, Id. at pp. I-4 through I-12, I-26 through I-52.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "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)" 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, this 18th day of March, 1985:

Helen F. Hoyt, Chairperson (2)  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

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

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

Troy B. Conner, Jr., Esq.  
Mark J. Wetterhahn, Esq.  
Conner and Wetterhahn  
1747 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Dr. Jerry Harbour  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Mr. Marvin I. Lewis  
6504 Bradford Terrace  
Philadelphia, PA 19149

Mr. Frank R. Romano  
Air and Water Pollution Patrol  
61 Forest Avenue  
Ambler, PA 19002

Joseph H. White, III  
15 Ardmore Avenue  
Ardmore, PA 19003

Ms. Phyllis Zitzer, President  
Ms. Maureen Mulligan  
Limerick Ecology Action  
762 Queen Street  
Pottstown, PA 19464

Martha W. Bush, Esq.  
Kathryn S. Lewis, Esq.  
1500 Municipal Services Bldg.  
15th and JFK Blvd.  
Philadelphia, PA 19107



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

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

Robert L. Anthony  
Friends of the Earth of the  
Delaware Valley  
103 Vernon Lane, Box 186  
Moylan, PA 19065

Angus R. Love, Esq.  
Montgomery County Legal Aid  
107 East Main Street  
Norristown, PA 19401

Charles W. Elliott, Esq.  
Brose & Poswistilo  
325 N. 10 Street  
Easton, PA 18042

David Wersan  
Consumer Advocate  
Office of Attorney General  
1425 Strawberry Square  
Harrisburg, PA 17120

Jay Gutierrez  
Regional Counsel  
USNRC, Region I  
631 Park Avenue  
King of Prussia, PA 19406

Steven P. Hershey, Esq.  
Community Legal Services, Inc.  
5219 Chestnut Street  
Philadelphia, PA 19139

Zori G. Ferkin  
Governor's Energy Council  
P.O. Box 8010  
1625 N. Front Street  
Harrisburg, PA 17105

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

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

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

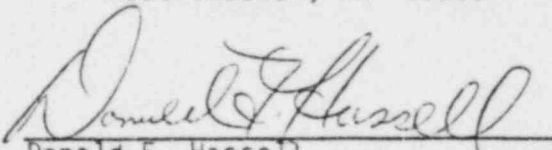
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U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

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Board Panel  
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\*

Gregory Minor  
MHB Technical Associates  
1723 Hamilton Avenue  
San Jose, CA 95125

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

  
Donald F. Hassell  
Counsel for NRC Staff