UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

4/23/79

In the Matter of	)	
	)	
Public Service Electric & Gas Company, et al.	)	Docket No. 50-272 (Proposed Issuance of Amendment to Facility Operating License No. DPR-70)
	)	
(Salem Nuclear Generating Station, Unit 1)	)	

LICENSEE'S OBJECTIONS TO INTERVENORS' PROFFERRED TESTIMONY

Introduction

By letter dated April 11, 1979, the Public Advocate of New Jersey, counsel for Mr. and Mrs. Alfred C. Coleman, submitted its proposed testimony in the captioned proceeding which consisted of a letter and attachments from Robert M. Crockett, Vice President Fuel Supply, Public Service Electric and Gas Company, (PSE&G) to the U.S. Department of Energy. In addition, the Public Advocate's letter indicated that the Colemans would seek to "introduce all relevant PSE&G documents pertaining to the operations of Salem One which have been filed with the Nuclear Regulatory Commission and placed in the Public Document Room." Furthermore, the letter raised another procedural matter which is addressed below. On April 10, 1979, Counsel for Lower Alloways Creek Township (LACT) submitted the testimony of George Luchak, Ph.D. with respect to contention 1.

As discussed below, Licensee Public Service Electric & Gas Company, et al. objects to the proposed testimony of the Colemans and LACT.

Testimony Offered by the Colemans

The Atomic Safety and Licensing Board has informed the parties that, inter alia, that portion of the Licensee's Motion for Summary Judgment pertaining to the Colemans' Contention 9 which related to consideration of alternatives to the proposed expansion of the capacity of the Salem Unit 1 spent fuel pool has been granted. If the Crockett letter is relevant to any issue in the proceeding it would have been to dismissed Contention 9. It cannot be disputed that an intervenor is prohibited from introducing direct evidence on an issue for which he has no contention. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 869, n. 17 (1974). Therefore, the Colemans are prohibited from introducing the Crocket letter into evidence.

Moreover, the Crocket letter speaks to matters which are entirely beyond the scope of issues in this proceeding, including the ultimate disposal of spent fuel elements and cost data.[1/] Moreover, it relates to facilities other than Salem Unit 1. The letter has no probative value even with regard to alternatives in that it only represents the opinions of PSE&G of what Department of Energy policies should be and does not represent DOE policy or the existence of an unreviewed alternative to the expansion of the Salem Unit 1 spent fuel pool capacity.

1/ The Licensing Board has also indicated that it has granted summary disposition with regard to the Colemans' Contention 13, the only contention whose reach could extend beyond Unit 1.

The attachment to the Crockett letter addresses seven questions. For convenience, the Licensee will address the content of each of the responses with regard to its objections. Question 1 speaks to fuel assemblies discharged by calendar year for the Salem and Hope Creek Stations. Question 2 provides a table showing spent fuel cooled at least five years. As each of these responses relates to facilities other than Salem Unit 1, it is beyond the scope of the issues in the proceeding. As to Unit 1, the schedule for discharge into the fuel pool is beyond the scope of the contested issues, i.e., the rate of discharge into the fuel pool is unchanged by the proposed action and no party has challenged the discharge rate stated in the Application.

Questions 3 and 4 present PSE&G's views as to design and economic criteria and policy considerations related to a retrievable geologic repository for spent fuel. In addition, it speaks to the capacity of spent fuel pools on Artificial Island, other than Salem Unit 1. As discussed previously, only the Salem Unit 1 spent fuel pool is at issue and the capacity of the spent fuel pool is not a contested matter. Nothing in these two responses speaks to the Colemans' Contention 2 and 6 related to deterioration of the neutron absorption material or fuel pool rack structure or even to LACT Contention 1 as to the existence of a viable alternative to the proposed action.

Similarly, responses to Questions 5, 6 and 7 relate to PSE&G's views as to fee structures, charges and design criteria and legal relationships for interim offsite storage and geological repository storage. These responses are beyond the scope of any issue in this proceeding.

The summary comments contained in the cover letter have the same shortcomings as do the detailed comments previously discussed. Therefore, Licensee objects to the introduction of the Crockett letter and attachments thereto into evidence.

Licensee also objects to the introduction of "all relevant P.S.E.&G. Co. documents pertaining to the operations of Salem One which have been filed with the Nuclear Regulatory Commission and placed in the Public Document Room." Such a general proffer fails to meet the Licensing Board's requirements with regard to the specific identification of direct testimony and completely frustrates other counsel's preparation for the hearing. It is entirely unfair and contrary to the letter and spirit of all the Board orders in this proceeding regarding discovery and pretrial preparation to require counsel to sift through a large number of documents in an attempt to anticipate what course the Public Advocate will decide to take. The only documents even generally identified as being reviewed by the Public Advocate are those "detailing problems with the boron concentrations of the primary reactor cooling water." There is insufficient information given to determine the materiality and

probative value of these reports with regard to the matter at issue in this proceeding, the expansion of the capacity spent fuel pools. The system regulating the boron concentration of the primary reactor cooling water is separate from any aspect of the spent fuel pool or its auxilliary systems. No relationship has been shown between any of the reports and the spent fuel pool. In fact, as the Colemans must concede, inasmuch as all criticality calculations for the expanded spent fuel pool racks were made assuming no boron poison in the fuel pool water whatsoever, i.e., only demineralized water is assumed to be present,[2] the reports are irrelevant to the proceeding and should not be admitted.

In his April 11, 1973 letter, the Public Advocate objects to the proposed use of a witness panel by the Licensee in this proceeding. Licensee submits that this objection has no merit. Witness panels such as the one proposed by the Licensee have been used in any number of NRC proceedings with sound justification. Due to the complexity and scope of the issues in NRC proceedings, no one can possess the variety of skills and experience to permit him to endorse and to explain the entire testimony. The Atomic Safety and Licensing Appeal Board has recognized the use of the witness panel approach.[3] The issues

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2/ Description and Safety Analysis, Spent Fuel Storage Rack Replacement, Revision 1 dated February 14, 1978 at 18.

3/ Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 569 (1977).

involved in this proceeding are such that they require the opinions of expert witnesses on technical subjects and not the credibility of witnesses on essentially factual matters. Moreover, essentially all testimony is in written form submitted in advance and all potential witnesses as well as all parties know in advance the basic position of the parties. The Public Advocate advances the argument that "the reliance upon group consultations contains an inherent risk for group responses for which no one person accepts personal responsibility." This argument has no merit. Each of the panel members is under oath and the individual responding to the question has "the responsibility" for his response." In the circumstances of this proceeding the proposed witness panel approach has overriding benefits and should be permitted.

Testimony Offered by LACT

LACT has profferred the testimony of George Luchak, Ph.D. with regard to the consideration of alternatives to the proposed fuel pool expansion. As discussed below, Licensee objects to such testimony. Initially, Dr. Luchak has not demonstrated expertise with regard to the design of commercial nuclear power plants, in general, or of the Salem Station, in particular, to be able to sponsor evidence related to such design or accident situations or to speak to the alternative of an independent spent fuel storage installation.

To the extent the testimony deals with units other than Salem Unit 1, it goes beyond the issues in this proceeding and should be stricken.[4/] Thus, the last sentence in paragraph 2 and the reference to Salem Unit 2 in paragraph 3 line 4, continuing to page 3 should be stricken. As the first paragraph on page 5 speaks to the probability of accidents at facilities on Artificial Island other than Salem Unit 1, it should be stricken.

Without addressing the correctness of the statements regarding costs of an ISFSI, where these costs are admittedly higher than the cost of proposed action, they have no relevance to the question of the environmental impact of alternatives. Moreover, where there has been no showing of significant environmental impacts relating to the proposed action, there is no requirement for the consideration of alternatives.[5/] In addition, even taking the calculations and statements at face value, there is no showing whatever that this alternative is viable, i.e., an ISFSI would be available to receive fuel from Salem Unit 1 were the pool capacity not expanded. Therefore, no consideration need be given to this theoretical exercise. As a result, the testimony from page 2, paragraph 1 through line 2, page 4 and page 7, paragraph 1 through page 8

4/ Hereinafter, Licensee will refer to the testimony by page, paragraph and line within that paragraph.

5/ Portland General Electric Co. (Trojan Nuclear Power Plant), ALAB-531, 9 NRC ____ slip op. at 2-3 (March 21, 1979).

paragraph 1 should be stricken.

The testimony appearing at page 4, paragraph 1 through page 5, line 4 and page 8, paragraph 2, lines 1-6, deal with policy questions related to the permanent disposal of spent fuel. As already recognized by this Board, these issues are beyond its jurisdiction[6/] and such testimony must be stricken.

The testimony at Page 5, paragraph 1 through line 5 page 7, addresses the consequences of so-called "Class 9" accidents. As such, this Board is prohibited from considering this matter. It has always been clear that Class 9 accidents need not be considered by a Licensing Board.[7/] The proposed Annex to 10 C.F.R. Part 50, Appendix D, treats Class 9 accidents as follows:

> [T]he probability of their occurrence is so small that their environmental risk is extremely low . . . . [T]he required high degree of assurance that potential accidents in this class are, and will remain, sufficiently remote in probability that the environmental risk is extremely low. For these reasons, it is not necessary to discuss such events in applicant's Environmental Reports. [Emphasis added.][8/]

6/ Id. at 9. See also Memorandum and Order dated April 26, 1978 at 11-13.

7/ This discussion is without prejudice to a broader exposition in a brief directed towards the propriety of certain of the Board's questions directed to the Staff and Licensees.

8/ This proposed Annex was published in 36 Fed. Reg. 22851 (1971) for comment and provides "interim guidance until such time as the Commission takes further action . . . ."

(Footnote 8/ continued on next page)

As a practical matter, events estimated to be of low probability are excluded from environmental and safety review. See the Commission's Standard Review Plan, NUREG-75/087, Section 2.2.3 (Evaluation of Potential Accidents).

Numerous decisions have sustained the use of this standard as an identifiable line of demarcation beyond which the likelihood of a radiological occurrence is so remote that it can be safely dismissed from further consideration. In Consolidated Edison Co. of New York (Indian Point, Unit No. 2), CLI-72-29, 5 AEC 20 (1972), where the Commission held that, absent demonstrated "special circumstances," there was no need to inquire into measures for the integrity of the pressure vessels for the light-water reactors beyond compliance with the Commission's regulations. A number of appeal boards in subsequent decisions

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8/ continued

Effective August 18, 1974, the procedures implementing NEPA previously set forth in Appendix D were transferred to Part 51. In the Statement of Considerations published in the July 18, 1974 issue of the Federal Register (39 Fed. Reg. 26279), the Commission expressly stated:

> Part 51 does not affect the status of the proposed Annex to Appendix D to Part 50 regarding the discussion of accidents in environmental reports published by the Commission for comment on December 1, 1971. The proposed Annex is still under consideration by the Commission.

Accordingly, the proposed Annex continues to be the operative statement of Commission policy regarding Class 9 accidents.

have relied upon Indian Point to reject a requirement that Class 9 accidents be considered. In Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9 (1978), the Appeal Board determined that the crash of an airline heavier than 200,000 pounds travelling at 200 knots was calculated to "have such a low probability that it does not present a hazard to the public, and therefore the plant need not be designed to withstand its effects."[9] The Appeal Board observed that "if the probability of a plane crash . . . can be shown to be less than 1×10^{-7} (i.e., less than one chance in 10 million) per year, such events are deemed by the Staff to be of sufficiently low likelihood that their effects may be ignored, even though the consequences of such a crash may exceed those specified in 10 C.F.R. Part 100."[10] See also Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-429, 6 NRC 229 (1977).

Moreover, the Commission has always taken the position in court that Class 9 accidents need not be considered. In

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9/ 8 NRC at 25.

10/ Id. at 26 (emphasis supplied). The Appeal Board relied upon an earlier decision in Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 845-846 (1973), which had held that the "rule of reason" under the National Environmental Policy Act does not require consolidation of a Class 9 accident absent some showing of "a reasonable probability of [its] occurrence." 6 AEC at 836.

Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975), the court specifically considered the Commission's position that the record in a licensing proceeding was adequate without including the possibility of a Class 9 accident in the Final Environmental Statement. The Court of Appeals sustained the Commission's non-consideration of Class 9 accidents:

> Because each statement on the environmental impact of a proposed action involves educated predictions rather than certainties, it is entirely proper, and necessary, to consider the probability as well as the consequences of certain occurrences in ascertaining their environmental impact. There is a point at which the probability of an occurrence may be so low as to render it almost totally unworthy of consideration . . . . Recognition of the minimal probability of such an event is not equatable with non-recognition of its consequences.[11]

Other courts have also recognized that an agency may exclude highly speculative or remote probabilities from an environmental impact statement. Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974);[12] NEPA's "rule of reason" was

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11/ 510 F.2d at 799.

12/ Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060, 1067-68 (8th Cir. 1977); Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 552 (9th Cir. 1977); Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 n. 130 (D.C. Cir. 1973); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972); Concerned About Trident v. Rumsfeld, 400 F.Supp. 454 (D.D.C. 1975), aff'd, 555 F.2d 17 (D.C. Cir. 1977); Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F.Supp. 916, 933 (N.D. Miss. 1972), aff'd, 492 F.2d 1123 (5th Cir. 1974).

specificially sustained by the Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978).

Accordingly, the Commission has consistently maintained that Class 9 accidents have such a low probability of occurrence that they need not be considered by a licensing board.[13/] The transcript of the meeting held by the Commission on January 31, 1979, considering the Appeal Board's Offshore Power decision indicates that the Commission would not even go as far as the Appeal Board did in distinguishing the risks of offshore reactors from land-based plants, but would simply note that the Staff had raised certain environmental considerations in its FES that could not be excised or disregarded. As Chairman Hendrie summarized, "the thrust of the Commission's decision, then, is that indeed these considerations the staff has raised

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13/ The decision of the Appeal Board in Offshore Power Systems (Floating Nuclear Power Plant), ALAB-489, 8 NRC 194 (1978), did not reach a contrary result. The Appeal Board squarely rejected the Staff's contention that it could override the Commission's policy of not considering Class 9 accidents as outlined in the proposed Annex to Appendix D to 10 C.F.R. Part 50 and the decisions of the Commission and its boards thereafter. The Appeal Board based its decision solely on the Staff's proposition that, "while the likelihood of a core-melt accident may not be more probable or its consequences more severe at a floating nuclear plant, it presents risks of a different kind than those associated with plants ashore. We do not take it to be disputed that such an event afloat could spread dangerous radioactivity wider than a similar incident ashore through what the staff terms 'the liquid pathway.'" 8 NRC at 218 (emphasis added).

in this case are appropriately considered. And I don't go further than that . . . ." (Tr. at 51).

Conclusion

As discussed above, the profferred testimony of the Colemans and LACT should be rejected and the objection of the Colemans to the use of the Licensee's witness panel should be denied.

Respectfully submitted,

CONNER, MOORE & CORBER

Mark J. Wetterhahn
Counsel for Licensees

April 23, 1979

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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PUBLIC SERVICE ELECTRIC AND GAS COMPANY, et al.	)	Docket No. 50-272
	)	(Proposed Issuance of
	)	Amendment to Facility
(Salem Nuclear Generating Station, Unit 1)	)	Operating License
	)	No. DPR-70)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Objections to Intervenors' Profferred Testimony," dated April 23, 1979, in the captioned matter, have been served upon the following by deposit in the United States mail this 23rd day of April, 1979:

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