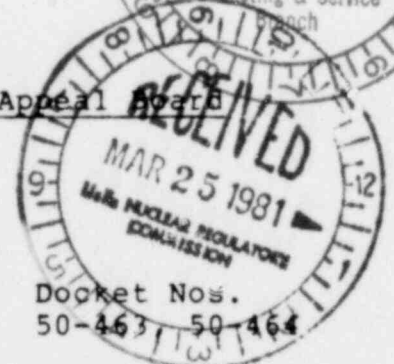


3/17/81

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Appeal Board



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

)  
) Docket Nos.  
) 50-463 50-464

EXCEPTIONS OF PHILADELPHIA ELECTRIC COMPANY TO  
ASLB DECISION AND ORDER DATED FEBRUARY 27, 1981

Philadelphia Electric Company (PE), the applicant in the above-captioned construction permit proceeding, hereby notes its exceptions, pursuant to § 2.762(a) of the Commission's regulations, 10 CFR § 2.762(a), to that portion of the Atomic Safety and Licensing Board panel's Decision and Order, dated February 27, 1981 and served March 2, 1981, which dismisses the proceeding with prejudice. PE itself had requested withdrawal of its construction permit application, which included a request for an adjudicatory Early Site Review of the Fulton site, by letter dated December 5, 1980 to the Director of the Commission's Office of Nuclear Reactor Regulation. In an accompanying motion to the ASLB, PE requested termination of the pending construction permit proceedings, without prejudice, as moot. The Regulatory Staff concurred in PE's motion, and noted the absence of any need for conditions of

dismissal because no construction activities had been conducted on the site. A coalition of intervenor groups also responded, supporting termination of the proceedings but requesting that termination be with prejudice, based on alleged hardships to them associated with the pendency of these dockets. Over PE's reply in objection to the intervenors' pleading, and without notice or opportunity for hearing, the ASLB dismissed the application with prejudice on a basis involving the nature and degree of PE's intent to use the Fulton site -- an argument not advanced by any of the parties before it.

The Atomic Safety and Licensing Board's decision, which could impair PE's ability to utilize the Fulton site in the future for a nuclear plant, was incorrect in several important respects. First, the ASLB incorrectly and inconsistently advanced a standard of intent with respect to use of a site, which it incorrectly found an applicant must meet in order to make use of the Commission's Early Site Review regulations, 10 CFR §§ 2.600, et seq. Second, the ASLB incorrectly found that PE did not meet the standard of intent necessary to utilize the process established by the Early Site Review regulations. Third, even if the ASLB had been correct in its conclusions on the two preceding questions, dismissal with prejudice was neither required of it (as it held) nor within the appropriate ambit of its discretion. Fourth, the ASLB's dismissal of the

application with prejudice, on grounds which had not been advanced by any party, and without notice or opportunity for hearing in a matter involving material issues of disputed fact as well as questions of law, denied PE due process of law. These arguments will be stated more fully in PE's brief.

Philadelphia Electric Company hereby lists its exceptions to the ASLB Decision and Order (hereinafter, ASLB Decision):

A. General Exceptions

1. The ASLB erred as a matter of law in its conclusions (ASLB Decision at 3, 4, 5, 6) as to the intent with respect to use of a site which an applicant must demonstrate in order to make use of the Commission's Early Site Review Regulations, 10 CFR §§ 2,600, et seq.
2. The ASLB erred as a matter of fact in finding (ASLB Decision at 8) that PE had not met whatever demonstration of intent with respect to use of a site is required under the Commission's Early Site Review regulations, 10 CFR §§ 2.600, et seq.
3. The ASLB erred as a matter of fact in finding (ASBL Decision at 8, penultimate paragraph) that "there has been a period of suspension and uncertainty since 1975" in this proceeding.

4. The ASLB erred as a matter of law in finding (ASLB Decision at 8) that a period of "suspension and uncertainty since 1975" in this proceeding, if one occurred, required it to dismiss the proceeding with prejudice (ASLB Decision at 8, last sentence).

5. The ASLB erred as a matter of law in concluding (ASLB Decision at 8, last paragraph) that the period of suspension found by it in this proceeding "is too long to justify a dismissal without prejudice" and required it to dismiss the proceeding with prejudice.

6. The ASLB abused its discretion in concluding that the "period of suspension and uncertainty" found by it (ASLB Decision at 8) justified it in dismissing the proceeding with prejudice.

7. The ASBL denied PE due process of law by dismissing this proceeding with prejudice, on grounds which go not to the contents of the application but to PE's "intent" and "motives".

8. The ASBL denied PE due process of law by dismissing its application with prejudice, without an opportunity for hearing, on grounds which go not to the contents of the application but to PE's "intent" and "motives", where there was no notice of the ASLB's intent to rest its decision on these grounds and where, as to these matters, there are disputed issues of material fact and important questions of law.

B. Specific Exceptions

9. The ASLB erred as a matter of law in finding, apparently, that an applicant must have irrevocable "firm plans" for "early use" of a potential site, or any other specific measure of intent with respect to a site, in order to utilize the procedures established by the Commission's Early Site Review regulations, 10 CFR §§ 2.600, et seq. (ASLB Decision at 3, 4, 6, 7).

10. The ASLB rendered meaningful review impossible, and thus erred as a matter of law, in failing to characterize clearly and consistently its view of the degree of intent with respect to future site use necessary to entitle an applicant to make use of the Early Site Review Regulations, 10 CFR §§ 2.600, et seq. The ASLB variously characterized its standard of intent as follows: (1) "firm plans for early use" of a site; (ASLB Decision at 3); (2) "firm plan to construct nuclear facilities on the site" (ASLB Decision at 4, 7); (3) something other than "no present intention to construct a nuclear facility" (ASLB Decision at 5); (4) something other than "mere desire for an Early Site Review in anticipation that a decision to use the site may be made at some future time" (ASLB Decision at 5); (5) "full intention of building a nuclear facility on the site" (ASLB Decision at 6).



11. The ASLB's required standard of intent to use a specific site for a nuclear power plant would require of an applicant a singlemindedness which is inconsistent with the requirement of the National Environmental Policy Act, § 102(2)(c) and the Commission's implementing regulations, 10 CFR Part 51, for evaluation of alternative sites and energy sources.

12. The ASLB erred as a matter of law in looking only to explicit verbal "statements" by the Applicant for indications its intent to utilize the Fulton site (ASLB Decision at 7).

13. The ASLB, in finding no evidence since 1975 of required intent to construct nuclear facilities on the Fulton site (ASLB Decision at 6-7), erred as a matter of fact in ignoring, inter alia, the following indicia of intent already in the record:

(a) PE's initial filing of an application for construction permits for two HTGRs in 1973 and subsequent prehearing review, much of it site-oriented, including answering questions in connection with the Staff's preparation of a SER and preliminary and final EIS and an ACRS letter (all of these documents favorable to the site), and providing answers to extensive discovery by

intervenors (some 900 interrogatories answered), prior to its reactor supplier's unilateral cessation of work on the project in September 1975.

(b) PE's filing monthly and other special report letters with the ASLB from September 17, 1975 through January 16, 1978 concerning the status of the application following its reactor supplier's unilateral cessation of work on the project in September 1975.

(c) PE's notification to the NRC (letter, Edward G. Bauer, Jr., to Roger S. Boyd, February 10, 1978), with notification to the ASLB (via covering letter, Donald P. Irwin to Samuel J. Chilk, February 28, 1980), that:

Dear Mr. Boyd:

Your December 19, 1977, letter requested that we identify all applications and requests for review which we plan to submit to the Nuclear Regulatory Commission between now and December 31, 1980....

The Company is presently evaluating options for providing additional base load generating capacity for service in the late 1980's and early 1990's. In this regard we are presently planning to file, within the period in question, an amendment to our Fulton construction permit application for early site review of the Fulton site.

(d) PE's notification to the NRC, by letter from its President, J. L. Everett to Richard P. Denise,

dated March 8, 1978 (copy attached hereto as Exhibit 1), reconfirming to the Commission its intent to use the Fulton site for its next base-loaded generation and to amend the pending Fulton construction permit application to include a request for an Early Site Review, which includes the following passage:

When we originally applied to construct two units on the Fulton site in 1973, we anticipated that they would consist of twin 1100-MWe HTGR's manufactured by the General Atomic Company (GAC). When it became clear, following the announcement by GAC in September, 1975 that it was suspending work on the project, that the Fulton site could not be utilized exactly as originally planned, we promptly requested the Licensing Board to be permitted to evaluate various available options for the site, including but not limited to the construction of replacement power reactors. At the Board's instruction, we have filed regular monthly status reports on the matter ever since. Until last month these letters reflected the fact that no concrete decisions about our future plans for the Fulton site had been made.

Philadelphia Electric Company's current system peak demand projections indicate that the first need for additional generation after Limerick Units 1 and 2 will occur in the early 1990's. Peak demands for the post-Limerick period could be substantially higher than are currently forecast because of changes in the regional economy, demography, and a desire to switch to electricity from alternate forms of energy. Should the high estimate peak loads occur, additional generation would be needed as early as 1987. The additional generation after Limerick would be base load generation, using either coal or



uranium as fuel. The economic choice is a uranium fueled plant and the prime candidate site for such nuclear generation on the Philadelphia Electric Company system is the Fulton site. [Emphasis supplied.]

(e) PE's preparation and submittal to the Commission on December 28, 1978 of a two-volume Early Site Review Report for review by the Staff, and subsequent technical contacts between PE and Regulatory Staff members.

14. The ASLB erred as a matter of fact in concluding (ASLB Decision at 6) that PE had reached no decision as to whether or not to use the Fulton site for a nuclear facility.

15. The ASLB erred as a matter of fact in concluding (ASLB Decision at 8) that PE had reached no decision as to the type of facility it would construct, if it decided to use the Fulton site.

16. The ASLB erred as a matter of law in considering (ASLB Decision at 8) "site banking", a matter of Pennsylvania state law and irrelevant to this case, in connection with the question of whether to dismiss with prejudice.

17. The ASLB erred as a matter of fact in concluding, as it apparently did (ASLB Decision at 8), that PE's application for an Early Site Review amounted to "site banking".

18. The ASLB erred as a matter of fact in concluding (ASLB Decision at 8) that PE's "motive" in seeking an Early Site Review was merely "to maintain the uncertainties as to the possible use of the site until a decision should be rendered at some future time, possibly in 1983."

19. Assuming, hypothetically, that PE did not intend to reach a final decision to use the Fulton site for a similar power plant until approximately 1983, the ASLB erred as a matter of law in concluding (ASLB Decision at 8) that such decisional flexibility is so inconsistent with the Early Site Review regulations as to require that any dismissal of an application be with prejudice.

20. The ASLB erred as a matter of law (ASLB decision at 8) in (a) inferring a "motive" for PE's ESR application, and (b) relying on PE's inferred motive, without notice, as a basis for its decision, and in not affording PE an opportunity for a hearing prior to rendering a decision adverse to PE based on this point, as to which there are plainly disputed issues of material fact.

21. The ASLB erred as a matter of fact in concluding (ASLB Decision at 9) that PE's request for an ESR

evaluation was solely "for the purpose of preventing termination of this proceeding", and not for that of obtaining an Early Site Review under the ESR regulations.

22. The ASLB erred as a matter of law (ASLB Decision at 8) in relying on the inferred purpose of an application, and in totally ignoring its contents, to decide whether to dismiss an application with prejudice.

23. To the extent that an assessment of PE's purposes is relevant in a determination whether to dismiss with prejudice, and to the extent that PE's purposes may have included avoidance of termination of these dockets, the ASLB erred by ignoring, among others, the following factors in the record before it or easily noticeable by it:

(a) the length of time necessary to arrange with a reactor manufacturer to design and manufacture a commercial reactor and to embody those arrangements in an application to the Commission, with accompanying Environmental Report;

(b) The unavailability of the Early Site Review option under the Commission's regulations between the termination of the HTGR arrangements in late 1975 and the ESR regulations' promulgation in June 1977;

(c) The great amount of material of continuing validity with respect to the Fulton site, already assembled and evaluated by the Regulatory Staff and other parties, which would have to be totally reassembled and re-evaluated if an entirely new docket were required.

24. The ASLB erred as a matter of law in concluding (ASLB Decision at 8), without any reference to or evidence of examination of the content of PE's ESR application, that "it does not conform to the substance of the pertinent [ESR] regulations."

25. The ASLB erred as a matter of law in concluding (ASLB Decision at 8) that PE's request for an Early Site Review "is outside the purpose and intent of the pertinent regulations."

26. The ASLB erred as a matter of fact in concluding (ASLB Decision at 8) that the Fulton licensing proceeding has been in a state of "suspension and uncertainty since 1975."

27. If the ASLB relied solely on the length of the period of "suspension" found by it to sustain its conclusion (ASLB Decision at 8, last paragraph) that the proceeding "must be dismissed with prejudice" (emphasis supplied), it erred as a matter of law. There is no

requirement in the Atomic Energy Act or its implementing regulations, nor in any other authority examined, that a suspension of any given length in a proceeding requires dismissal with prejudice.

28. If the ASLB intended to rely on the "uncertainty" found by it (ASLB Decision at 8 penultimate paragraph) to sustain its decision that the proceeding "must be dismissed with prejudice" (emphasis supplied), it erred as a matter of law by (1) failing so to state (page 8, last paragraph) and (2) finding that prejudicial dismissal is required as a matter of law. There is no requirement in the Atomic Energy Act or its implementing regulations, nor in any other authority examined, that "uncertainty" of any given kind or duration requires dismissal with prejudice.

29. If the ASLB intended to dismiss the application as a matter within its discretion and not as a matter of legal obligation (though it held itself required to dismiss with prejudice, ASLB Decision at 8 last paragraph), it erred as a matter of law in failing to state so.

30. If the ASLB intended to dismiss the application as a matter within its discretion, it abused that discretion in that:



(a) Its finding that the licensing proceeding has been in suspension since 1975 ignores PE's subsequent submissions to the record, including but not limited to the two-volume ESR application in December 1978 and subsequent technical review;

(b) Its finding (ASLB Decision at 8) that PE's purposes in filing its ESR request were outside the purposes of the ESR regulations (necessary to enable it to ignore the significance of that filing) is erroneous as a matter of fact and law;

(c) Its reliance on "uncertainty" (ASLB Decision at 8) as a justification for dismissal with prejudice refers to no legally cognizable wrong. It must refer back to intervenors' undocumented assertions of mental anguish and inability to utilize or dispose of property occasioned by the application's pendency (ASLB Decision at 3) -- a possible aspect of any licensing application, regardless of whether or not the applicant happens to own all of the proposed site. Further, the only harm to intervenors which could be avoided by dismissal with prejudice (rather than dismissal without prejudice) is foreclosure of the possibility that a later licensing application might be

filed for the same site. The possibility of such subsequent litigation is not among the types of legally cognizable harm to parties (intervenors or, by analogy, defendants in civil suits) sought to be guarded against by dismissal with prejudice. For a recent decision embodying this principle, see Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1) (Docket No. 50-376) (Memorandum and Order, February 18, 1981).

31. If an applicant's intent to utilize a site is a relevant consideration in determining to conduct an Early Site Review, dismissal of an application with prejudice is not the appropriate remedy. The appropriate remedy, pursuant to § 2.605 of the Commission's regulations, 10 CFR § 2.605, is for the Commission, on its own motion or that of any party, to decline to proceed with an Early Site Review.

32. The ASLB abused its discretion in summarily dismissing the Fulton application with prejudice, and thus potentially rendering the Fulton site useless to PE for a nuclear power plant, in that it neglected the following facts, among others:

- (a) The favorable findings of the Regulatory Staff as to the site's suitability for nuclear

reactors contained in the Staff's SER and FES published in connection with the initial HTGR-oriented configuration of the Fulton application;

(b) The shortage of viable nuclear power plant sites within reach of PE's service territory.

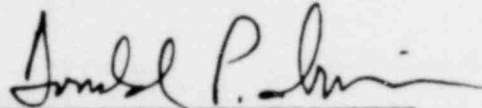
(c) The substantial change in the Commission's regulations and regulatory guidance within the past few years relating to, inter alia, site selection and alternative site evaluation methodologies and information requirements, all of which significantly complicate and lengthen any process of submission and evaluation of application documents.

33. In dismissing the application with prejudice on an unarticulated and unclear standard not based on the contents of PE's application, and as to which there are disputed issues of material fact as well as questions of law, without an opportunity for hearing, the ASLB denied PE its right to a hearing under § 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a).

34. In dismissing the application with prejudice on an unarticulated and unclear standard not based on the contents of PE's application as to which there are disputed issues of material fact as well as questions of

law, without an opportunity for hearing, the ASLB abused its discretion and denied PE due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States.

Respectfully submitted,



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Of Counsel:

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DATED: March 17, 1981

Attachment: Letter, J. L. Everett to Richard P. Denise,  
March 8, 1978

PHILADELPHIA ELECTRIC COMPANY

2301 MARKET STREET

PHILADELPHIA, PA. 19101

(215) 841-4221

J. L. EVERETT  
PRESIDENT

March 8, 1978

Mr. Richard P. Denise  
Assistant Director for Special Projects  
Division of Project Management  
Office of Nuclear Reactor Regulation  
United States Nuclear Regulatory Commission  
Washington, D. C. 20555

Re: Fulton Generating Station  
NRC Docket Nos. 50-463 and 50-464

Dear Mr. Denise:

This is in response to your letter of January 30, 1978, in which you request information on our plans for the Fulton site. In addition, you indicate that, on the basis of certain stated facts and judgments, the Staff proposes to file soon a motion to terminate Philadelphia Electric Company's present construction permit application for the Fulton Generating Station,\*/ and you have asked for our views on this proposal.

When we originally applied to construct two units on the Fulton site in 1973, we anticipated that they would consist of twin 1100-MWe HTGR's manufactured by the General Atomic Company (GAC). When it became clear, following the announcement by GAC in September, 1975, that it was suspending work on the project, that the Fulton site could not be utilized exactly as originally planned, we promptly requested the Licensing Board to be permitted to evaluate various available options for the

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\*/ (This response is being submitted by March 8 rather than February 17, pursuant to your agreement.)

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Mr. Richard P. Denise  
Page 2  
March 8, 1978

site, including but not limited to the construction of replacement power reactors. At the Board's instruction, we have filed regular monthly status reports on the matter ever since. Until last month these letters reflected the fact that no concrete decisions about our future plans for the Fulton site had been made.

Philadelphia Electric Company's current system peak demand projections indicate that the first need for additional generation after Limerick Units 1 and 2 will occur in the early 1990's. Peak demands for the post-Limerick period could be substantially higher than are currently forecast because of changes in the regional economy, demography, and a desire to switch to electricity from alternate forms of energy. Should the high estimate peak loads occur, additional generation would be needed as early as 1987. The additional generation after Limerick would be base load generation, using either coal or uranium as fuel. The economic choice is a uranium fueled plant and the prime candidate site for such nuclear generation on the Philadelphia Electric Company system is the Fulton site.

In February, 1978, we notified the Commission, and the Hearing Board and parties to the Fulton proceeding, by letter (copies attached) that we had determined to amend the Fulton application so as to obtain an early site review. I had already intimated our interest in this option in my telephone conversation with you in December, 1977. Early site review, as you know, was not a course which had been available to us when the original H<sup>T</sup>GR arrangements were concluded in the winter of 1975-76; indeed, the Commission's regulations making early site reviews available (42 Fed. Reg. 22882 (1977)) did not become effective until June, 1977.

Of the two types of early site review available under the Commission's regulations, it is our view that the adjudicatory Early Site Review procedure, as contrasted with a Staff site review under 10 CFR Part 50, Appendix Q, is clearly the appropriate course of action in this case in view of the status of the record in the Fulton proceeding and our plans for the utilization of the Fulton site.

Mr. Richard P. Denise  
Page 3  
March 8, 1978

The existing Fulton construction permit application, including its site suitability elements, has been reviewed from both safety and environmental standpoints and has received the approval of both the Staff and the ACRS in the form of a final EIS, a SER and an ACRS letter. In this context it is appropriate to take the next step toward a construction permit which is provided by an adjudicatory Early Site Review conducted within the framework of a construction permit docket and results in an adjudicatory decision resolving site suitability issues.

Accordingly, it is our intention to file with the Commission by the end of this year an amendment to the construction permit application for an adjudicatory Early Site Review for the Fulton site.

Major portions of an adjudicatory Early Site Review submission for Fulton -- those relating to the physical characteristics of the site and its environs -- remain as valid as when they were initially submitted by us and reviewed by the Staff in connection with the Fulton construction permit application. Certain other portions of the submission will need to be updated and basic plant parameters provided, and we would hope to meet with the Staff in the near future to discuss concretely any necessary revisions to the substance or format of information already in the record.

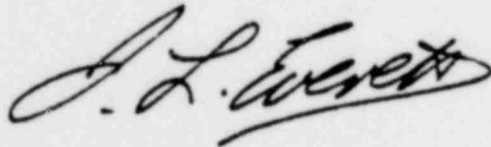
The adjudicatory Early Site Review procedure permits efficient use of the vast amount of still valid information already submitted to the Commission, and of the intense review already given it by the Staff and provides for a degree of certainty not otherwise available for planning nuclear capacity. Such certainty is a fundamental goal of the Early Site Review regulations and the present status of the record in the Fulton proceeding is ideally suited to the adjudicatory Early Site Review procedure as the next logical step in the licensing process. Thus, the public policy goals of not only the Commission but of the Administration as well -- restoring confidence in and efficacy to the licensing process -- would be served.

Mr. Richard P. Denise  
Page 4  
March 8, 1978

We firmly believe that orderly, efficient amendment of the present Fulton application to obtain an adjudicatory Early Site Review is a course which is fully consistent with the Commission's new Early Site Review regulations and will resolve the concern expressed in your letter that a decision be made as to the utilization of the Fulton site. To simply terminate the Fulton proceedings as suggested in your letter would waste applicable work already done, unnecessarily burden future efforts, and would constitute a lost opportunity to make use of a potentially valuable means of helping to stabilize the licensing process.

I trust that this letter has been fully responsive to your January 30 request. If you have any questions about it, please do not hesitate to call me.

Sincerely,

A handwritten signature in cursive script, appearing to read "A. L. Everett". The signature is written in dark ink and is positioned below the typed name "Sincerely,".

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of )  
PHILADELPHIA ELECTRIC COMPANY ) Docket Nos.  
(Fulton Generating Station, Units 1 and 2) ) 50-463, 50-464

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the Exceptions of Philadelphia Electric Company to ASLB Decision and Order Dated February 27, 1981 on the following persons by hand or by U.S. mail, first class postage prepaid, this date:

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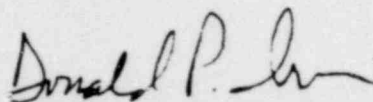
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Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory  
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Atomic Safety and Licensing  
Appeal Board Panel  
U.S. Nuclear Regulatory  
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DATED: March 17, 1981