

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
BEFORE ADMINISTRATIVE JUDGES:

Lawrence Brenner, Chairman
Dr. Richard F. Cole
Dr. Peter A. Morris

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

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

February 10, 1983

MEMORANDUM AND ORDER REJECTING TABLE S-3
FUEL-CYCLE CONTENTION

On June 16, 1982, Limerick Ecology Action (LEA) and the Environmental Coalition on Nuclear Power (ECNP) jointly moved for leave to file a new contention. The proposed contention alleged that in merely reproducing Table S-3 pursuant to 10 C.F.R. § 51.20(e), the Applicant's Environmental Report inadequately discusses the environmental and health impacts of the uranium fuel cycle associated with proposed operation of the Limerick facility. The basis, and justification offered for filing this contention late, was the then-recent holding in Natural Resources Defense Council v. NRC, 685 F.2d 459, 494 (D.C. Cir. April 27, 1982), cert. granted, 51 U.S.L.W. 3419 (November 29, 1982), that the current "final" S-3 rule (as well as predecessor S-3 rules) "...are invalid due to their failure to allow for proper consideration of the uncertainties that underlie the assumption that solidified

high-level and transuranic wastes will not affect the environment once they are sealed in a permanent repository".

By order of July 1, 1982, we granted Applicant's requests both to defer ruling on the proposed contention and to extend Applicant's time to respond to the contention until five days after publication in the Federal Register of anticipated Commission guidance on the implementation of the Court of Appeals decision. We also extended the NRC Staff's time to respond until ten days after publication of the Commission guidance. As we discuss below, the Commission issued its guidance over three months ago in the form of a Statement of Policy, and pursuant to it the proposed contention may not be admitted as an issue for litigation. "Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts", 47 Fed. Reg. 50591 (November 8, 1982). The Applicant and NRC Staff have both inexplicably failed to file responses in the required time-frame, although that time-frame had been established pursuant to Applicant's own request. Given the S-3 policy statement, we will proceed without their advice. The Applicant and NRC Staff, and indeed all parties, are warned that such defaults are viewed with great disfavor by this Board and could easily result in matters being found against them, or other sanctions. See e.g., 10 C.F.R. §§ 2.707, 2.718.

The history and background of the Commission's consideration of the environmental impact of the nuclear fuel cycle attributable to individual nuclear power plants is well summarized in a recent Appeal

Board decision, and will not be repeated here. See Mississippi Power & Light Co. (Grand Gulf, Units 1 and 2), ALAB-704, 16 NRC ____ (December 8, 1982). The current "final" Table S-3 rule (10 C.F.R. §§ 51.20(e) and 51.23(c)), as promulgated in 1979 (44 Fed. Reg. 45362), is a table which generically establishes the numerical quantification of fuel cycle releases attributable to a reactor, and precludes litigation of the amounts of these releases in individual licensing proceedings. In its S-3 decision, the Court of Appeals found that since an April, 1978 clarifying amendment to the interim S-3 rule, health effects could be considered in individual licensing proceedings. Only the quantification of environmental effects addressed by the S-3 table were precluded from litigation. The Court also found that at least since the final rule, the Commission had made clear that in addition to health effects, socioeconomic and cumulative effects of fuel cycle impacts could be considered in individual proceedings. Natural Resources Defense Council v. NRC, supra, 685 F.2d 459, 477-78, 486-88, 494. See also Grand Gulf, supra, Slip op. at 8.

The proposed late-filed contention, when read without the basis section, addresses "environmental and health impacts of the uranium fuel cycle" attributable to the Limerick facility. This would be impermissibly broad and vague, particularly for a late-filed contention given the history of the scope of litigation, as summarized above, permitted by the S-3 rule. However, as is made clear from the basis section of the contention, and the reliance on the Court of Appeals S-3 decision as justification for late filing, the contention seeks to assure proper consideration in this proceeding of the defect in the

final S-3 rule found by the Court of Appeals; i.e., that the rule gives inadequate consideration of the uncertainties of the impacts of wastes sealed in a permanent repository. This view of the scope of the contention is reinforced by the petitioners' views that its admission would be unlikely to expand the proceeding significantly since they expect the defect found by the Court will be cured by generic amendment of Table S-3. Petition, para. 11.

Having construed the contention so that it would appear to be admissible given the Court's S-3 ruling, we must nevertheless reject it as instructed by the Commission's S-3 policy statement, by which we are bound. Grand Gulf, supra, Slip op. at 12, n.3. In its policy statement, the Commission notes that the D.C. Circuit has stayed its mandate with the knowledge that the Commission would proceed in reliance on the final S-3 rule during such a stay. 47 Fed. Reg. 50592-93. As indicated above, the Supreme Court has granted certiorari. Accordingly, we are directed by the Commission "to proceed in continued reliance on the Final S-3 rule until further order from the Commission, provided that any license authorizations or other decisions issued in reliance on the rule are conditioned on the final outcome of the judicial proceedings". Id., at 50593.

The Commission's policy statement explains that to engage in case-by-case litigation of this matter "...would reintroduce the significant burdens the [S-3] rule was intended to relieve". 47 Fed. Reg. 50592. The Commission's policy statement recounts that the

Commission previously has had reasonable confidence that safe waste disposal will be available when needed (42 Fed. Reg. 34391, (1977)); NRDC v. NRC, 581 F.2d 166 (2d Cir. 1978); and that it is now completing the so-called "waste confidence" proceeding (44 Fed. Reg. 61372 (1979)), to reassess whether there is reasonable assurance that safe waste disposal will be available when needed. 47 Fed. Reg. 50592. The Commission states that:

Should the "waste confidence" proceeding arrive at an outcome inconsistent with this policy judgment, the Commission will immediately inform the Congress and will reassess the positions taken in this policy statement.

Id., at 50592.

and concludes that:

Considering the rule's limited purpose and taking into account the Commission's "waste confidence" proceeding, the Commission continues to believe that the record of the final S-3 rulemaking contains adequate information on waste disposal uncertainties to support continued use of the fuel cycle rule.

Id., at 50593.

Accordingly, the Table S-3 fuel-cycle contention proposed by intervenor LEA and petitioner ECNP is not admitted.¹ Future

¹ In view of our action in a separate order dismissing ECNP's one other pending contention, ECNP has been denied admission as a party in this proceeding.

Commission guidance on this subject will be applied to the Limerick facility and any license authorizations which may be issued in the interim will be conditioned on the final outcome of the judicial proceedings.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
February 10, 1983