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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

APPLICANT'S ANSWER TO MOTION BY FRIENDS OF
THE EARTH FOR ADMISSION OF NEW, LATE CONTENTIONS
RELATED TO APPLICANT'S MOTION FOR AN EXPEDITED
PARTIAL INITIAL DECISION AND ISSUANCE
OF A LOW-POWER LICENSE

Preliminary Statement

On May 9, 1984, Applicant Philadelphia Electric Company ("Applicant") filed a motion pursuant to 10 C.F.R. 50.57(c), with the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") requesting issuance of an expedited partial initial decision ("PID") and an operating license authorizing Applicant to load fuel in the Limerick Generating Station ("Limerick"), Unit 1 reactor and to operate the facility at power levels not to exceed five percent of full power. In a motion filed May 18, 1984, intervenor Friends of the Earth ("FOE") responded to Applicant's motion by seeking the admission of ten new, late filed contentions.

None of FOE's new contentions is relevant to the issuance of an expedited PID or a low-power license. FOE apparently does not appreciate that an applicant's request

for a low-power license is subsumed within the application for an operating license and does not, therefore, automatically trigger submission of new contentions and requests for additional hearings. In any event, the newly proposed contentions are inadmissible. In part, they constitute an impermissible request to relitigate adjudicated contentions. In other respects, FOE seeks, in effect, to have this Board oversee the disposition of routine NRC inspection report findings. Moreover, FOE has wholly failed to address, much less satisfy, the Commission's requirements for admitting late filed contentions. Accordingly, its motion should be denied.

Argument

As the result of Commission guidance to its adjudicatory boards issued as an exercise of its inherent supervisory authority over pending adjudications in the Diablo Canyon proceeding, it is now firmly established that a request for a low-power license is predicated upon the existing record of the application and does not automatically give rise to the submission of additional contentions and requests for hearings. In that case, the Commission stated:

1. The Board Should Rule Promptly on Motions for Fuel Loading and Low Power Testing

Pursuant to 10 CFR 50.57(c), the filing of a motion for a partial initial decision on fuel loading and low power testing requires an initial determination by the Licensing Board on whether the evidentiary record compiled to that point is adequate for such a partial

decision. 10 CFR 50.57(c) does not generally contemplate that a new evidentiary record, based on litigation of new contentions, would be compiled on the motion for fuel loading and low power testing. When the record has been closed but motions to reopen have been filed, the Licensing Board should decide whether the record must be reopened for new evidence directly relevant to the fuel loading and low power licensing request. Decisions on full power issues associated with the motion to reopen could be postponed until later.1/

The Commission reaffirmed its position on low-power license requests in a subsequent aspect of the same proceeding, where it similarly stated:

As the Commission has previously held, a request for a low-power license does not give rise to a proceeding separate and apart from a pending full-power operating license proceeding. It follows that this hearing request is subsumed within the scope of the continuing full-power proceeding, as was the request for a low-power license. Further operation at low power is within the scope of PG&E's application for a full-term, full-power license and is controlled by the record developed to date in the operating license proceeding. Thus, there is no section 189a right to a separate hearing here and no need for any "significant hazards consideration" finding of the type that would be called for were this a separate proceeding on an application for a license amendment. For the same reason, Sholly v. U.S. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980) (per curiam), cert. granted, 451 U.S. 1016 (1981), does not require a

1/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981).

hearing in this instance. This request for a hearing would ordinarily be treated as a motion to reopen the low-power record.^{2/}

Accordingly, FOE is not entitled to a hearing on its contentions unless it has met the Commission's requirements for admitting late filed contentions under 10 C.F.R. §2.714(a)(1)(i)-(v). Insofar as FOE wishes to litigate the same or related matters contained in contentions already admitted and adjudicated, it must also satisfy the requirements for reopening.

FOE has failed to meet (and has not even addressed) the three criteria for reopening: (1) that its contentions are timely presented; (2) that its contentions are addressed to a significant safety or environmental issue; (3) that litigating its contentions would have resulted in a different result in the outcome of the proceeding.^{3/} Several of the contentions appear to be no more than an attempt to

^{2/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982). More recently, the Licensing Board in Shoreham held that an intervenor seeking a hearing on new contentions by virtue of a request for a low-power license must satisfy the criteria for reopening the record and admission of late filed contentions. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 632 (1983).

^{3/} See generally Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). The Wolf Creek test was approved by the Commission in Diablo Canyon, supra, CLI-81-5, 13 NRC at 363.

relitigate admitted contentions, i.e., proposed Contention 1 (relating to offsite industrial accidents) and Contentions 6 and 7 (relating to quality control and welding procedures). FOE makes no effort to show why the record on those matters should be reopened.

The contentions are largely based upon routine Staff correspondence which discusses generic matters related to the Staff's customary findings,^{4/} or isolated excerpts from NRC inspection reports.^{5/} Particularly at this advanced

4/ For example, FOE cites as a basis for its proposed Contention 2 a letter dated May 15, 1984 from the Staff to Applicant regarding the independent design review of the core spray system. The letter merely states: "The staff finds that the proposed independent design review will be useful in its determination that the design process used in the construction of Limerick Unit 1 has complied with NRC regulations and licensing commitments." Similarly, the letter dated May 9, 1984 from the Staff to Applicant cited in support of the first item labeled Contention 4 is simply a routine request for additional information for the Staff's review under NUREG-0737. In support of Contention 5, FOE cites a letter dated May 8, 1984 from Applicant to the Staff describing the current status of Applicant's program to address the positions contained in Generic Letter 83-28 (relating to the Salem ATWS events). Again, the mere assertion by FOE that there is no assurance that Applicant will meet related requirements raises no litigable safety issue.

5/ While Applicant does not agree that minor infractions form the basis of a proper contention, it is difficult in many instances even to discern which portions of the report FOE relies upon for its contention. For example, FOE asserts that Inspection Report No. 50-352/84-13 (dated April 30, 1984) shows that the security program at Limerick is inadequate for fuel loading. To the contrary, the summary of this report states: "Implementation of the licensee's security program is progressing as scheduled."

stage of the proceeding, the mere recitation of inspection report findings of Level IV and V infractions fails to provide any basis for reopening the record on closed issues or litigating other matters anew.^{6/} The Licensing Board in Byron denied a motion to reopen which was based upon the same kind of inspection report findings. The Board there agreed with the position of the NRC Staff that because of the complexity of the preoperational testing program and the increased inspection hours required, "identifying many items of noncompliance is not unexpected."^{7/} The Board expressed its belief that the violations (Level IV) contained in the inspection reports did not seem to rise to a level "indicative of any institutional incapacity."^{8/}

6/ This Board itself recognized at the outset of the proceeding that the proposed contention on quality assurance "could be made more specific with better articulated bases," but admitted the contention because of its importance, "subject to the development of specific contentions and their bases" Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1518 (1982). The Board took essentially the same approach in requiring intervenor to specify the particular deficiencies with regard to welding and/or inspection and correction thereof which it wished to litigate. Limerick, supra, "Memorandum and Order Confirming Rulings Made at Prehearing Conference" (October 28, 1983) (slip op. at 5). Now, however, FOE wishes to replough the same ground.

7/ Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 110 (1983).

8/ Id.

The inspection reports and related documents cited by FOE are of the same nature. They indicate no litigable issue as to the safety of the plant, and certainly no particular issue relating to fuel loading and low power testing.^{9/} In short, none of the reports cited by FOE demonstrates the existence of any significant safety issue or any reason to believe that the Board's consideration of the report as evidence would change the result of the proceeding. Nor has FOE addressed or satisfied the Commission's separate requirements for admitting late contentions.^{10/}

Conclusion

For the reasons discussed more fully above, FOE has failed to satisfy the Commission's requirements for reopening and admitting late filed contentions. Further, the matters which it wishes the Board to take up in its proposed

^{9/} Contrary to the allegations in proposed Contention 8, Applicant finds nothing in the SALP report dated May 7, 1984 from Region II which would "disqualify" fuel loading.

^{10/} Applicant has discussed the standards for reopening and admitting late filed contentions in other recently filed pleadings before the Board. In the interest of brevity, the Board is respectfully referred to Applicant's Answer to Petition for Intervention by CANE (May 29, 1984).

contentions do not present any litigable issue. Accordingly, FOE's motion should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

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June 1, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Del-Aware's Proposed Late Contentions Regarding Applicant's Motion for an Expedited PID and Issuance of a Low-Power License" and "Applicant's Answer to Motion by Friends of the Earth for Admission of New, Late Contentions Related to Applicant's Motion for an Expedited Partial Initial Decision and Issuance of a Low-Power License" both dated June 1, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 1st day of June, 1984:

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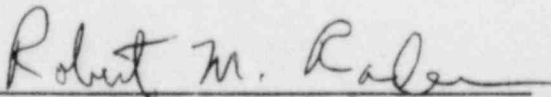
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