

636

DOCKETED
June 7, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 JUN 14 AIO:20

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))	

NRC STAFF RESPONSE TO FOE'S MOTION IN OPPOSITION TO APPLICANT'S MOTION FOR AN EXPEDITED PARTIAL INITIAL DECISION AND ISSUANCE OF A LOW-POWER LICENSE FOR LOADING AND TESTING AND SUBMISSION OF NEW CONTENTIONS

I. INTRODUCTION

Intervenor Friends of the Earth (FOE), through its representative, Mr. Robert L. Anthony, filed a "Motion By R. L. Anthony/FOE (In the Delaware Valley) In Opposition To Applicant's Motion For An Expedited Partial Initial Decision And Issuance Of A Low-Power License For Loading And Testing; And Submission Of New Contentions Based On New Matter," (Motion) dated May 18, 1984. At the evidentiary hearing held on May 31, 1984, Mr. Anthony served on the Atomic Safety and Licensing Board (Licensing Board or Board) and parties a "Supplement To R. L. Anthony/FOE Motion vs. Applicant's Motion For Partial Initial Decision And Low-Power License, And Submission Of Contentions On New Matters, Dated May 18, 1984" (Supplemental Motion). For the reasons stated below the Staff opposes the Motion.

B406150104 840607
PDR ADOCK 05000352
© PDR

DESIGNATED ORIGINAL
Certified By DS07 *[Signature]*

II. BACKGROUND

On May 9, 1984, the Philadelphia Electric Company (Applicant) filed its motion^{1/} for an expedited Partial Initial Decision (PID) and an operating license authorizing the Applicant to load fuel at the Limerick Generating Station, Unit 1 reactor and to operate the facility at power levels not to exceed five percent of power pursuant to 10 C.F.R. § 50.57(c). Intervenor FOE, thereafter, filed a Motion and Supplemental Motion opposing the Applicant's Motion for low power and submitted fourteen new contentions based on the Applicant's alleged failure to satisfy 10 C.F.R. § 50.57(1), (2), (3), (4), (6) and (6)(b). (Motion at page 1).

III. DISCUSSION

FOE opposes the Applicant's Motion for basically two reasons. The first reason is that the Applicant's Motion is in violation of "10 C.F.R. § 50.57(c) in asking to operate 'not to exceed 5% of power' while Par. (c) provides for up to only 1% of full power." (Motion at page 1). FOE has incorrectly interpreted the provisions of 10 C.F.R § 50.57(c). Section 50.57(c) provides, in pertinent part:

(c) An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation." (Emphasis added).

^{1/} "Applicant's Motion For An Expedited Partial Initial Decision And Issuance Of A Low-Power License For Fuel Loading And Low-Power Testing" (Applicant's Motion).

Clearly, the "one percent of full power" restriction applies to testing the facility, but the low power operation of a facility could be any level of power less than full power. The Applicant, however, seeks a low power license for operation at a maximum of five percent (5%) of full power.^{2/}

The second reason that FOE opposes the Applicant's Motion is that "the PECO motion and the state of construction at the plant (Unit 1) do not satisfy 10 C.F.R. § 50.57[a](1), (2), (3), (4) and (6) and (6)(b)."^{3/} Again, it is the view of the Staff that FOE has misconstrued the Commission's regulations. 10 C.F.R. § 50.57(c) provides, in pertinent part:

(c) . . . Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section.

^{2/} Applicant's Motion at pages 1-2.

^{3/} The Staff believes FOE intended to include 10 C.F.R. § 50.57(b) instead of § 50.57(6)(b) as no such section exists.

It is the view of the Staff that 10 C.F.R. § 50.57(a)(4)^{4/}, by its terms, is inapplicable since the Applicant is an electric utility. Thus, it appears that the fourteen new contentions that FOE seeks to have admitted and litigated would be based on the Applicant's alleged failure to satisfy 10 C.F.R. § 50.57(a)(1), (2), (3), (6) and § 50.57(b). The Commission's regulations contemplate that the Licensing Board will authorize the issuance of a low-power license based on the record that it has before it. The Licensing Board's partial initial decision and the findings required by § 50.57(c) shall be based on those issues admitted for litigation and relevant to the activity to be authorized.^{5/}

The Commission has stated that "10 C.F.R. § 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."^{6/} The Commission has further indicated that a request for low power operation falls within the scope of an application for a full-term full power license and is controlled by the record already developed

4/ 10 C.F.R. § 50.57(a)(4) provides:

(4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter. However, no finding of financial qualifications is necessary for an electric utility applicant for an operating license for a production or utilization facility of the type described in § 50.21(b) or § 50.22.

5/ The Director of Nuclear Reactor Regulation shall make all other necessary finding pursuant to 10 C.F.R. § 50.57(a). With respect to 10 C.F.R. § 50.57(b) any license issued in connection with the low power application will contain such provisions as are determined necessary.

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

in the operating license hearing.^{7/} With respect to low power operation at Diablo Canyon, the Appeal Board noted that:

Low power testing is a normal, necessary and expected step in the life of every nuclear plant. This is true whether such testing is planned under the authorization of a separate fuel loading and low power testing license, as in the case of Diablo Canyon, or scheduled as the first step toward operation under the authority of a full power license. Low power testing, unlike full power operation, is not intended to produce electrical power, and it is not an alternative to full power operation. ^{8/}

Furthermore, as discussed below, FOE's contentions fail to meet either the criteria for accepting late filed contentions set forth in 10 C.F.R. § 2.714(a) or the basis and specificity requirements of 10 C.F.R. § 2.714(b).

The FOE motion (at page 2) contains a statement of "Bases for Contentions" where FOE attempts to satisfy the lateness criteria of 10 C.F.R. § 2.714(a). Those factors are:

- (i) Good cause, if any, for failure to file on time. ^{9/}

^{7/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714 (1982).

^{8/} Pacific Gas And Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 794 (1983).

^{9/} The Commission in Catawba, CLI-83-19, 17 NRC at 1043-44, found that all of the factors in 10 C.F.R. § 2.714(a)(1) should be applied by a licensing board in determining admissibility of late filed contentions, including the three-part test for good cause fashioned by the Appeal Board in Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982). The test is that a contention:

1. [is] wholly dependent upon the content of a particular document;
2. could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and
3. is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination.

- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden or delay the proceeding.

It is FOE's responsibility to affirmatively address each of the five factors that the Licensing Board must balance and affirmatively show that the balance favors admitting the late-filed contention.^{10/} FOE has failed to conduct such balancing.

The first criterion is good cause for failure to file on time. The Staff believes that FOE has not satisfied its burden with respect to establishing good cause for late filing. FOE alleges that these contentions are based upon the Applicant's motion for a low-power license and the accompanying alleged failure to satisfy 10 C.F.R. § 50.57(a)(1), (2), (3), (6) and §50.57(b). However, FOE actually relies on a series of recently issued documents as additional bases for the proposed contentions, but fails to establish that the information contained therein is, in fact, new. As stated earlier, the filing of a motion for a low-power license does not

^{10/} Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615-12 NRC 350, 352-353 (1980).

trigger any automatic right to file new contentions. Thus, this criterion does not weigh in FOE's favor.

The second criterion is the availability of other means to protect its interest regarding the operation of the facility. FOE has failed to address this criterion. However, no other regulatory or judicial body has jurisdiction to hear the matters being raised in these proceedings. Therefore, the Staff believes that this license proceeding is nonetheless an appropriate forum for FOE to present its views. Thus, this factor weighs in FOE's favor.

The third criterion is the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record. The Appeal Board, in addressing development of a sound record, has held that "when a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses and summarize their proposed testimony."^{11/} FOE has made vague allegations of being "equipped" to raise the contentions it now seeks to have admitted in this proceeding. However, such a vague assertion of ability is insufficient to satisfy this standard.^{12/} Therefore, this criterion does not weigh in FOE's favor.

The fourth criterion, the extent to which petitioner's participation will be represented by existing parties, does not weigh in FOE's favor. Many of the proposed contentions have already been the subject of

^{11/} Mississippi Power and Light Company, et al. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

^{12/} Id.

litigation. Inasmuch as FOE was a participant in those evidentiary proceedings, it had an opportunity to present evidence, examine witnesses and file proposed findings.

The fifth factor is whether the issues will be broadened or the proceeding delayed. This factor weighs against FOE because the admission of these new contentions will necessarily delay the proceeding. The next issue to be heard is CITY-15. Once the record has closed on that issue, the remaining issues to be heard involve offsite emergency planning which is an issue that does not have to be determined prior to issuance of a low-power license.^{13/} The admission of any of these contentions would indeed broaden the issues and delay the proceeding. Therefore, this factor does not weigh in FOE's favor.

On balance, the five criteria do not weigh in favor of admitting FOE's late-filed contentions even if the basis and specificity requirements of § 2.714(b) are met. The Staff has grouped FOE's proposed contentions into basically four categories and will now examine the proposed contentions against the criteria set forth in 10 C.F.R. § 2.714(b) or, as appropriate, the standards for reopening the record.

FOE's Contentions 1, 6, 7 and 12 involve either matters that have been considered and rejected or issues that have been litigated before this Board. FOE's Contention 1 concerns FOE's admitted Contention V 3a-3b relating to pipeline accidents, blast overpressures and industrial accidents. FOE Contentions 6 and 7 involve quality control

^{13/} 10 C.F.R. § 50.47(d).

and welding and are related to admitted Contention VI-1. All of these matters have been litigated before this Board. In addition, FOE Contention 12, which concerns the dangers from an explosion on the railroad and the resulting hazards to fuel being transported to the fuel hoistway in the plant, was raised by FOE in connection with the Applicant's 10 C.F.R. Part 70 application to receive and store fuel onsite.^{14/} This contention was considered and rejected by the Licensing Board and the Appeal Board.^{15/}

In view thereof, FOE must address and satisfy the requirements for reopening the record in this proceeding in order to have these proposed contentions admitted for further litigation. The requirements for a motion to reopen the record are:

1. that the motion be timely filed;
2. that it address a significant environmental or safety issue; and
3. that it contain new information that would lead to a different result than had been reached initially.^{16/}

FOE has failed to address or even comment on these requirements. The Staff submits these contentions do not satisfy any of the requirements for reopening the record and should be rejected by the Board.

^{14/} See, Contention 3, "Application By Anthony/FOE To File A Contention Based On New Matter, i.e., PECO's Application Part 70 To Store Fuel At The Limerick Plant, Served 2/21/84," dated February 23, 1984.

^{15/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) Memorandum and Order, LBP-84-16, 19 NRC ____, Slip op. at 16 (March 16, 1984); Memorandum and Order ALAB-765, 19 NRC ____, Slip op. at 16 (March 30, 1984).

^{16/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980).

In Contention 14, FOE maintains that the difference in the Applicant's and Staff's estimate of completion of construction for Limerick Generating Station, Unit 1 suggests a "possible glossing over of safety issues." In support of its contention, FOE has furnished one page of the transcript of a Commission meeting held on April 24, 1984. A review of the furnished page from the transcript establishes that safety issues were not the topic of conversation. This contention is vague and without basis, thus, it should be rejected by the Licensing Board.

FOE Contentions 3, 4, 8, 9 and 10 consist of cryptic references to routine inspection reports. However, FOE makes no effort to explain why any of the statements in these documents would prevent the Licensing Board from making the findings necessary to grant the Applicant's motion to an expedited partial initial decision and the subsequent authorization of low-power testing and operation. Indeed, it is inevitable that items of noncompliance will be issued. However, unless the items of noncompliance raise a reasonable doubt about the overall integrity of a facility and its safety-related structures and components, they would not serve as a basis for denying a license.^{17/} Accordingly, since FOE fails to explain why any of the cryptically noted items in the inspection reports are of such significance to cast doubt on the overall integrity

^{17/} Union Electric Company (Calloway Plant, Unit 1), ALAB-74G, 18 NRC 343, 346 (1983).

of the Limerick Generating Station, none of its contentions based on inspection reports meets the basis and specificity requirements of 10 C.F.R. § 2.714(b).

FOE Contentions 2, 5 and 11 are speculative in nature. With respect to Contention 2, FOE is simply conjecturing that the Independent Design Review will uncover design deficiencies significant enough to prevent Limerick from receiving an operating license. As for Contention 5, FOE offers no basis for concluding that the procedures referred to will not be in place by the time low power operation begins. Further, there is no indication that not having these procedures in place warrants not authorizing low-power testing. Finally, in Contention 11, FOE postulates that the Commission will reverse the Appeal Board's denial, in ALAB-765, of its contentions with respect to the receipt of unirradiated fuel. The speculative nature of all three of these contentions renders them inadmissible pursuant to 10 C.F.R. § 2.714(b).

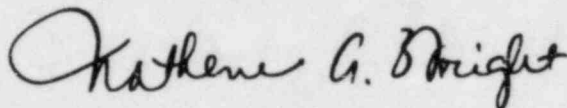
In Contention 13, FOE alleges that the Applicant's evaluation of the effects of high energy line breaks is deficient because of the exclusion of certain lines. FOE then concludes that the lines excluded from the study are "most subject to rupture because of the fluctuations in heat and pressure and they could trigger other breaks and bring the cumulative consequences above the FSAR Chapter 15 analysis." FOE, however, fails to articulate why these lines are subject to leak and pressure fluctuations, or how they could trigger other breaks and exceed the limits noted in the FSAR Chapter 15 analysis. This contention is vague and, therefore, does not serve as a basis for denying the Applicant's motion for an expedited partial initial decision and low-power license and is not otherwise

admissible. The contention should not be admitted because it fails to satisfy the specificity and basis requirements of 10 C.F.R. § 2.714(b).

IV. CONCLUSION

For the reasons stated above, the Staff opposes FOE's Motion and its Supplemental Motion.

Respectfully submitted,

A handwritten signature in cursive script, reading "Nathene A. Wright".

Nathene A. Wright
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of June, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-352
(Limerick Generating Station,) 50-353
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO FOE'S MOTION IN OPPOSITION TO APPLICANT'S MOTION FOR AN EXPEDITED PARTIAL INITIAL DECISION AND ISSUANCE OF A LOW-POWER LICENSE FOR LOADING AND TESTING AND SUBMISSION OF NEW CONTENTIONS" 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 7th day of June 1984:

Lawrence Brenner, Esq., Chairman(2)
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

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

Dr. Peter A. Morris
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

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

Phyllis Zitzer, President
Limerick Ecology Action
P.O. Box 761
Pottstown, PA 19464

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

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

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

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

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
1101 Building
11th & Northampton Streets
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

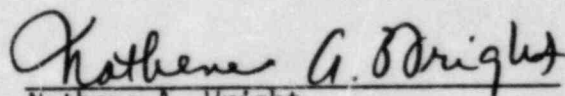
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Atomic Safety and Licensing Appeal
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


Mathene A. Wright
Counsel for NRC Staff