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

In the Matter of	Docket Nos. 50-352-OL 50-353-OL
PHILADELPHIA ELECTRIC COMPANY	
(Limerick Generating Station, Units 1 and 2)	August 22, 1984

MEMORANDUM AND ORDER DENYING MOTIONS OF CANE AND CEPA TO ADMIT OR CERTIFY FINANCIAL QUALIFICATIONS CONTENTIONS

CANE

By motion dated June 25, 1984, a non-party petitioner in this proceeding, Citizens Action in the Northeast (CANE), requests that the Board permit it to litigate the issue of the Applicant's financial qualifications in this operating license proceeding. In the alternative, CANE requests that we certify the question to the Commission. We deny both requests.

The Applicant's and NRC Staff's answers, dated July 10 and 16, respectively, are correct that the Commission's June 7, 1984 "Financial Qualifications Statement of Policy" has directed licensing boards not to

permit litigation of financial qualifications contentions in an operating license proceeding. 49 Fed. Reg. 24,111 (June 12, 1984). In addition, CANE's instant motion, as well as its previous filings on this subject */, does not attempt to demonstrate, pursuant to 10 C.F.R. § 2.758, a prima facie showing that the rule should be waived because there are special circumstances with respect to the Limerick Generating Station such that application of the Commission's rule, 10 C.F.R. § 50.57(a)(4) (March 31, 1982), continued in effect by its policy statement, would not serve the purposes for which it was adopted. Waivers or exceptions to rules, pursuant to Section 2.758, should be granted only in "unusual and compelling circumstances." Northern States Power Co. (Monticello, Unit 1), CLI-72-81, 5 AEC 25, 26 (1972).

CANE's generalized assertions that the Applicant has or may in the future have some "rate base" difficulties are manifestly insufficient. As another licensing board detailed recently, the Commission's rule is premised on the proven assumption that state ratemaking bodies (in this case the Pennsylvania Public Utility Commission) provide a reasonable rate of return for electric utilities, including costs of compliance with NRC requirements for safe operation. See generally Long Island

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*/ CANE first advanced its contention on March 5, 1984, and renewed it on May 14, 1984. By agreement of all parties, the Board had deferred action on it pending the issuance of the anticipated Statement of Policy by the Commission.

Lighting Co. (Shoreham, Unit 1), LBP-84-30, 20 NRC ___ , particularly slip op. at 9-10 (August 13, 1984), citing "Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants," 49 Fed. Reg. 13,044, 13,045 cols. 2 and 3 (April 2, 1984). The fact that a utility may encounter some financial difficulties, or that a state ratemaking body would deny some of the return being sought by the utility, would not be a sufficient basis for waiving the regulations precluding litigation of financial qualifications in operating license cases. Shoreham, supra slip op. at 13, citing Houston Lighting and Power Co. (South Texas, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1984).

In view of the above, we need not decide whether the contention was timely filed, and, if not, whether it satisfies the balancing test for late-filed contentions. We do note our view that CANE's general contention, even if it were otherwise admissible, would not satisfy the bases and specificity requirement of 10 C.F.R. § 2.714 applicable to even timely contentions.

CEPA

By an undated filing, received by the Board on July 16, 1984, the Consumers' Education and Protective Association (CEPA), seeks to

litigate a new contention that the Applicant "is unable to conduct full and safe testing of the Limerick 1 Unit and therefore endangers the health and safety of the general public." CEPA's basis for raising this late contention, after the June 20, 1984 close of the evidentiary record on all issues related to the request for a low-power operating license, is a June 15, 1984 "Petition for Declaratory Order" (Petition) filed by the Applicant before the Pennsylvania PUC. The Petition seeks a change in the PUC procedures for timing of certain rate considerations and concomitant accounting treatment related to commercial operation of Unit 1. CEPA points to the statement in the Petition (at p. 10, para. D) that the procedures the Applicant is proposing

> ensures that Limerick 1 will be completed and safely tested on a timely basis, unaffected by rate case considerations, particularly if Limerick 1 does not achieve commercial operation before the end of the test year in the Limerick 1 rate case.

CEPA's motion to have this new contention admitted in this proceeding is denied. The discussion above of financial qualifications contentions in the context of CANE's proposed contention applies equally to CEPA. Although CEPA labels its contention "safety," it in fact advances no specific basis or allegation that Applicant will not or cannot conduct required preoperational and low-power testing, other than the general one of financial qualifications. The correctness of CEPA's interpretation -- that the quoted portion of the Petition is an admission by Applicant that it will be unable to safely test Unit 1

unless it receives the relief requested from the PUC -- is not clear. However, even assuming arguendo that CEPA's interpretation is correct, the contention must fail for the reasons behind the Commission's rule, as discussed above. CEPA's contention would require this Board to speculate that the PUC would not permit the Applicant reasonable rate treatment, including any revenue needed for required testing of Unit 1. Such speculation at this time is pointless, as well as being inconsistent with the long history of rate treatment in all states, as noted by the Commission. See this order, supra at 2-3. Indeed, it appears from the Petition that the precedent for the procedure changes being requested is the Pennsylvania PUC's actions in connection with the Susquehanna nuclear power plant. Petition, at 4. Moreover, as also noted above, even denial of a particular request for rate relief is not sufficient "unusual and compelling" basis to waive the Commission's rule. Monticello, supra, 5 AEC at 26 and Shoreham, supra at 13, citing South Texas, supra, 18 NRC at 59. In the absence of a basis for finding that the Pennsylvania PUC is engaged in a systematic denial of costs for Unit 1, there is no prima facie showing that the rule should be waived. Shoreham, supra at 13.

Although we need go no further in our analysis, given the ruling we have reached, some other factors merit discussion. Applicant argues that our previous dismissal of CEPA as a party because it decided not to participate in its only remaining subject area of possible contentions, offsite emergency planning, should now bar CEPA from raising a

late-filed contention in a new subject area as a present non-party. We do not agree with Applicant in the circumstances of this case. We treat CEPA no differently from the non-party CANE in this regard. We note that CEPA's present explanation that it defaulted in filing respecified emergency planning contentions because it decided that the endeavor would not have been the best use of its limited resources, should have been made at the time it was expected to file such contentions. CEPA's previous silence, resulting in the default, was not the best or even a courteous procedure for CEPA, which is represented by counsel, to follow.

The Board does agree with the analysis of the Applicant and Staff, in their respective answers of July 27 and July 31, that the balance of the factors for late-filed contentions weigh against CEPA's contention, even if it were otherwise cognizable. This is so even if we give CEPA all possible benefit of the doubt and assume that it would not have been reasonable to expect CEPA to challenge the Applicant's financial ability to safely operate or test the plant, based on facts and PUC proceedings in existence long before the Applicant's June 15, 1984 Petition. Indeed, the contention is arguably not even specific enough to justify admission if it were timely, let alone to raise a significant issue on which CEPA could make any contribution sufficient to justify the lengthy delay which would ensue by its admission after the close of the low-power record. See Long Island Lighting Co. (Shoreham, Unit 1),

LBP-83-30, 17 NRC 1132, 1143-44 (1983). In reaching this conclusion, we have considered CEPA's unauthorized reply of August 9.

We close by noting that we have not accepted, and nothing in our determination depends on, the Applicant's argument (Answer, at 3-4) that its PUC Petition does not relate at all to funds necessary for testing, because the problem of "synchronization" of commercial operation of Unit 1 with the conclusion of the test year, as employed by the PUC in its normal base rate proceedings, would exist regardless of whether tests are completed before or after the conclusion of the ratemaking proceeding. It does appear to us that, given the nature of the problem of timing the future rate base test year faced by the Applicant, its concern is independent of low-power testing. If Unit 1 begins commercial operation before the end of the test base year, low-power testing will have been completed independent of the Applicant's proposed procedure changes. In this event, Applicant's proposal would prevent a delay, if not a loss, of revenues for the period of the gap between such early commercial operation and the end of the test base year. See Petition, at 2-3. (We infer from the Petition, and also assume that, like most states, the Pennsylvania PUC does not consider low-power testing operation of up to 5% to be commercial operation.)

On the other hand, if the circumstance noted in the above-quoted paragraph D, from page 10 of the Petition, comes to pass, the Applicant is concerned that if commercial operation does not begin until after the

end of the test base year, absent advance PUC provisions, then base rate recognition of the costs of operation could be challenged at the later time of commercial operation. Petition, at 4. The Applicant's proposal would still permit it to receive, at the conclusion of the test year, the rates justified without consideration of Limerick 1 in the rate base. Thereafter, upon commercial operation of Limerick 1, the Applicant's proposal would allow it to receive rates based on recognition of Unit 1 in the rate base, as allowed in the rate case, without the need to institute a second rate increase case. Petition, at 8. It appears to us that in this later commercial operation scenario, low-power testing again would have taken place prior to receipt by the Applicant of any increased rates based on inclusion of Limerick 1 in the rate base.

Notwithstanding the above belief by us of the intent and effect of the Applicant's PUC Petition, we do not accept the Applicant's argument that the Petition is irrelevant to the obtaining of funds for testing. This is because if our understanding is correct, then the quoted Paragraph D is disingenuous hyperbole by the Applicant before the PUC, because the changes in procedures it seeks would be irrelevant to ensuring "that Limerick 1 will be completed and safely tested on a timely basis . . . ." Yet, the Applicant's answer before us, like our own analysis, also leads to the conclusion that paragraph D is not at all an "advantage" of granting the Petition, contrary to the Petition's claim. Petition, at 10-11.

In sum, either the Applicant is saying apparently inconsistent things before the PUC and this Board, or we are not correctly understanding the contents of Applicant's Petition. If the latter is the case, the Applicant's answer before us has similarly failed to come to grips with explaining why the Petition is not, contrary to the assertion of the Petition itself (para. D, at 10), related to completion and safe testing of Unit 1 on a timely basis. If the purpose and meaning of the Petition were material to our decision on the admission of CEPA's contention, we would have directed the Applicant and invited the other parties to provide a better explanation in light of our discussion. However, for the reasons set forth in the first part of our ruling on CEPA's contention, the meaning of the Petition before the PUC is not material to our determination.

CONCLUSION

For the reasons stated, the separately proposed new contentions of CANE and CEPA are not admitted as issues in controversy in this NRC operating license proceeding.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 22, 1984

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COURTESY NOTIFICATION

As circumstances warrant from time to time, the Board will mail copies of its memoranda and orders directly to each party, petitioner or other interested participant. This is intended solely as a courtesy and convenience to those served to provide extra time. Official service will be separate from the courtesy notification and will continue to be made by the Office of the Secretary of the Commission. Unless otherwise stated, time periods will be computed from the official service.

I hereby certify that I have today mailed copies of the Board's "Memorandum and Order Denying Motions of CANE and CEPA to Admit or Certify Financial Qualifications Contentions" to the persons designated on the attached Courtesy Notification List.

Valarie M. Lane
Valarie M. Lane
Secretary to Judge Brenner
Atomic Safety and Licensing
Board Panel

Bethesda, Maryland

Attachment

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