716

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 OCT 24 A11:29

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Mr. Gustave A. Linenberger, Jr.
Ivan W. Smith, Alternate Chairman

SERVED OCT 24 1984

In the Matter of:	NRC Docket No. 50-463-CP 50-464-CP
PHILADELPHIA ELECTRIC COMPANY	
(Fulton Generating Station, Units 1 and 2)	(ASLBP Docket No. 76-300-01 CP)
	October 23, 1984

INITIAL DECISION

I. Introduction

On February 4, 1982, the Commission declined to review an appeal board decision, 14 NRC 967 (ALAB-657, 1981), which had vacated this board's decision to dismiss the captioned proceeding with prejudice. The appeal board decision remanded the proceeding "for further action in conformity with this opinion." Id. at 979. ALAB-657 held that the licensing board had abused its discretion in deciding to dismiss with prejudice Philadelphia Electric Company's (Applicant or PECO) application for a permit to construct twin high temperature gas cooled reactors (HTGR) at its Fulton site 36 miles east of Baltimore, Maryland. Following a review of the entire record in this matter, the application to construct twin high temperature gas cooled reactors at the Fulton

8410250079 841023
PDR ADOCK 05000463
G PDR

DS02

site is hereby dismissed without prejudice as moot. The dismissal is conditioned, all as more fully set out below.

II. Background

The sole issue before this Board* is whether this remanded proceeding should be dismissed with or without prejudice. The issue is before us on a motion for summary decision filed by Applicant.

The background of this proceeding is set forth in greater detail in the prior licensing board's unpublished opinion dated February 27, 1981, and the ALAB-657 decision to vacate and remand. Those decisions recite that the original application for a construction permit to build twin HTGRs at the Fulton site was filed in July 1973; that PECO's reactor supplier unilaterally stopped work on the project and NRC suspended its review of the application in 1975; and that the proceeding was then suspended for three years, although PECO filed monthly status reports with the licensing board from December 1975 to December 1978. The decisions further recite that the Commission issued its regulation authorizing Early Site Review (ESR) in 1977; that in March 1978 PECO

---

*The board was reconstituted on December 9, 1983 (48 Fed. Reg. 55789) and February 28, 1984 (49 Fed. Reg. 8097) by replacing two of its three members.

informed NRC Staff informally that PECO would amend its application to seek early site review, that PECO filed the application in December 1978, but then on December 5, 1980, PECO moved to withdraw its application without prejudice. The ESR application was not actually docketed by the NRC Staff prior to its withdrawal. Thereafter, one of the three principal groups of intervenors requested that the licensing board dismiss the application with prejudice. The board granted intervenor's request in 1981, and an appeal led to the issuance of ALAB-657.

The ALAB-657 decision was based on the appeal board's defining the licensing board dismissal with prejudice to mean that PECO could be barred from filing an application to construct any reactor at the Fulton site. The appeal board's chosen definition was the third of three possible limitations it saw on PECO's future activities, namely:

> ... (1) refiling an identical application to construct an HTGR at the Fulton site; (2) filing a new application to construct any type of nuclear reactor at any site; or (3) filing a new application to construction any type of nuclear reactor at Fulton.
>
> If the Board contemplated the first alternative, then this appeal may be much ado about nothing. Id. at 973. (Emphasis in original.)

We agree. The dismissal with prejudice in the original licensing board decision meant that PECO was barred from refiling an identical application to have General Atomic Corporation construct the twin HTGRs proposed at the Fulton site.

However, the Licensing Board's Decision contained discussion of PECO's intent and good faith in reaching its final decision to withdraw the ESR application. The original application proceeding had been actively litigated by the parties for the first two years after the application was filed, and the NRC Staff had produced both a Safety Evaluation Report and a Final Environmental Statement by the time General Atomic Company announced its unilateral decision not to build the facility in September, 1975. The proceeding was essentially suspended for three years while PECO reassessed its options and then was reactivated in December, 1978 by PECO's amending its construction permit application to seek early site review instead. The licensing board's discussion of those events in conjunction with the dismissal with prejudice in 1981 apparently prompted PECO's appeal.

Upon reconstitution in late 1983, this licensing board issued a proposed decision and order dismissing this proceeding with prejudice for the narrow purpose of bringing to a final conclusion the original application to build the General Atomic HTGRs at the Fulton site. Nevertheless, PECO and the NRC Staff objected, and PECO filed a Motion for Summary Decision seeking to terminate the proceeding without prejudice as moot. Staff supported PECO. Intervenor York County, a member of Environmental Coalition on Nuclear Power (ECNP) opposed PECO's motion, and the only other respondent, the Susquehanna River Basin Commission, did not object to dismissal of the proceeding. Thereafter,

oral argument on PECO's motion, including any possible claim for intervenors' fees and expenses, was held in Philadelphia, Pennsylvania.

III. Positions of the Parties

Applicant states that the record demonstrates and ALAB-657 held that there is no evidence either of a bad faith prosecution of PECO's amended application for early site review or any injury to any legally cognizable interest. PECO argues that a dismissal with prejudice requires both bad faith and harm to an individual or the public, that the burden of making such a showing is on the one seeking dismissal with prejudice, not the applicant, and that no such showing has been made. Consequently, PECO concludes the proceeding should be dismissed without prejudice. PECO asserts further that it would not object to a condition that any future application for a Fulton nuclear plant could not be identical to the amended application now pending before this Board. Motion for Summary Decision at 23.

Dr. Johnsrud, representing the York Intervenors, asserts that the only reason for PECO's actions (which she characterizes as unreasonable, arbitrary, and capricious) in connection with the ESR application was to keep it alive. Tr. 23-27. While not asserting bad faith as such, Dr. Johnsrud sees three distinct injuries resulting from PECO's actions: (1) an unspecified harmful effect on property values; (2) damaging stress on individual citizens concerned about the application; and

(3) the substantial cost to the Commission in staff time and effort expended on reviewing the original and the amended application. Tr. 48-66; January 7, 1984 Intervenors' Response. Nevertheless, Dr. Johnsrud affirmatively asserts that intervenors York, the central Pennsylvania group, and herself personally, do not seek fees or costs. Tr. 61, 66. Rather, they seek in the first instance an order "that this utility may not raise another application for a reactor license at the Fulton site" (Tr. 52), or, in the alternative, dismissal with prejudice confined to a ban against building the original General Atomic HTGR at the Fulton site. Intervenors' Response, p. 4.

The NRC Staff concurs with PECO's position, and adds that because PECO paid a licensing fee on the original application and a First Circuit Court of Appeals' decision banned retroactive imposition of fees equal to the amount the Staff had expended in reviewing the application, no further fees are payable. Staff submitted a copy of its letter to PECO in 1982 stating that position. Tr. at 70.

IV. Discussion

The grounds for either form of relief sought by intervenors has evolved at this juncture into two broad categories: (1) harm to those near the site either to property values or in the form of psychological stress; and (2) recoupment of costs incurred by the Commission Staff

above and beyond the initial application fee For the reasons set out below, no such relief is available.

The claimed harm to property values has never risen above the status of an unparticularized, general allegation. No property or properties have ever been identified, no affidavits proffered, nor has any basis of any kind been offered such as would require this Board to inquire further. The allegation has been brief and casual to say the least. In short, it is not

> ... supported by a showing, typically through affidavits or unrebutted pleadings, of sufficient weight and moment to cause reasonable minds to inquire further.

Puerto Rico Electric Power Authority, 14 NRC 1125, 1133-34 (ALAB-662, 1981); Philadelphia Electric Co., 14 NRC 967, 979 (1981).

Similarly, general allegations of psychological stress are wholly unsupported. Philadelphia Electric Co., supra. More significantly, however, even if a threshold factual showing were made, no basis for a legally cognizable claim for harm to psychological health has been suggested. In Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S.Ct. 1556, 75 L.Ed. 2d 534 (1983), the Supreme Court held that the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., did not create a cause of action for harm to psychological health resultant from the prospect of renewed operation of the Three Mile Island nuclear

plant. Harm to psychological health is a perception of risk beyond the scope of NEPA. Dr. Johnsrud's claim of psycnological stress has even less purported foundation than that asserted in the Supreme Court case where an accident had occurred in the twin to the reactor proposed for renewed operation. In the instant case there has not only been no accident, there has been nc reactor. This Board has found no other legal basis for a claim for psychological harm, and thus it must fail both factually and legally.

Finally, intervenors allege that the Commission has incurred additional costs that should be compensated. Intervenors make no legal arguments, they simply allege the fact of additional costs. The allegation as to additional costs may well be grounded in fact, but there is no basis for asserting a right to compensation in law. In opposition, Staff points to New England Power Co. v. NRC, 683 F.2d 12 (1st Cir. 1982). There the Court held that applicants could not be billed for withdrawn applications if the request for withdrawal was filed before November 6, 1981. The application at issue here was withdrawn in 1980. Consequently, the Staff has concluded that it is barred from billing PECO for costs of review beyond those in effect prior to the time the Commission's revised rule became effective on November 6, 1981 to enlarge the amount that could be billed. We concur in the Staff's conclusion. Id. at 18.

All litigation must come to an end some time. To that end we accept PECO's lack of objection to a condition on the dismissal barring

"any future application at Fulton ... identical to the one which, as amended, is presently pending before ..." this licensing board. The term "identical" is used in our order to mean, as PECO points out, that with changes in technology and regulations, it is highly unlikely that a future application would be the same in all respects as the HTGR application at issue here.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 23rd day of October, 1984

ORDERED

That Philadelphia Electric Company is barred from filing a future application at Fulton identical to the one, as amended, which is presently pending before this Licensing Board; and

That Applicant's motion for summary decision is granted and In the Matter of Philadelphia Electric Company, NRC Docket Nos. 50-463-CP and

50-464-CP, is dismissed without prejudice as moot.

THE ATOMIC SAFETY AND LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Ivan W. Smith
ADMINISTRATIVE LAW JUDGE

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,

this 23rd day of October, 1984.