

February 12, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Docket Nos. 50-352 06
50-353 06

NRC STAFF RESPONSE TO AWPP (ROMANO)
NEW CONTENTION CONCERNING SHELTERING

I. INTRODUCTION

On January 27, 1985, the Air and Water Pollution Patrol (AWPP), through its representative Frank R. Romano, filed a document entitled "AS IT RELATES TO SHELTERING, AIR AND WATER POLLUTION PATROL (ROMANO) CONTENDS THAT APPLICANT AND STAFF NEITHER CONCENTIOUSLY [sic] CONCERNED THEMSELVES, NOR MADE PUBLIC PLANS FOR, NOR TESTED THE ADEQUACY OF SUCH PLANS, OR OTHERWISE INSURED AGAINST HEALTH EFFECTS FROM MASSIVE IONIZING RADIATION RELEASES AS GASES OR PARTICULATE ENTITIES, IN CASE OF A SERIOUS ACCIDENT AT LIMERICK UNDER CONDITIONS WHICH WOULD PREVENT EVACUATION" (Request) that requests the Licensing Board to admit a new contention related to sheltering. For the reasons set forth below, the NRC staff opposes the Request and believes the Licensing Board should deny the admission of AWPP's new contention.

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II. BACKGROUND

During the week of March 5, 1984, arguments on admissibility of off-site emergency planning contentions were heard by the Licensing Board at a special prehearing conference. ^{1/} AWPP did not participate in that prehearing conference on offsite emergency planning and thus did not proffer any offsite emergency planning contentions for Board consideration at that time. ^{2/} Further, AWPP did not participate in the lengthy earlier prehearing phase of this case on offsite emergency planning. ^{3/} On August 8, 1984, AWPP filed a late-filed contention regarding evacuation ^{4/} to which it refers in its current request. Request at 1. AWPP's late-filed contention of August 8, 1984 asserted the following:

[The] Applicant must be made to provide a truly realistic plan, and must be required to test its required capability* before receiving a license to operate or risk the public.

. . . AWPP contends the Applicant and Staff, singly or together, must provide a plan that passes the Limerick Test of Evacuation capability. That test . . . is to prove via a complete, live evacuation exercise, *** that the Applicant has devised a plan which would guarantee all people and livestock within ten miles, or more if necessary, can be moved without injury or death under the highly probable, non-controllable factor of 'worst weather' condition.

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order Rejecting AWPP's New Contention On Evacuation, (unpublished) slip op. at 1 (September 14, 1984).

^{2/} Id. at 5.

^{3/} Id. at 6.

^{4/} "AWPP (ROMANO) NEW CONTENTION RE EVACUATION", dated August 8, 1984 at 1, 2.

*That capability having such inherent guarantees of safety that people in authority at schools, townships and boroughs will embrace the plan. 5/

On September 14, 1984, the Licensing Board issued a memorandum and order rejecting AWPP's August 8, 1984 late-filed contention. 6/ The Licensing Board held that the contention (1) wholly lacked the specificity and bases required by 10 C.F.R. § 2.714(b); (2) was an ill-considered attack on the Commission's regulations on emergency preparedness exercises; and (3) does not survive a balancing of the factors that 10 C.F.R. § 2.714(a)(1) requires to be considered in ruling on the admissibility of late-filed contentions. 7/ In its January 27, 1985 filing, which is dated two day's before the close of the record on all offsite emergency planning contention in this proceeding, AWPP (Romano) now seeks to have admitted a new late-filed contention.

Request at 1. AWPP claims:

As it relates to sheltering, Air and Water Pollution Patrol (Romano) contends that Applicant and Staff neither conscientiously [sic] concerned themselves, nor made public plans for, nor tested the adequacy of such plans, or otherwise insured against health effects from massive ionizing radiation releases as gases or particulate entities, in case of a serious accident at Limerick under conditions which would prevent evacuation.

The need to litigate the recent admitted possibility that the opposite to evacuation, namely, 'sheltering' might be forced upon unsuspecting thousands, referred to by Mr. Bartle, merits the same requirement of planing, familiarization by the public, monitoring, testing drills and all-inclusive home

5/ "AWPP (ROMANO) NEW CONTENTION RE EVACUATION" at 1.

6/ Memorandum And Order Rejecting AWPP's New Contention On Evacuation at 2.

7/ Id.

communication systems, before sheltering can be used as an option.

AWPP (Romano) contends that neither the Applicant nor the Staff adequately paralleled the conditions required of evacuation with sheltering. Neither the Applicant nor Staff, therefore, did all that is necessary to demonstrate that sheltering could be considered a workable option to evacuation. Neither did Applicant nor Staff formally assure that sheltering would not indeed be a term, which in this instance, may hide the possibility of meaning a death trap. Request at 1, 3.

III. DISCUSSION

A. Reconsideration

Before discussing the standards for the admission of late-filed contentions and their applicability to AWPP's newly proffered contention of January 27, 1985, the Staff would note that AWPP's Request references the Licensing Board's September 14, 1984 characterization of its August 8, 1984 contention regarding evacuation as "draconian". Request at 1. AWPP (Romano) argues that its August 8, 1984 contention could be a real possibility as shown by a statement made by Applicant's counsel, Mr. Rader, during his cross-examination of Mr. Bartle, Chairman of the Montgomery County Board of Supervisors about a concern Mr. Bartle expressed in a letter concerning the possibility of evacuation occurring at 3:00 am on a very cold, snowy, wintry morning. ^{8/} Although AWPP has not explicitly challenged the Licensing Board's September 14, 1984 memorandum and order, AWPP appears to implicitly suggest that the Board's decision was wrong since AWPP alleges that its August 8, 1984 contention could be a real

^{8/} Request at 1; see, Tr. 18,613-614.

possibility. Thus, it is unclear whether AWPP (Romano) is seeking reconsideration of the Licensing Board's September 14, 1984 memorandum and order rejecting its August 8, 1984 late-filed contention. Assuming arguendo that AWPP (Romano) is seeking such relief, the Staff submits that AWPP's position is totally without merit. First, AWPP has failed to demonstrate how any of the deficiencies the Licensing Board found in its August 8, 1984 late-filed contention regarding evacuation have been remedied. In propounding the question to Mr. Bartle on January 15, 1985, Mr. Rader stated:

Q. If you were advised, and if you were to accept as a fact, that one of the options during such a situation would be to shelter individuals in their existing residences, rather than to attempt an evacuation, would that alleviate the limited concern that you had expressed in the letter regarding the feasibility of evacuation under those very rigid conditions? 9/

The statement by Mr. Rader indicating that sheltering is a protective action option provides no basis for AWPP's August 8, 1984 late-filed contention which by its terms was solely concerned with evacuation and not sheltering. Secondly, such a request by AWPP (Romano) based on Mr. Rader's statement would be fatally untimely since (1) it comes over four months after the

9/ Tr. 18,614.

Licensing Board's decision on the contention ^{10/}, and (2) is based on information that was made available to Mr. Romano in December 1981, which is more than three years ago. ^{11/} Furthermore, AWPP (Romano) fails to explain how the Licensing Board's reasoning was unsound or in error as to the deficiencies it found in AWPP's late-filed contention. For these reasons, the Licensing Board should deny AWPP's (Romano) request to the extent it seeks reconsideration of the Licensing Board's September 14, 1984 memorandum and order rejecting AWPP's August 8, 1984 late-filed contention regarding evacuation.

B. Criteria for Admission of Late-Filed Contentions

The standards for determining the admissibility of proposed contentions are set forth in 10 C.F.R. § 2.714 of the Commission's rules and

^{10/} The time limit for motions for reconsideration that has been established by the Licensing Board in this case is ten days, in addition to five days for regular mail service of the ruling which is the subject of the motion. See, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order Rejecting Late-Filed Contentions From FOE And AWPP, Denying AWPP's Second Request For Reconsideration Of Asbestos Contention, Denying AWPP's Motion to Add A PVC Contention And Commenting On An Invalid Inference In Del-Aware's May 17, 1984 Filing, (Unpublished) slip op. at 21 (August 24, 1984).

^{11/} On December 16, 1981, the Assistant Counsel, Commonwealth of Pennsylvania transmitted to the Licensing Board and parties including Mr. Frank R. Romano, a copy of the Commonwealth of Pennsylvania, Disaster Operations Plan, Annex E, Fixed Nuclear Facility Incidents, November 1981. At page E-9-1, that plan, which was described as "the Commonwealth's emergency plan for incidents involving nuclear power plants", states "Sheltering is another protective action which could be recommended to the public under certain circumstances short of a General Evacuation." (See, December 16, 1981 letter from Mr. Robert W. Adler to Judges Brenner, Cole and Morris with Attachment.)

regulations. Moreover, when a proposed contention is late-filed, all of the factors in 10 C.F.R. § 2.714(a)(1) ^{12/} should be applied by a licensing board in determining the admissibility of such contentions. ^{13/}

AWPP (Romano) has the burden of addressing each of the 10 C.F.R. § 2.714(a)(1) factors governing the admissibility of late-filed contentions and demonstrating that, on balance, they favor admission of its untimely contention. ^{14/} AWPP (Romano) has briefly addressed four of the five factors that 10 C.F.R. § 2.714(a)(1) requires the Licensing Board to consider in ruling on the admissibility of the late-filed contention and concluded that these factors weigh in favor of admitting its contention.

^{12/} 10 C.F.R. § 2.714(a)(1) provides that nontimely petitions to intervene or requests for hearing will not be entertained absent a determination by the Licensing Board that the petition or request should be granted based upon a balancing of the following factors:

- (i) good cause, if any, for failure to file on time;
- (ii) the availability of other means to protect petitioner's interest;
- (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record;
- (iv) the extent to which existing parties will represent the petitioner's interest; and
- (v) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

^{13/} Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NPC 1041 (1983); Memorandum and Order Rejecting AWPP's New Contention On Evacuation at 2, 5.

^{14/} Duke Power Company, et al. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

Nevertheless, the Staff submits that AWPP (Romano) has failed to demonstrate that a balancing of the Section 2.714(a)(1) factors favors admission of this late-filed contention.

1. Good Cause

The first factor governing the admissibility of late-filed contentions is good cause for failure to file on time. AWPP (Romano) claims that the cause for late filing "involves the life and death importance of the real possibility of 'sheltering' brought forth on January 15th, 1985 before the Atomic Safety and Licensing Board in Philadelphia". Request at 1. AWPP (Romano) asserts that this developed when Applicant's counsel, Mr. Rader, admitted that sheltering will be the means to protect the public within the Limerick EPZ during a severe accident under conditions that make evacuation impossible. Id. The Commission's emergency planning standards at 10 C.F.R. Section 50.47(b)(10) calls for a range of protective actions to be developed for the plume exposure pathway EPZ for emergency workers and the public. That standard also calls for the development and establishment of guidelines for the choice of protective actions during an emergency, which are consistent with Federal guidance. ^{15/} NUREG-0654 ^{16/}, II.J. sets forth the Commission's evaluation criteria for implementing this planning standard. NUREG-0654 Criterion II.J.10.m. explicitly mandates the inclusion of expected local protection afforded in residential units or

^{15/} 10 C.F.R. § 50.47(b)(10).

^{16/} Criteria For Preparation And Evaluation Of Radiological Emergency Response Plans And Preparedness In Support Of Nuclear Power Plants, NUREG-0654/FEMA-REP-1/Rev. 1 (November 1980) ("NUREG-0654").

other shelter for direct and inhalation exposure in the bases for choosing recommended protective measures for the plume exposure EPZ during emergency conditions. ^{17/} Thus, the Commission's emergency planning requirements and guidance specifically contemplate that sheltering may be a protective action during a radiological emergency. More importantly, perhaps, AWPP (Romano) has had information (the Commonwealth's emergency plan for incidents involving nuclear power plants) available to it for approximately three years that indicates that sheltering could be recommended as a protective action under certain circumstances. ^{18/} This same information is contained in the February 1984 changes to the Commonwealth's emergency plan which lists the three counties within the Limerick EPZ, i.e., Montgomery, Chester and Bucks, as risk counties for the Limerick Generating Station. ^{19/} Thus AWPP's (Romano) argument that only now, after the January 15, 1985 evidentiary hearing session, is it clear that sheltering is a means to protect the public within the Limerick EPZ during a severe accident making evacuation impossible ^{20/} is without merit. The record is clear that for many months prior to the start of the offsite emergency planning proceeding information has been available that permitted AWPP (Romano) to have proffered this contention challenging the adequacy of planning for sheltering

^{17/} NUREG-0654 at p. 61, 64.

^{18/} See note 10, supra.

^{19/} The current version of the Commonwealth of Pennsylvania Disaster Operations Plan, Annex E was identified as an exhibit in this proceeding as early as November 28, 1984.

^{20/} Request at 1, 3.

at the same time other intervenors proffered their contentions. The risks of exposure to radiation associated with sheltering as a protective measure are no different now than in December 1981 and February 1984 when the information became available. Consequently, AWPP (Romano) has not established could cause for its untimely filing of a contention regarding sheltering two days before the record closed in this proceeding.

2. Availability of Other Means

The second factor the Board is required to consider is the availability of other means to protect petitioner's interests. ^{21/} AWPP's (Romano) contention frequently references the Applicant's and Staff's failure to properly plan for sheltering as a protective measure. Request at 1, 3. But, neither the Applicant nor the Staff make the plans for evacuation or sheltering for the Limerick plume EPZ. AWPP has other means available for protecting its interests since it could go to state and local planners. AWPP could also attend the public meeting that is required to be held prior to formal FEMA approval of the offsite emergency plans under 44 C.F.R. § 350. ^{22/}

3. Assist In Development of A Sound Record

The third factor to be considered by the Board is the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record. ^{23/} A tardy petitioner must affirmatively demonstrate that it has special expertise which would aid in the development

^{21/} See, 10 C.F.R. § 2.714(a)(1)(ii).

^{22/} See, 44 C.F.R. § 350.10; Memorandum And Order Rejecting AWPP's New Contention On Evacuation at 6.

^{23/} See, 10 C.F.R. § 2.714(a)(1)(iii).

of a sound record to prevail on this factor. ^{24/} In addressing this factor, AWPP (Romano), as a tardy petitioner, has the responsibility to "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Vague assertions regarding petitioner's ability or resources . . . are insufficient." ^{25/}

For this third factor, AWPP (Romano) alleges that it will show that adequate plans and studies were not made concerning sheltering in the average home should that be required during a severe accident involving worst case conditions. Request at 2. This amounts to nothing more than a vague assertion about what AWPP (Romano) will show since AWPP has failed to particularize precisely how any of the offsite radiological emergency response plans for Limerick are inadequate regarding the use of sheltering as a protective measure. AWPP has not alleged that the guidelines for the choice of sheltering as a protective action are inconsistent with Federal guidance. Furthermore, AWPP (Romano) does not specifically allege that the homes within the Limerick plume EPZ are inadequate for sheltering. Also, there is no NRC or FEMA regulation that requires that studies be made of the sheltering capability of residences within the plume EPZ.

^{24/} Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980); see also, South Carolina Electric & Gas Co., et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-642, 13 NRC 881, 892-94 (1981).

^{25/} Mississippi Power and Light Company, et al. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

AWPP asserts that it will contribute by calling expert witnesses to testify on the following matters: (1) barrier requirements against massive and intensive gamma radiation as a measure of the degree to which gamma radiation may or may not be stopped by different types of house construction within the Limerick EPZ; (2) air transfer within average residences as related to the evaluation of the amount of particulate matter that can infiltrate airspaces that cannot keep air out of the average house; and (3) environment of houses that are too airtight for breathing by large numbers of people for extended times. Request at 2. AWPP (Romano) has not indicated that it either possesses any special expertise or that it has retained qualified experts. Although AWPP (Romano) has attempted to generally summarize the testimony of its alleged prospective witnesses, ^{26/} it has failed to identify the name and background of any of the alleged prospective witnesses. Thus, the Licensing Board has been presented with too little information to make an informed judgment that AWPP would assist in developing a sound record.

Based on the foregoing reasons, Staff submits that AWPP (Romano) has not met its burden because of its failure (1) to particularize the precise issues it plans to cover, (2) to identify its prospective witnesses, and (3) demonstrate that it has any special expertise. Thus AWPP (Romano)

^{26/} Staff would note that AWPP's (Romano) summary amounts to nothing more than an indication of the conclusions that AWPP would like drawn from the testimony. The summary is not a proper summary to meet the Grand Gulf standard. See, Memorandum And Order Rejecting Late-Filed Contentions From FOE And AWPP, Denying AWPP's Second Request For Reconsideration Of Asbestos Contention, Denying AWPP's Motion to Add A PVC Contention And Commenting On An Invalid Inference In Del-Aware's May 17, 1984 Filing at 19.

has not satisfied its burden of demonstrating that the third 10 C.F.R. § 2.714(a)(1) factor favors admission of its untimely contention.

4. Representation by Existing Parties

The fourth factor that 10 C.F.R. § 2.714(a)(1) requires the Licensing Board to consider is the extent to which existing parties will represent the petitioner's interest. ^{27/} The Staff concedes that there is no other party who might directly represent the interest of AWPP (Romano) at this stage in the proceeding. However, Limerick Ecology Action (LEA) a party to this proceeding did have a contention admitted to this proceeding (LEA-12) that concerned the sufficiency of school personnel "if sheltering is recommended as a protective measure". ^{28/} Thus this factor weighs in favor of granting AWPP's untimely request for admission of its new contention.

5. Delay and Broadening of the Issues

Finally, the fifth factor to be considered in ruling on AWPP's late-filed contention is the extent to which petitioner's participation will broaden the issues or delay the proceeding. ^{29/} AWPP (Romano) has failed to address this factor in its request for consideration of its late-filed emergency planning contention on sheltering. Needless to say, the admission of AWPP's late-filed contention at this stage of the proceeding

^{27/} See, 10 C.F.R. § 2.714(a)(1)(iv).

^{28/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum And Order Ruling On Reworded And Respecified Offsite Emergency Planning Contentions, slip op. at 7-8, (September 24, 1984).

^{29/} See, 10 C.F.R. § 2.714(a)(1)(v).

would significantly broaden the issues since the litigation of all admitted contentions was completed on January 29, 1985. The proceeding would be substantially delayed should the late-filed contention be admitted because time would have to be allotted for specification of the contention, discovery and testimony. Consequently, the fifth factor of 10 C.F.R. § 2.714(a)(1) weighs against admitting AWPP's (Romano) late-filed contention regarding sheltering.

6. Balancing of Factors

The Staff would note that the availability of other means whereby a petitioner can protect its interest (factor two) and the extent to which other parties will represent that interest (factor four) are given less weight than the other factors. ^{30/} The extent to which other parties will represent AWPP's interest (factor two) is the only factor that weighs in favor of admitting AWPP's late-filed contention. Accordingly, the Staff submits that AWPP's (Romano) request for admission of its late-filed contention regarding sheltering should be denied based on a proper balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1).

C. Bases and Specificity

Given AWPP's (Romano) failure to demonstrate that a balancing of the factors 10 C.F.R. § 2.714(a)(1) requires the Licensing Board to admit its late-filed contention, the Staff finds it unnecessary to elaborate at length on AWPP's late-filed contentions failure to satisfy the specific-

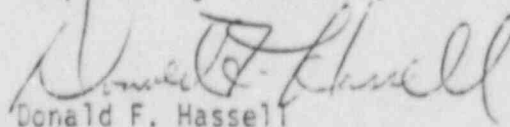
^{30/} See, South Carolina Electric & Gas Co., et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

ity and bases required by 10 C.F.R. § 2.714(b). AWPP's late-filed contentions does not specifically identify what provisions of offsite radiological emergency response plans for Limerick are inadequate with regard to sheltering. In short, AWPP does not provide specific failures or inadequacies of such plans. Moreover, AWPP's late-filed contention alleges failures on the part of the Applicant and Staff for actions they are not required to take under ^{31/} the Commission's emergency planning regulations or guidance. At bottom, the Staff is of the view that AWPP's late-filed contentions lacks the bases and specificity required by 10 C.F.R. § 2.714(b) in that it does not explain how the offsite emergency response plans, the Applicant or the Staff fail to do what is required under the Commission's emergency planning regulations or guidance.

IV. CONCLUSION

Based on the reasons stated above, the Staff submits that the Licensing Board should (1) deny admission of AWPP's (Romano) late-filed offsite emergency planning contention regarding sheltering, and (2) deny AWPP's request to the extent it seeks reconsideration of the Licensing Board's September 14, 1984 memorandum and order rejecting AWPP's August 8, 1984 late-filed contention.

Respectfully submitted,


Donald F. Hassell
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of February, 1985

^{31/} Request at 3.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
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} Docket Nos. 50-352
50-353

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO AWPP (ROMANO) NEW CONTENTION CONCERNING SHELTERING" 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 12th day of February, 1985:

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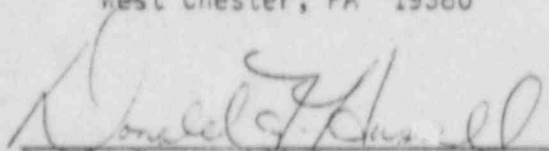
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