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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

In the Matter of
Philadelphia Electric Company
(Limerick Generating Station,
Unit 1)

)
) Docket No. 50-352-~~OLA~~
) (Check Valve)
) Docket No. 50-352-~~OLA-2~~
) (Containment Isolation)
) March 19, 1986

OLA/OLA-2

LICENSEE'S MOTION FOR DIRECTED CERTIFICATION OF THE
"MEMORANDUM AND ORDER RULING ON ROBERT L. ANTHONY'S
PETITION FOR LEAVE TO INTERVENE"

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)
Philadelphia Electric Company) Docket No. 50-352-OLA
(Limerick Generating Station,) (Check Valve)
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) (Containment Isolation)
) March 19, 1986

LICENSEE'S MOTION FOR DIRECTED CERTIFICATION OF THE
"MEMORANDUM AND ORDER RULING ON ROBERT L. ANTHONY'S
PETITION FOR LEAVE TO INTERVENE"

Preliminary Statement

Pursuant to 10 C.F.R. §§2.718(i) and 2.785(b) (1),^{1/} Philadelphia Electric Company ("Licensee") requests the Atomic Safety and Licensing Appeal Board ("Appeal Board") to direct certification of a Memorandum and Order issued March 13, 1986 by the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board").^{2/} The Licensing Board ruled that Mr. Robert Anthony's late-filed petition regarding issuance of an amendment to the operating license for the Limerick Generating

^{1/} See generally Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

^{2/} Philadelphia Electric Company (Limerick Generating Station, Unit 1) (Check Valve), "Memorandum and Order Ruling on Robert L. Anthony's Petition for Leave to Intervene" (March 13, 1986). As discussed below, the proceeding in which the Board entered the subject Memorandum and Order, which relates to Amendment No. 1 for the Limerick operating license, has been consolidated with a new proceeding related to Amendment No. 2.

Station ("Limerick") met the requirements for late intervention and standing under the Commission's regulations^{3/}.

The net effect of the Board's ruling is to create a licensing proceeding where none would otherwise be required,^{4/} based upon manifest error "so 'patently inconsistent' with prevailing law as to merit . . . attention now."^{5/} Certification is warranted under precedent because the ruling "affect[s] the basic structure of the proceeding in a pervasive or unusual manner,"^{6/} namely:

- o Refusing to follow the 30-day notice requirements prescribed by the Federal Register Act and 10 C.F.R. §§2.105(d) and 50.91(a) (2) by substituting the Board's own notion of what it deemed "fair" (slip op. at 6-7).
- o Sua sponte development of arguments on behalf of a petitioner who wholly failed to address the five lateness criteria in his petition and who therefore did not meet his affirmative obligation to do so (slip op. at 7).

3/ Licensee disagrees with the Board's findings on standing, but does not seek certification of the matter.

4/ The Board's decision was subject to admission of at least one valid contention. See "Memorandum and Order Ruling on Anthony Petition" at 10. As discussed below, however, the Board clearly stated its intention to expedite the proceeding in order to complete it by May 26, 1986, the end of the extension granted by the amendment at issue for surveillance testing of certain excess flow check valves. Therefore, recourse to review under 10 C.F.R. §2.714a will not provide a practical means of relief if the Board grants any one or more of the 11 contentions proposed by Mr. Anthony in the Amendment No. 1 proceeding alone. These special circumstances and the need for certification are detailed in Part IV, infra.

5/ Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982).

6/ Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

- o Finding that petitioner, as "a long-time intervenor in the Limerick operating license proceeding," had greater rights in intervening than other individuals, i.e., he "should not have had to monitor the Federal Register to learn about his opportunity to participate in this amendment proceeding" (slip op. at 6-7).
- o Violating Commission precedent on admitting late contentions by ruling that a showing of "good cause" for lateness creates "a light burden on the other four factors to be balanced for late-filed petitions" (slip op. at 7).
- o Determining as a legal and factual matter that a petitioner has met the third factor for admitting a late petition where the Board "has no information about whether [petitioner's] participation would assist in developing a sound record" (slip op. at 7) (emphasis added).
- o Ruling that admission of a late-filed petition does not "delay the proceeding" even though there would otherwise be no proceeding if the petition were denied (slip op. at 7).

The Board's decision has the effect of overriding the Commission's regulations under 10 C.F.R. §2.105(d) and §50.91(a)(2) for providing notice to interested parties of the proposed issuance of operating license amendments. It has created a new corollary to these rules such that the intervention deadline does not expire, at least for "long-time" intervenors like Mr. Anthony, until actual, personalized notice of an opportunity for hearing has been received. Further, the Board holds that such an intervenor is totally excused from his affirmative obligation to justify his untimely request for intervention.

In short, the Board has so radically departed from Commission precedent governing the binding effect of notice by publication in the Federal Register and construing well-defined criteria for admitting late petitions that immediate review is justified and necessary to prevent

initiation of an adjudicatory proceeding which would otherwise never take place.^{7/} Therefore, given the shortened time frame indicated by the Board, the Appeal Board should direct certification, vacate the decision below and dismiss Mr. Anthony's petition.

Background

This request for certification arises from a late petition for leave to intervene and for a hearing filed by Robert L. Anthony with respect to the proposed issuance of Amendment No. 1 to the operating license for Limerick. On December 18, 1985, Licensee submitted an application which requested the NRC to issue an amendment to its operating license for Limerick Unit 1 revising the Technical Specifications to allow a one-time-only extension of 14 weeks for the testing of excess flow check valves in certain instrumentation lines.^{8/} This routine testing required by the Technical Specifications must be performed every 18

^{7/} Licensee notes that Frank R. Romano filed a late petition for intervention in this matter on February 24, 1986. As discussed at pages 25-26, infra, the pendency of that petition, filed one month late, does not make it any more likely that a hearing will be necessary. As regards lateness, the Anthony and Romano petitions are indistinguishable, except that Mr. Romano is even more untimely. Accordingly, if the Appeal Board directs certification and reverses, Mr. Romano's petition should be rejected a fortiori.

^{8/} The application discussed the need and technical basis for the requested amendment and also provided information regarding the determination on "significant hazards consideration" to be made by the Commission pursuant to 10 C.F.R. §50.92. The Licensee concluded that the proposed temporary amendment of the schedule for tests specified in the application did not constitute a significant hazards consideration under Section 50.92. See generally letter from Eugene J. Bradley, Associate General Counsel, Philadelphia Electric Company to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, NRC (December 18, 1985) (enclosing Application for Amendment of Facility Operating License NPF-39). See also 50 Fed. Reg. 52874 (December 26, 1985).

months and necessitates a plant shutdown. As shown on the application's certificate of service, Mr. Anthony and other parties to the NRC operating license proceeding were served.

Pursuant to the regulations, the NRC published notice in the Federal Register on December 26, 1985 of its proposed determination that the requested amendment involves no significant hazards consideration and stated that the NRC was seeking public comments on its proposed determination. The notice provided that, by January 26, 1986, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene."^{9/} As customary, the notice also stated that untimely petitions to intervene would not be entertained absent a favorable determination based upon a balancing of the factors for admitting late contentions. The NRC granted the proposed amendment on February 6, 1986, authorizing the testing to be performed during a scheduled outage to begin on or before May 26, 1986.^{10/}

By letter dated February 6, 1986, the Chief, Docketing and Service Branch, NRC, confirmed an earlier telephone conversation in which Mr.

^{9/} 50 Fed. Reg. 52874, 52875 (December 26, 1985). As the Licensing Board observed, the notice was inartfully worded because it did not explicitly include the right of a petitioner to request a hearing. As the Board also noted, however, "it is apparent that Mr. Anthony was not misled [sic]" because he in fact requested a hearing. "Memorandum and Order Ruling on Anthony Petition" at 5 n.4. Thus, there is no question as to the adequacy of Federal Register notice.

^{10/} See Letter from Walter R. Butler, Division of BWR Licensing, NRC to Edward G. Bauer, Jr., Vice President and General Counsel, Philadelphia Electric Company (February 6, 1986). The license amendment was supported by a written safety evaluation which was also attached.

Anthony was informed that the Office of the General Counsel had reviewed and rejected his January 30th petition because of its noncompliance with the rules.^{11/} Accordingly, the NRC expressly declined to docket Mr. Anthony's nonconforming petition. On February 5, 1986, Mr. Anthony filed an amendment to his petition.

By Order dated February 12, 1986, the Chairman of the Atomic Safety and Licensing Board Panel appointed a licensing board to rule upon petitions for leave to intervene and/or requests for hearing with respect to Amendment No. 1, and to preside over the proceeding if a hearing were ordered.^{12/} Both the Licensee and NRC Staff opposed Mr. Anthony's petition to intervene. After preliminary procedural rulings, the Licensing Board held "that Mr. Anthony's petition meets the threshold requirements for admission set out in Section 2.714."^{13/} The Board directed the filing of answers to contentions (filed February 15, 1986 by Mr. Anthony) by noon, March 17, 1986 and scheduled a prehearing conference for March 27, 1986.^{14/}

^{11/} The docketing officer cited violations of (1) the formal requirements for documents under 10 C.F.R. §2.708; (2) the requirements for a certificate of service under 10 C.F.R. §2.712; and (3) the requirements for a petition to intervene under 10 C.F.R. §2.714. According to his letter, after Mr. Anthony said that he would file an amendment to his petition, the docketing officer stated that he would refer the amendment to the Atomic Safety and Licensing Board Panel for consideration when received.

^{12/} Limerick, supra, "Establishment of Atomic Safety and Licensing Board" (February 12, 1986).

^{13/} "Memorandum and Order Ruling on Anthony Petition" at 10.

^{14/} Id. at 11.

Argument

I. The Board Erred in Permitting Late Intervention Because Petitioner Wholly Failed to Address the Five Mandatory Lateness Criteria.

Boards have discretion in weighing the five lateness factors, but under 10 C.F.R. §2.714(a)(1)(i)-(v), the principles governing admission of late-filed petitions are themselves well-defined and understood.^{15/} In this case, a licensing board has not simply abused its discretion in weighing the five lateness criteria. Rather, it has ignored the unambiguous mandate of the regulations. Because Mr. Anthony's petition is wholly devoid of any discussion of the five factors, the Board was obliged by regulation and precedent to dismiss it out of hand. Instead, the Board engaged in an improper sua sponte development of arguments on

^{15/} Section 2.714(a)(1) provides in relevant part:

Nontimely filings will not be entertained absent a determination . . . that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in Paragraph (d) of this section:

(i) Good cause, if any, for failure to file on time.

(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 presented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Mr. Anthony's behalf based on its own perceptions. Such action was completely unjustified, especially here, inasmuch as "Mr. Anthony was a long-time intervenor in the Limerick operating license proceeding."^{16/} Mr. Anthony was therefore fully conversant with the requirement under the regulations to address the five lateness factors.

Virtually the same situation recently arose in the Pilgrim license amendment proceeding. Like Mr. Anthony, the petitioner in that case was a veteran intervenor in NRC proceedings. Nonetheless, he did not discuss the lateness factors in his petition, which was filed several days beyond the deadline noticed in the Federal Register, again, like Mr. Anthony. The Appeal Board affirmed denial of the petition. It held: "[G]iven [petitioner's] failure even to address the section 2.714(a) lateness factors, his intervention petition was correctly denied because it was untimely."^{17/} The Appeal Board rejected petitioner's claim that he had no duty to address lateness until it was raised as a defense by the NRC Staff and licensee.

The ruling in the instant case is so patently contrary to the Pilgrim ruling as to warrant summary reversal:

There is no conceivable merit to [petitioner's] claim that his duty to confront the five lateness factors did not materialize until after the applicant and the staff had responded to the intervention petition and raised the matter of its untimeliness. . . . In short, it is of no consequence whether, in an opposition to the late petition, one of the other litigants points to the

^{16/} "Memorandum and Order Ruling on Anthony Petition" at 6.

^{17/} Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985), aff'g, LBP-85-24, 22 NRC 97 (1985) (emphasis added).

untimeliness. Even if all of the parties are inclined to waive the tardiness, the board nevertheless is duty-bound to deny the petition on its own initiative unless it is persuaded that, on balance, the lateness factors point in the opposite direction.

It is equally clear that the burden of persuasion on the lateness factors is on the tardy petitioner and that, in order to discharge that burden, the petitioner must come to grips with those factors in the petition itself. The underlying reason for this requirement is particularly apparent in the context of the first factor. A licensing board hardly could determine whether there was justification for the untimely filing without knowing why the petition was not submitted by the prescribed deadline - information peculiarly within the possession of the petitioner. Likewise, in most instances at least the board will not be able to assess confidently the third factor (the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record) without having before it the petitioner's reasons for believing that the factor weighs in his or her favor.^{18/}

In sum, the Appeal Board reaffirmed that petitioner's "obligation is to establish affirmatively at the threshold (i.e., in the late petition itself) that a balancing of the five lateness factors warrants overlooking the tardiness."^{19/}

This is nothing new. The Appeal Board emphasized years ago in Perkins that "the late petitioner must address each of those five factors and affirmatively demonstrate that, on balance, they favor

^{18/} Pilgrim, supra, ALAB-816, 22 NRC at 466 (emphasis added) (footnotes omitted).

^{19/} Id. at 467 n.22 (emphasis added). See generally 10 C.F.R. §2.732; Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 331 (1983).

permitting his tardy admission to the proceeding."^{20/} Moreover, Mr. Anthony is no stranger to NRC procedures and requirements under the Rules of Practice. He actively participated as an intervenor in the Limerick operating license proceeding^{21/} and has previously had to deal with the lateness factors, for example, in two requests in 1985 to reopen the record in the operating license proceeding for Limerick.^{22/}

Therefore, Mr. Anthony, by personal knowledge and experience, was well versed in the rules, specifically the requirement that he must address the five lateness factors. Mr. Anthony's status is indistinguishable from that of the petitioner in Pilgrim, also "by no means a newcomer to NRC licensing proceedings" who nonetheless "paid no heed to [the] admonition" in the Federal Register notice that the five lateness factors must be addressed.^{23/} Mr. Anthony's petition should have been denied on this ground alone.

^{20/} Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980) (emphasis added).

^{21/} Limerick, supra, LBP-82-43A, 15 NRC 1423, 1440 (1982). In addition to his participation in licensing proceedings since 1981, Mr. Anthony has filed several motions for stays and to reopen proceedings (discussed infra), at least five petitions under 10 C.F.R. §2.206 (see note 38, infra), and two motions for stays in the United States Court of Appeals for the Third Circuit (Anthony v. NRC, No. 85-3606 (3d Cir. November 26, 1985); Anthony v. NRC, No. 84-3409 (3d Cir. December 21, 1984)), all of which have been denied.

^{22/} See Limerick, supra, ALAB-828, 23 NRC _____ (January 16, 1986) (slip op. at 10); Limerick, supra, ALAB-823, 22 NRC 773 (1985).

^{23/} Pilgrim, supra, ALAB-816, 22 NRC at 467.

II. The Licensing Board Ignored the Federal Register Act and Erred in Finding "Good Cause" for Lateness.

By excusing Mr. Anthony from his affirmative obligation, the Licensing Board necessarily inferred reasons and arguments Mr. Anthony never made on his own behalf, even finding in his favor where it acknowledged that the record is blank. This impermissively reversed the burden of proof. On the first factor, good cause for lateness, it is difficult to discern what actually constitutes the "good cause" found to justify Mr. Anthony's untimeliness.

Initially, the Board erred in considering Mr. Anthony's letter of January 30, 1986 as a petition in response to the published notice in determining timeliness.^{24/} As the Board accurately stated, that letter was rejected by the Office of the Secretary and the General Counsel for noncompliance with specific requirements for accepting docketed matters.^{25/} While the Board disclaimed any intent to overrule that action,^{26/} that is precisely what it did by relying on the undocketed letter.^{27/} It is irrelevant whether the Board regarded the January 30th letter as functional, comprehensible or otherwise informative of Mr.

^{24/} See "Memorandum and Order Ruling on Anthony Petition" at 4.

^{25/} Id. at 2. See note 11, supra.

^{26/} Id. at 5 n.3.

^{27/} Id. at 3. The Office of the Secretary is the Commission's delegate for maintaining its official docket. 10 C.F.R. §1.33. The Office of the General Counsel has been delegated responsibility to provide legal advice and assistance to the Commission's offices. 10 C.F.R. §1.32. As such, the Secretary, as guided by the General Counsel, had every right and responsibility to reject Mr. Anthony's January 30, 1986 letter as in violation of docketing requirements.

Anthony's "intervention intentions."^{28/} Inasmuch as it was never docketed, the letter failed to toll the time for filing a petition to intervene.^{29/} For the Board's purposes, it was a legal nullity.^{30/}

As the Board accurately stated, Mr. Anthony did not even acknowledge that his January 30th letter was late. It must be emphasized that nowhere in either his January 30th letter or his February 5th petition did Mr. Anthony address lateness or any of the five factors for admitting late-filed petitions. Nonetheless, the Board credited Mr. Anthony with prevailing on the "good cause" factor because he "alludes to a possible good cause justification by explaining that he could not have responded any earlier" since the monthly NRC notice did not reach him until January 29, 1986.^{31/} The Board therefore illegally acted sua sponte to relieve Mr. Anthony of his affirmative obligation to justify his lateness.

^{28/} "Memorandum and Order Ruling on Anthony Petition" at 4-5.

^{29/} See 10 C.F.R. §2.709.

^{30/} Even if the Board could have legally considered the January 30th 1986 letter as an attempted filing in order to judge "good cause" for lateness, it erred in not taking the further step of determining whether the letter constituted a good faith, bona fide effort to file a valid petition. As the Board noted, Mr. Anthony is a veteran of NRC proceedings and is by now fully conversant with the Commission's pleading requirements. He has been repeatedly admonished on the importance of complying with the Commission's procedural rules for filing documents, including a specific warning that future filings not in conformance with the Rules of Practice "will be subject to summary rejection." Limerick, supra, ALAB "Order" (August 5, 1985) (slip op. at 3). Therefore, objectively speaking, Mr. Anthony had no reason to believe that his January 30th letter met filing requirements.

^{31/} "Memorandum and Order Ruling on Anthony Petition" at 5 (emphasis added).

Even so, the Board's analysis was predicated upon clear legal error. Although acknowledging that publication in the Federal Register gives legal notice of NRC actions, the Board reached the startling conclusion that Mr. Anthony should be excused from the binding effect of the license amendment notice because

Mr. Anthony was a long-time intervenor in the Limerick operating license proceeding. In fairness, Mr. Anthony should not have had to monitor the Federal Register to learn about his opportunity to participate in this amendment proceeding, especially when the notice was published so soon after the application.^{32/}

This constitutes clear error. To state that Mr. Anthony was at liberty to ignore legal notices on Limerick in the Federal Register because he participated in earlier NRC proceedings makes a mockery of the Federal Register Act and is highly prejudicial to the rights of Licensee. If the Licensing Board's decision were allowed to stand, no Commission licensing action would be safe from late attacks by individuals who had intervened in previous proceedings.

The Federal Register Act explicitly provides that publication constitutes notice to "all persons residing within the States of the Union."^{33/} Years ago, the United States Supreme Court held in Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947), that publication in the Federal Register gives legal notice to all citizens. As aptly stated in the Seabrook proceeding, publication in the Federal Register to parties wishing to intervene in hearings before the NRC "is

^{32/} Id. at 6-7.

^{33/} 44 U.S.C. §1508.

a notice to all the world."^{34/} The Licensing Board's contrary ruling violates an unbroken line of Commission precedents by which filing deadlines are those noticed in the Federal Register.^{35/}

The Board's error arose from its reliance in part upon the Staff practice of mailing out monthly compilations of previously published notices, above and beyond the 30-day Federal Register notice required by the Commission's regulations. It also based its decision upon the fact that the NRC technical Staff acted on the application with competent, timely approval.^{36/} No basis exists under the Federal Register Act or the Commission's regulations for the Board to have given Mr. Anthony additional time to file his petition because of the Staff's voluntarily initiated practice of sending notices to intervenors in the operating license proceeding. No legal nexus between the operating license proceeding and the subsequent amendment proceedings exists.

Additionally, the Board incorrectly failed to charge Mr. Anthony with actual notice of the amendment application when served upon him on December 18, 1985 by Licensee. It noted that "notice of the application

^{34/} Seabrook, supra, LBP-82-76, 16 NRC 1029, 1085 (1982).

^{35/} See, e.g., Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 201 (1982); Florida Power and Light Company (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 192 (1979); New England Power & Light Company (NEP, Units 1 and 2), LBP-78-18, 7 NRC 932, 933-34 (1978).

^{36/} "Memorandum and Order Ruling on Anthony Petition" at 6-7. The Board erroneously stated that the Staff "implies that Mr. Anthony was entitled to receive a copy of the Federal Register notice when it was published." Id. at 7. The Staff took no such position. It merely noted that it inadvertently neglected to send Mr. Anthony the monthly compilation of notices under the practice the Staff recently elected to institute.

for the amendment is not notice of the opportunity for a hearing on the amendment."^{37/} The Board's reasoning overlooked the obvious: Mr. Anthony had the application in hand and was well aware of intervention rights from previous experience. If the application truly concerned him, Mr. Anthony was duly alerted to check the Federal Register or at least contact the NRC.^{38/} The Board's extraordinary leniency to Mr. Anthony on notice and lateness far exceeds its discretion.

The Board's astounding conclusion that Mr. Anthony was entitled to greater notice privileges because he was a "long-time intervenor in the Limerick operating license proceeding"^{39/} defies explanation. To the contrary, boards have repeatedly ruled that veteran intervenors are charged with greater, not lesser, knowledge of the rules. The Appeal Board recently reiterated this very point in the Pilgrim case, discussed above, where a long-time intervenor in NRC proceedings ignored the deadline for timely intervention given in a Federal Register notice. The petitioner did not contest the finding that his petition, filed eight days late, was untimely.^{40/} In affirming the denial of the late petition, the Appeal Board did not state that it was "unfair" to hold

^{37/} "Memorandum and Order Ruling on Anthony Petition" at 6.

^{38/} Licensee notes that Mr. Anthony has routinely contacted the NRC Staff, both formally and informally, on numerous occasions. Recent decisions by the Director of the Office of Nuclear Reactor Regulation discuss only a fraction of illustrative communications. Limerick, supra, DD-86-01, 23 NRC _____ (January 21, 1986); Limerick, supra, DD-85-18, 22 NRC 870 (1985); Limerick, supra, DD-85-11, 22 NRC 149 (1985).

^{39/} "Memorandum and Order Ruling on Anthony Petition" at 6.

^{40/} See generally Pilgrim, supra, LBP-85-24, 22 NRC 97 (1985).

petitioner to the deadline noticed in the Federal Register even though he was "only" eight days late, like Mr. Anthony, who filed ten days late.^{41/} On the contrary, both Mr. Anthony and petitioner in Pilgrim "fully apprehended the reach of the affirmative obligation imposed upon the petitioner who appears on the scene after the prescribed deadline has passed."^{42/}

In ruling that "Mr. Anthony has demonstrated good cause for the slightly late filing,"^{43/} the Board erred in confusing "good cause" for lateness with degree of lateness. Mr. Anthony stated no justification for missing the Federal Register deadline. In Summer, the Appeal Board stressed that "whether there is 'good cause' for a late filing depends wholly upon the substantiality of the reasons assigned for not having filed at an earlier date."^{44/} As the Appeal Board found in Pilgrim, lateness of "only" a few days does not equal good cause for the lateness.

If the rule were otherwise, the Federal Register Act and the Commission's regulations governing notice would be effectively abolished.

41/ Pilgrim, supra, ALAB-816, 22 NRC at 466-68. Mr. Anthony did not file a timely petition until February 5, 1986.

42/ Id. at 468.

43/ "Memorandum and Order Ruling on Anthony Petition" at 7.

44/ South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981) (emphasis in original), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982). The Appeal Board repeated this admonition in Perry, supra, ALAB-675, 15 NRC at 1113 n.9.

III. The Board Erred in Evaluating the Remaining Four Lateness Factors.

Inasmuch as Mr. Anthony did not address any of the lateness factors, the Licensing Board's evaluation was necessarily conclusory and unsubstantiated. In reality, the record developed by petitioner was totally silent and all five factors therefore weighed against him as a matter of law. Preliminarily, however, the Board ruled that "[w]ith good cause shown for late filing, Mr. Anthony has a light burden on the other four factors to be balanced for late-filed petitions."^{45/} The Board cited no authority for this novel proposition. The Board's improper standard thereby violated the regulations by excusing Mr. Anthony from the requisite showing on all of the lateness factors.^{46/} As the Commission expressly stated in Three Mile Island: "While recent events may be a key factor in establishing 'good cause' for late intervention, they do not relieve [petitioner] of the obligation to address the other factors."^{47/}

On the second factor, the Licensing Board stated in conclusory fashion that there are no other means by which Mr. Anthony's interest may be protected. The Board apparently did not consider the recent decision of the Appeal Board in Limerick that reliance upon the NRC

^{45/} "Memorandum and Order Ruling on Anthony Petition" at 7.

^{46/} In Seabrook, for instance, the Commission reaffirmed its interpretation "that the admissibility of a late-filed contention must be determined by a balancing of all five of the late intervention factors in 10 C.F.R. §2.714(a)." Seabrook, supra, CLI-83-23, 18 NRC 311, 312 (1983) (emphasis in original).

^{47/} Three Mile Island, supra, CLI-83-25, 18 NRC at 331.

Staff may constitute sufficient "other means," depending upon the issues sought to be raised, the relief requested and the stage of the proceeding.^{48/} As the Appeal Board observed in Fermi, a party unable to gain admittance to a proceeding may request the Director of Nuclear Regulation under 10 C.F.R. §2.206 to institute a proceeding to address its concerns. This alternative remedy "is a real one."^{49/}

In this instance, Mr. Anthony has, in fact, sought relief from the Commission related to the subject amendment, which the Commission has referred to the Director under 10 C.F.R. §2.206.^{50/} Inasmuch as the Staff has already prepared a detailed, written safety evaluation on Amendment No. 1, it is clear that it has acted and will continue to act in protection of any interest asserted by Mr. Anthony. In Pilgrim, the Appeal Board, while not directly addressing the second factor, stated a relevant consideration:

Among other things, it does not appear that saddling [petitioner] with the consequences of his own dereliction might result in a possibly serious safety problem escaping proper scrutiny. While the merits of the proposed license amendment are not

^{48/} Limerick, supra, ALAB-828, 23 NRC ____ (January 16, 1986) (slip op. at 12).

^{49/} Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982). Mr. Anthony has filed at least five such requests known to Licensee, including three which resulted in formal decisions. See note 38, supra.

^{50/} On February 12, 1986, Mr. Anthony filed a petition with the Commission seeking review and revocation of Amendment No. 1 and petitioning for an immediately effective stay. On February 27, 1986, Mr. Anthony filed a petition to suspend the operating license for Limerick pursuant to 10 C.F.R. §50.100 alleging, inter alia, that the NRC acted illegally in issuing Amendment Nos. 1 and 2. We have been advised by the NRC Staff that the Commission has referred both matters to the Director for disposition.

before us, it can be said at this juncture that we neither have been provided with nor know of any technical basis for questioning the staff's judgment that if approved by it, the [proposed amendment] will furnish an adequate margin of safety.^{51/}

Likewise here, the operating license amendment granting a brief extension of time to conduct routine surveillance tests is a routine action with no significant safety implications. The Staff will continue to protect the interests of the public, including Mr. Anthony, even in the absence of an adjudication.

On the third factor, the Board flatly stated that it "has no information about whether Mr. Anthony's participation would assist in developing a sound record."^{52/} Here again, the Board violated the regulations by relieving Mr. Anthony of his burden of proof. As the Appeal Board stated in Pilgrim, "the board will not be able to assess confidently the third factor . . . without having before it the petitioner's reasons for believing that the factor weighs in his or her favor."^{53/}

In the Catawba proceeding, the Appeal Board rejected intervenors' argument that their past effectiveness in participating on other issues in the proceeding provided a basis for concluding that they could assist in developing a sound record on a late contention. The Appeal Board stated:

Such a bare assertion, unsupported by specific information from which a Board could draw an informed inference that the intervenors can and will

^{51/} Pilgrim, supra, ALAB-816, 22 NRC at 468.

^{52/} "Memorandum and Order Ruling on Anthony Petition" at 7.

^{53/} Pilgrim, supra, ALAB-816, 22 NRC at 466.

make a valuable contribution on a particular issue in this proceeding, will not suffice.^{54/}

Mr. Anthony does not even fare that well. He did not cite his prior participation as evidence of an ability to enhance the record. He made no personal claim of expertise in analyzing the potential for significant safety hazards associated with the subject operating license amendment. Nor did he provide the names of any prospective expert witnesses and a summary of their proposed testimony, as required by the Appeal Board in Grand Gulf.^{55/}

On the fourth criterion, the Board similarly found in conclusory fashion that there is no other party which will represent Mr. Anthony's interests. For the reasons discussed above, the NRC Staff, which thoroughly evaluated safety and environmental considerations of the subject amendment as required under 10 C.F.R. §§50.91 and 50.92, would adequately represent Mr. Anthony's interest if there were a hearing on the challenged amendment. In any event, the second and fourth lateness factors are entitled to substantially less weight.^{56/}

On the fifth factor, the Board correctly noted that if it denied the petition there would be no hearing and, therefore, that Mr.

^{54/} Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985) (emphasis added).

^{55/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983).

^{56/} Summer, supra, ALAB-642, 13 NRC at 894-95.

Anthony's "participation necessarily will broaden the issues."^{57/} The Board ruled, however, that "since the amendment is already in force, his participation will not delay the proceeding."^{58/} The Board thereby violated the clear admonition of the Appeal Board in several cases that it is delay of the proceeding, not delay in licensing, which is controlling.^{59/}

Also, by considering whether any other "harm" would result by permitting a hearing, the Board impermissibly introduced an extraneous factor into the lateness test. The regulation deems delay in the proceeding harm enough without proof of other adverse consequences. Even so, the Board totally ignored the expenditure of hearing time and expense on the part of Licensee in defending against the challenge. The extraordinary prejudice of defending its case at a hearing when none is truly required obviously constitutes palpable harm to Licensee.

IV. The Appeal Board Should Direct Certification of the Licensing Board's Manifestly Erroneous "Memorandum and Order" for Review Now.

Ordinarily, a party seeks review of a licensing board's order granting or denying intervention after the board has determined that petitioner has pleaded at least one valid contention.^{60/} In this instance, the normal appellate route under 10 C.F.R. §2.714a will not

^{57/} "Memorandum and Order Ruling on Anthony Petition" at 7.

^{58/} Id.

^{59/} E.g., Limerick, supra, ALAB-828, 23 NRC ____ (January 16, 1986) (slip op. at 15).

^{60/} See e.g., WPPSS, supra, ALAB-747, 18 NRC at 1170 n.5; Sumner, supra, ALAB-642, 13 NRC at 884.

afford Licensee meaningful relief. As noted, the amendment at issue granted an extension for certain routine testing until the next scheduled outage to begin on or about May 26, 1986. The Licensing Board has already announced its intention to expedite completion of the hearing on Mr. Anthony's contentions by that date. The Board stated:

[I]f the Board were to allow this proceeding to progress in the normal sequence with the normal timing, the parties might still be wrestling with prehearing matters well into the time period in issue. Even with the best efforts of the Board and the parties it may be very difficult to resolve this proceeding before the scheduled outage on May 26, 1986.^{61/}

The Board gave no explanation for its assumption that completing the hearing by May 26th is necessary.

In conditionally admitting Mr. Anthony to the proceeding, the Board gave part of its expedited schedule.^{62/} On March 14, 1986, the Board issued another order consolidating the check valve amendment proceeding (Amendment No. 1) with the containment isolation valve proceeding (Amendment No. 2) and noticed a prehearing conference for both proceedings for March 27, 1986.^{63/} In its consolidation order, the Board set out an accelerated schedule for the filing and disposition of contentions relating to both Amendment Nos. 1 and 2 at the prehearing conference.

^{61/} Limerick (Check Valve), supra, "Memorandum and Order on Licensee's Motion to Defer Answers to Petitioner's Contentions" (March 6, 1986) (slip op. at 1-2).

^{62/} "Memorandum and Order Ruling on Anthony Petition" at 11.

^{63/} Limerick (Check Valve) (Containment Isolation), supra, "Memorandum and Order Consolidating Proceedings and Setting Schedule for Identification of Issues" (March 14, 1986); Limerick (Check Valve)
(Footnote Continued)

Thus, assuming the Board admits just one of Mr. Anthony's eleven proposed contentions on Amendment No. 1, any contention filed by Mr. Romano on Amendment No. 1 or any contention filed by Mr. Anthony on Amendment No. 2, it plans to commence hearings so as to accommodate issuance of an initial decision before May 26, 1986. Given the time for briefing before the Appeal Board and time for review and decision, any practical relief on appeal is problematical. Hence, delay by resort to an appeal under Section 2.714a will, in all likelihood, foreclose meaningful review of admitting Mr. Anthony.

Licensee's motion meets the test for directed certification under 10 C.F.R. §2.718(i). Following the standard in Marble Hill, the Appeal Board will accept discretionary interlocutory review "where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner."^{64/} Licensee meets either standard, but most clearly the second.

As explained above, subsequent appeal under Section 2.714a cannot, as a practical matter, assure that the Licensing Board's error can be alleviated by a later appeal. Licensee is mindful of those decisions in

(Footnote Continued)

(Containment Isolation), supra, "Notice of Prehearing Conference" (March 14, 1986).

^{64/} Marble Hill, supra, ALAB-405, 5 NRC at 1192. See also Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980).

which the Appeal Board has declined interlocutory review of applicants' challenges to the allowance of one or more contentions based on the argument that they should not be put to the time and cost of defending inadmissible issues.^{65/} As the Appeal Board explained in Braidwood, "[e]ven assuming a violation of the Commission's regulations . . . , the net effect of the Board's rulings is simply to admit one additional contention to a proceeding that already involves litigation of various matters."^{66/} Licensee believes that these cases are distinguishable because, in the situation here, no hearing at all would occur but for the Board's erroneous ruling. That is far different from simply having to defend against additional contentions in a hearing to which an intervenor is otherwise entitled.

Alternatively, the Board's error in ignoring the notice provisions and intervention requirements of the regulations unquestionably affects the basic structure of the instant proceeding in a pervasive or unusual manner because, in allowing intervention, "the Licensing Board has effectively abandoned or fundamentally altered . . . the requirements of

^{65/} See e.g., Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1983); Perry, supra, ALAB-706, 16 NRC 1754 (1982). See also Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470 (1985) (denied interlocutory review of ruling permitting intervenors to take discovery on inadmissibly vague contention); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981) (declined interlocutory appeal to review denial of summary disposition of contentions); Allens Creek, supra, ALAB-585, 11 NRC 469 (1980) (dismissing interlocutory appeal by intervenor on denial of less than all his contentions).

^{66/} Braidwood, supra, ALAB-817, 22 NRC at 474.

10 CFR §2.714 [and] Commission precedent."^{67/} Moreover, the Board compounded its error by stating its intention to expedite hearings, thereby prejudicing any effective appeal by Licensee. This action justifies immediate review now.

It is also significant that the Board's ruling has generic implications far beyond Limerick. This enhances the justification for review.^{68/} The legal effect of notice by publication in the Federal Register is particularly likely to be a recurring issue in operating license amendment proceedings. Typically, such proceedings lack the notoriety of construction permit or operating license proceedings. The binding effect of such notice should be settled immediately.

Moreover, Licensee notes that Mr. Romano, yet another petitioner, has sought intervention in the instant proceeding. He likewise justifies his one-month lateness by receipt in hand of the NRC Staff's monthly compilation of notices. Finally, identical issues are posed by Mr. Anthony's petition requesting intervention and a hearing on Amendment No. 2 for Limerick.^{69/} The same Board members have been designated

^{67/} Perry, supra, ALAB-706, 16 NRC at 1758. As noted, this is not a case in which the Board simply abused its discretion. E.g. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648 (1979).

^{68/} Catawba, supra, ALAB-687, 16 NRC 460, 465 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

^{69/} See letter dated February 24, 1986 from Frank R. Romano to the Secretary of the Commission; Petition by Intervenor Anthony/FOE for a Hearing and Leave to Intervene in Opposition to PECO's Request to Amend TS 4.6.1.2.d and g, License NPF-39 (February 26, 1986). The latter petition by Mr. Anthony was filed about two months late in response to notice in the Federal Register at 50 Fed. Reg. 53235
(Footnote Continued)

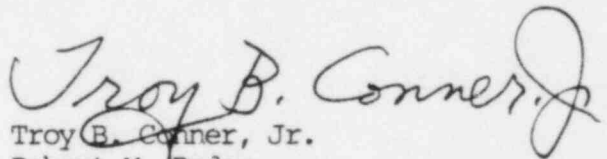
as a new Licensing Board to rule upon Mr. Anthony's request.^{70/} The Board's recent order abbreviating the normal time for filing and reply to contentions on Amendment No. 2 emphasizes its intent to commence hearings soon.^{71/} All of these considerations warrant review and reversal of the Licensing Board's serious errors immediately.

Conclusion

For the reasons discussed above, the Licensing Board clearly abused its discretion in permitting Mr. Anthony's late intervention so as to adversely affect the basic structure of the proceeding in a pervasive and unusual way. The Appeal Board should direct certification of the matter, vacate the decision below and dismiss Mr. Anthony's petition.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Troy B. Conner, Jr.
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Counsel for Licensee

March 19, 1986

(Footnote Continued)

(December 30, 1985). Except for the statement by Mr. Romano on his untimeliness, neither his petition nor Mr. Anthony's second petition contains any discussion of the five lateness factors.

70/ Limerick, Docket No. 50-352-OLA-2, supra, "Establishment of Atomic Safety and Licensing Board" (March 13, 1986).

71/ Limerick (Check Valve) (Containment Isolation), supra, "Memorandum and Order Consolidating Proceedings and Setting Schedule for Identification of Issues" at 4-6 (March 14, 1986).

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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In the Matter of)
Philadelphia Electric Company) Docket No. 50-352-OLA
(Limerick Generating Station,) (Check Valve) BRANCH
Unit 1) Docket No. 50-352-OLA-2
) (Containment Isolation)
) March 19, 1986

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Motion for Directed Certification of the 'Memorandum and Order Ruling on Robert L. Anthony's Petition for Leave to Intervene,'" dated March 19, 1986 in the captioned matter have been served upon the following by deposit in the United States mail this 19th day of March, 1986:

- | | |
|--|---|
| * Mr. Ivan W. Smith, Chairman
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U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 | * Atomic Safety and
Licensing Appeal Panel
U.S. Nuclear Regulatory
Commission
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| * Dr. Richard F. Cole
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Board Panel
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Section
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| * Mr. Gustave A. Linenberger, Jr.
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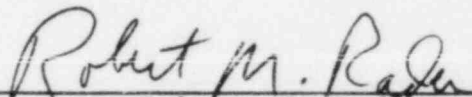
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