658

SERVED APR 4 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING APPEAL BOARD

'86 APR -4 P2:42

Administrative Judges:

Thomas S. Moore, Chairman
Dr. Reginald L. Gotchy
Howard A. Wilber

April 4, 1986
(ALAB-833)

In the Matter of	)	
PHILADELPHIA ELECTRIC COMPANY	)	Docket No. 50-352-OLA (Check Valve)
(Limerick Generating Station, Unit 1)	)	

Troy B. Conner, Jr., Robert M. Rader, and Nils N. Nichols, Washington, D.C., for licensee Philadelphia Electric Company.

Robert L. Anthony, Moylan, Pennsylvania, intervenor pro se and for intervenor Friends of the Earth.

Benjamin H. Vogler and Joseph Rutberg for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

We have before us Philadelphia Electric Company's (PECo) motion for directed certification of the Licensing Board's March 13, 1986 ruling on Robert L. Anthony's petition to intervene and request for a hearing in this operating license amendment proceeding. That ruling conditionally granted the petition subject to the Board's later finding that at least one of Mr. Anthony's proffered contentions is admissible.

This matter began on December 18, 1985 when PECo applied for an amendment to its operating license for the

DS02

Limerick Generating Station, Unit No. 1, located in Montgomery County, Pennsylvania. The amendment sought to revise the plant's Technical Specifications to allow a one-time-only extension of the interval between surveillance tests of the excess flow check valves in certain instrumentation lines. Such tests normally must be performed at least every 18 months and only when the plant is shut down. Under the requested amendment, the surveillance would be performed during a scheduled shutdown beginning no later than May 26, 1986 -- a date some 96 days beyond the originally designated time for the testing. PECo sought the extension to allow continued operation of the plant until the time other more extensive surveillance testing would be performed, and for which plant shutdown already would be required.[1]

On December 26, 1985, the Commission published in the Federal Register a notice of consideration of the requested license amendment. The notice explained the technical details of the amendment, the reason for the request, and the Commission's proposed "no significant hazards" determination. It then provided a 30-day comment period on the Commission's proposed determination and stated that petitions for leave to intervene and requests for a hearing

---

[1] 50 Fed. Reg. 52,874 (1985).

must be filed by January 26, 1986. Finally, the notice indicated that the Commission's proposed "no significant hazards" determination would become final absent a hearing request.[2]

On January 30, 1986, Mr. Anthony submitted to the Commission a letter requesting a hearing on the proposed license amendment and seeking leave to intervene. The Chief of the Docketing and Service Branch declined to docket the letter because it failed to comply with the Commission's rules. Mr. Anthony was informed of this determination orally on February 5, 1986, and in writing on February 6. Thereupon, by a pleading dated February 5, 1986 (and received by the Commission on February 7), Mr. Anthony

---

[2] Id. at 52,874-876. Under Section 189a(2)(A) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(2)(A), upon an initial determination by the Commission that an amendment to an operating license involves no significant hazards, that amendment may become immediately effective prior to the holding of any hearing required under the Act. Pursuant to 10 C.F.R. § 50.92(c), the Commission may make a "no significant hazards" determination if operation of the facility in accordance with the proposed amendment would not:

> (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
>
> (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
>
> (3) Involve a significant reduction in a margin of safety.

submitted an amendment to his January 30 letter, which the Docketing and Service Branch accepted and referred to the Atomic Safety and Licensing Board Panel for consideration. In the interim, on February 6, the Commission issued the requested operating license amendment. Unit No. 1 of the Limerick facility is currently operating under that authority.

Both PECo and the NRC staff opposed Mr. Anthony's intervention petition, although not on precisely the same grounds. Taken together, they claimed that he lacked standing to intervene, his petition was untimely, and his asserted intervention interests were not within the scope of the notice of opportunity for hearing.

The Licensing Board considered Mr. Anthony's submissions of January 30 and February 5, 1986 as making up his intervention petition.[3] Despite the fact that in his petition Mr. Anthony failed to address the five criteria in 10 C.F.R. § 2.714(a)(1) that a late petition must satisfy, the Licensing Board concluded "that the petition should not be denied on the grounds of tardiness."[4] The Board also

---

[3] See Memorandum and Order Ruling on Robert L. Anthony's Petition for Leave to Intervene (March 13, 1986) at 3.

[4] Id. at 7.

found that Mr. Anthony's petition satisfied the other "threshold requirements for admission set out in Section 2.714."[5] The Board then scheduled a prehearing conference for March 27, 1986, to consider, inter alia, the admissibility of Mr. Anthony's contentions.[6]

On March 19, 1986, PECo requested that we direct certification of the Licensing Board ruling. In short, PECo argues that the net effect of the ruling is to create an amendment proceeding where none would otherwise exist, and that this circumstance clearly meets the well-known requirement for directed certification that the challenged ruling "affect[ ] the basic structure of the proceeding in a pervasive or unusual manner."[7] Mr. Anthony opposes the grant of directed certification asserting generally that the Licensing Board's ruling is fair. The NRC staff, on the other hand, takes the position that PECo's motion is premature.

PECo's motion for directed certification is denied. The motion is premature because the Licensing Board's March 13, 1986 ruling did not have the effect of admitting

---

[5] Id. at 10.

[6] Id. at 11.

[7] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

Mr. Anthony as a party to the proceeding. Under the Commission's Rules of Practice, Mr. Anthony cannot become a party to the proceeding until the Licensing Board rules on the admissibility of Mr. Anthony's proposed contentions and admits at least one of them.[8] Until that happens, there is no adversarial hearing and PECo has suffered no real harm. Indeed, if the Board finds none of Mr. Anthony's contentions acceptable, PECo's instant complaint will be moot. As we have said before, "even though a petitioner seeking to intervene demonstrates standing to be heard and good cause for being late, unless that petitioner also submits an acceptable contention, intervention may still be denied."[9] Thus, even assuming PECo's complaint is meritorious, PECo should have deferred seeking our intercession until the Board granted intervention to Mr. Anthony.

Even putting the timing of the instant motion aside, we note that the Licensing Board's ruling would not be a strong candidate for directed certification. The gist of PECo's argument is that the Licensing Board's ruling violates the Commission's rules and precedents. But as we said only recently,

---

[8] 10 C.F.R. § 2.714(b), (g).

[9] Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 865 (1980).

> [t]he basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy or Commission regulations. Similarly, the mere fact that a party . . . must litigate an additional issue, or that a matter will be subject to adversarial exploration rather than staff review, does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision.[10]

Simply stated, claimed violations of the Commission's Rules of Practice, standing alone, are not enough to warrant invocation of our discretionary interlocutory review of a

---

[10] Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474-75 (1985) (footnotes omitted), petition for review denied, Order of March 20, 1986 (unpublished).

The licensee takes pains to point out that, in this case, the result of the Licensing Board decision may be the "initiation of an adjudicatory proceeding which otherwise would never take place." Licensee's Motion for Directed Certification of the "Memorandum and Order Ruling on Robert L. Anthony's Petition for Leave to Intervene" (March 19, 1986) at 3-4, 24. Although this factor was not present in Braidwood, the difference is not significant. It may be true that interlocutory review of the Board's ruling might obviate the hearing completely. The same consideration would be present, however, had the Licensing Board wrongly admitted, over objection, a timely intervenor. Certainly, in that case, it could not be argued successfully that directed certification would be warranted. See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 376 (1983), (quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983)).

Licensing Board ruling.[11] This is especially true where another remedy is provided by the Rules of Practice, as is the case here.

Should any of Mr. Anthony's proposed contentions be admitted by the Licensing Board, PECo would be free to seek our review of the grant of intervention to Mr. Anthony under 10 C.F.R. § 2.714a(c).[12] That section provides that, "[a]n order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied." Contrary to PECo's assertion that the Licensing Board's intention to attempt to complete the proceeding before the May 26 scheduled shutdown renders an appeal under section 2.714a impractical, such an appeal would offer meaningful relief. In light of the Licensing Board's stated intention to proceed on an expedited schedule, PECo may file its appeal immediately upon the issuance of any Licensing Board

---

[11] But see Braidwood, 22 NRC at 476-479 (Mr. Moore dissenting).

[12] See Zimmer, 11 NRC 860; Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978).

order accepting one or more of Mr. Anthony's contentions. At the same time, PECo is free to request that the schedule for responses to its brief be expedited if there is a basis for such relief. Because the principal issues in such an appeal likely already have been addressed in the directed certification pleadings, there does not appear to be any obstacle to such expedition.

The motion for directed certification is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board