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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:
Ivan W. Smith, Chairman
Richard F. Cole
Gustave A. Linenberger, Jr.

In the Matter of	)	Docket No. 50-352-OLA-1
	)	[ASLBP No. 86-522-02-LA]
PHILADELPHIA ELECTRIC COMPANY	)	(Check Valves)
	)	Docket No. 50-352-OLA-2
(Limerick Generating Station,	)	[ASLBP No. 86-526-04-LA]
Unit 1)	)	(Containment Isolation)

April 4, 1986

MEMORANDUM AND ORDER
DENYING AND DISMISSING PETITIONS FOR LEAVE
TO INTERVENE AND TERMINATING PROCEEDING

I. Background and Summary

The background of these consolidated proceedings is set out in our Orders of March 13 (LBP-86-6A, ___ NRC ____) and March 14, 1986 (LBP-86-6B, ___ NRC ____). In summary, on December 18, 1986, the Licensee, Philadelphia Electric Company, applied for Amendment Nos. 1 and 2 to the Limerick Operating License. Amendment No. 1 involved a one-time-only extension of time for the surveillance and testing of instrument-line, excess-flow check valves ("check valves"). Amendment No. 2 involved a one-time-only amendment authorizing an extension of time for local leak-rate testing on primary containment isolation valves

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("containment isolation"), and an exemption from certain 10 CFR Part 50 Appendix J requirements.

The amendments were issued before any hearing upon a determination by the NRC Staff that they involved "no significant hazards considerations" under Section 189 a(2)(A) of the Atomic Energy Act (as amended by the "Sholly" Amendment). Notices of opportunity for hearing were published in the Federal Register on December 26, 1985 (Amendment No. 1) and December 30, 1985 (Amendment No. 2).

Mr. Robert L. Anthony petitioned for a hearing and leave to intervene on Amendment No. 1 (check valves) by letters dated January 27 and 30, 1986. On March 13, 1986 the Licensing Board ruled, over the objection of the Licensee and NRC Staff, that Mr. Anthony had established an interest in the Amendment No. 1 proceeding and had identified an appropriate aspect of the proceeding as to which he wished to intervene in conformance with the intervention regulation, 10 CFR § 2.714. We deferred consideration of his contentions, however, until a prehearing conference which we convened in Philadelphia on March 27, 1986.

On February 26, 1986 Mr. Anthony also petitioned to intervene in the Amendment No. 2 (containment isolation) proceeding. That petition was opposed by the Licensee and the NRC Staff on the basis of lateness and on other grounds. Consideration of the containment-isolation petition was also deferred to the prehearing conference.

On February 24, 1986, Mr. Frank R. Romano on behalf of the Air and Water Pollution Patrol petitioned to intervene in the check valve

proceeding. His petition was also opposed by the Licensee and NRC Staff on the grounds of lateness and on other grounds. The Board also deferred consideration of Mr. Romano's petition until the prehearing conference.

On March 14, 1986 the Board consolidated the proceedings and directed the parties to appear at the prehearing conference noted above.

In the order below we dismiss Mr. Anthony's petition on Amendment No. 1 on the dual grounds that his petition should not have been granted in the first instance and that he failed to submit any contentions within the scope of the check-valve proceeding. Mr. Romano's petition on Amendment No. 1 is denied on several grounds, especially on the ground of his failure to raise any issue within the scope of the proceeding. Mr. Anthony's petition in the Amendment No. 2 proceeding is denied on the grounds of lateness. As a consequence of these actions there is nothing left to adjudicate and we direct that the consolidated proceeding be terminated.

II. Amendment No. 1 (Check Valves)

A. Mr. Anthony's Petition

The Federal Register notice of opportunity to intervene in the Amendment No. 1 proceeding described the instrument-line, excess-flow check valves; the testing procedure for instrument-line, excess-flow check valves; and explained why they cannot be tested during operation. 50 Fed. Reg. 52874. In explaining why the testing could safely be

delayed from February 19, 1986 until the scheduled plant outage on May 26, 1986, the NRC Staff found:

> The consequences of leakage from an instrumentation line are minimal since the one-quarter inch orifice inside containment limits flow, and the majority of the line outside of primary containment is only three-eighths inch in diameter. The lines protected by the check valves are also located within the reactor enclosure which is served by the standby gas treatment system so that any release from the line would be filtered and monitored. The failure of an instrument line is an analyzed event in the Final Safety Analysis Report and no aspect of the proposed change to the Technical Specifications would require a change in the safety analysis.

Id.

The Licensing Board inferred, erroneously as we later learned, that there were two discrete safety aspects to Amendment No. 1: (1) leakage through primary containment via the instrument-lines or their excess-flow check valves and (2) instrument-line failure as a consequence of a failure of their excess-flow check valves. In our Order of March 13, we noted that Mr. Anthony's petition did not relate to leakage from the containment but, rather, that his petition related to the second perceived aspect, instrument-line failure. We quoted from his petition:

> "We are convinced that any extension of time for the tests required to determine the ability of the instrumentation lines to function properly would pose risks to our health and safety since these lines are essential to operator information and functioning in every aspect of the plant's operation and are a key link in the control of the nuclear process and absolutely essential to the safe shutdown of the plant in the event of any accident at the plant which could result in the release of radioactive poisons to the environment, thereby threatening us and the public."

Memorandum and Order at 8.

The difference in the two perceived aspects of Amendment No. 1 is very important. Had Mr. Anthony sought to intervene on the aspect of leakage through the containment via the instrument-lines or their excess-flow check valves, we would have found that his residence, twenty miles from the Limerick Station, is too far for "any injury in fact" to him as a consequence of any leakage through the small orifices into secondary containment.[1]

However, we found that, since Mr. Anthony sought to intervene on instrument-line failure, the consequence of any such failure might be about the same as in a traditional operating license or construction permit proceeding where a distance of about 50 miles has been thought to confer standing to intervene. Id. at 10.

Initially the Board construed some of Mr. Anthony's contentions to pertain to check-valve leakage through containment and some to relate to the instrument-line failure. Many are vague and would permit either construction. But at the prehearing conference, after being advised that the Board would not regard leakage-through-containment contentions to fall within the scope of his petition (Tr. 24-26, 51), Mr. Anthony

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1 But see Virginia Electric and Power Company (North Anna, Units 1 and 2), ALAB-822, 9 NRC 54 (fuel pool modification). There the Appeal Board did not reject out-of-hand the Potomac intervenors' claim of standing based on a member's residence thirty-five miles away, finding only that Potomac's claim of interest on that basis was "not as strong." Standing by Potomac was found on the basis of recreational activities in the general vicinity of the plant. Id. at 57.

avowed that each of his contentions relate to instrument-line failure. Tr. 40-55. His contentions, he explained, predict the broad operational consequences of instrument-line failure. E.g., Contention 6, discussed at Tr. 43. They are not the consequences of instrument-line failure calling for check-valve actuation followed by check-valve failure with a resultant pathway through containment. Id.; Tr. 40-55.

In its pleadings and at the prehearing conference, the Licensee has taken the position that none of Mr. Anthony's contentions on Amendment No. 1 are litigable in this proceeding because both instrument-line, excess-flow check-valve failure and instrument-line failure have been analyzed in the Limerick Final Safety Analysis Report (FSAR) and that their assumed failures have been found to be acceptable. Therefore, Licensee's reasoning goes, since the amendment would not change those analyses, the contentions alleging the effects of the failures are not litigable today. They could have been addressed at the operating-license stage. E.g., Tr. 27-36 (Wetterhahn). The Staff agrees in principle with the Licensee's technical/legal argument. Tr. 36 (Vogler).

The Board, however, has not been persuaded by these arguments. Even though the FSAR might assume and find acceptable instrument-line, excess-flow check valve failures and instrument-line failures, the issue under the notice of hearing is whether the "no significant hazards consideration" determination is correct. We would expect that, under Section 189 a(2)(A) of the Act, an allegation of any significant decrease in the margin of safety flowing from a "no significant hazards

consideration" amendment would be a fairly litigable issue notwithstanding the continuing validity of the FSAR. We have no Commission or Appeal Board guidance on this issue, however. Our discussion is simply for the purpose of explaining the ruling on Mr. Anthony's intervention which turns on a somewhat different point.

Apparently the Licensee and the Staff were also trying to explain to the Board that instrument-line failure qua instrument-line failure is not an issue in the proceeding on Amendment No. 1. We have since revisited the application for Amendment No. 1;[2] the Staff's Safety Evaluation in support of Amendment No. 1;[3] pertinent parts of the Limerick FSAR;[4] and the explanations by Mr. Martin of the NRC Staff at the prehearing conference.[5] We now understand that the only issue considered in Amendment No. 1 was the effect of the delay in the surveillance and testing of the instrument-line, excess-flow check valves; not on the instrument lines themselves. Instrument lines are relevant because their failure may demand the actuation of the associated check valves. Instrument-line, excess-flow check valves

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2 Attached to letter of March 16, 1986 from Mr. Connor to Licensing Board.

3 Forwarded by letter of March 7, 1986 from Mr. Rutberg to the Licensing Board.

4 Attached to Licensee's Answer to Contentions Proposed by Intervenor Robert L. Anthony On Amendment No. 1 and Contentions Proposed on Amendment No. 2, March 26, 1986.

5 E.g., Tr. 76-81 (Martin).

which might fail during the extension of time until the surveillance and testing would not cause a failure of instrument lines. None of the analyses performed in connection with Amendment No. 1 relates to instrument-line failure except as a demand upon check valves. The rather vague statement in the notice of opportunity for hearing to the effect that failure of the instrument line is an analyzed event in the FSAR may pertain to the relative role of instrument lines vis-a-vis the check-valve failure.

Accordingly, none of Mr. Anthony's contentions on Amendment No. 1 are within the scope of the notice of hearing. Nor do they have bases. Nor is the aspect of his proposed intervention as set out in his petition for leave to intervene within the scope of the proceeding. Therefore, the Board does not have jurisdiction to consider Mr. Anthony's petition or his contentions on Amendment No. 1.

B. Mr. Romano's Petition

The notice of opportunity for hearing on Amendment No. 1 set January 26, 1986 as the date for petitions for leave to intervene. 50 Fed. Reg. at 52875, supra. The Air and Water Pollution Patrol, by its President, Mr. Romano, filed a petition for leave to intervene dated February 24, 1986 asserting that he received his notice from Mr. Anthony on February 21, 1986 -- "thus the delay." Other than that brief comment, the petition does not discuss the five factors under 10 CFR

§ 2.714 which must be balanced when petitions are filed late.[6] The NRC Staff points out that Mr. Romano was served with the notice along with others on the Limerick service list with a letter from the NRC to Mr. Bauer of Philadelphia Electric Company on January 27, 1986.

Mr. Romano's petition is late and he has not demonstrated good cause for its lateness. However we do not burden the record with an unnecessary balancing of the four other factors for considering late-filed petitions because Mr. Romano's petition is fatally defective on at least two other counts. The aspect as to which he seeks to intervene is copied from Mr. Anthony's petition including spelling errors. He seeks to intervene on instrument-line failure as an aspect in itself. Therefore the petition is defective for the same reasons we cited above with respect to Mr. Anthony's petition. But his petitioning deteriorates even more in the March 19, 1986 supplement containing his contentions. It is a rambling, argumentative paper, which except for its title, has no discernable relevance to the instrument-line, excess-flow check valve proceeding. Overall his petitioning is without any merit.

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6 Section 2.714(a)(1):

(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 represented by existing parties.

(Footnote Continued)

III. Amendment No. 2 (Containment Isolation)

The notice of opportunity for hearing on Amendment No. 2, published on December 30, 1985, set February 3, 1986 as the date for requests for hearing and petitions for leave to intervene. 50 Fed. Reg. 53226-227, 53235. Mr. Anthony filed his petition dated February 26, 1986 stating, as we believe to be the case, that he first received a copy of the Federal Register notice with the Staff's letter, dated January 27, 1986, to Philadelphia Electric Company's Mr. Bauer. He also stated in his petition that it was within the prescribed time period. Perhaps for that reason he did not address the five factors to be balanced in considering late-filed petitions.

At the prehearing conference, Mr. Anthony was requested to elaborate on his assertion that the petition on Amendment No. 2 was not late. He represented to the Board that he believed that regulations gave him 30 days from the day the Staff served him with the notice of opportunity for hearing. Tr. 115 (Anthony).

The Board has contrasted Mr. Anthony's oral representation with the plain language of the notice of opportunity for hearing and with his statement in his January 30 petition on Amendment No. 1. In his January 30 petition, Mr. Anthony asserted that he could not have responded any earlier to the NRC-to-Bauer letter because it "reached us

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(Footnote Continued)

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

only on 1/29/86." We are convinced that on January 30, 1986, Mr. Anthony knew that he had to petition immediately on Amendment No. 1 because he implied as much. The best inference is that he also knew that an immediate petition on Amendment No. 2 was required. Accordingly the Board does not accept Mr. Anthony's representation. We find that he has not demonstrated good cause for the late filing of his February 26, 1986 petition on Amendment No. 2.

We have also balanced the other four factors of the intervention regulation (n.6, supra) to determine whether his late-filed petition should nevertheless be accepted. He has a heavier burden on the other factors because of the absence of good cause for late filing.

There are no other means by which his interest may be protected and we assign that factor to his favor.

We cannot conclude either way whether his participation in any proceeding might reasonably be expected to assist in developing a sound record. On one hand the vagueness of his contentions does not bode well for a contribution to any record. On the other hand, there will be no record, sound or otherwise, on Amendment No. 2 unless Mr. Anthony assists in developing it. The third factor is neutral.

No other parties will represent his interests. We do not accept Licensee's argument that the NRC Staff will represent Mr. Anthony's interest. This factor favors accepting the late petition.

With respect to the fifth factor, Mr. Anthony's participation would broaden the issues because there will be no issues without his participation. In addressing this same factor with respect to

Mr. Anthony's petition on Amendment No. 1, the Board commented that, since that amendment was already in force, his participation would not delay the proceeding; that any harm to Licensee was obviated when the amendment was issued without considering the petition. Licensee has objected to that analysis in its motion for a directed certification. The Board recognizes some merit in Licensee's complaint. Requiring Licensee to go to hearing, when in fact it may be entitled as a matter of law to have an invalid petition dismissed, would be a harm unwarranted in the present situation. We weigh the fifth factor against accepting the late petition.

The sum of the balancing of the five factors for considering late-filed intervention petitions is that the petition should be denied on the ground of tardiness.

IV. Mr. Anthony's Petition for Stay of Proceedings

Mr. Anthony has filed with the Board two motions seeking a stay of the proceeding. The first, dated March 13, 1986, seeks leave to petition the Board to intervene with the Commission to set aside the referral to the Staff of Mr. Anthony's petition to the Commission for a stay on Amendment No. 1. See Letter from Chilk to Anthony, March 5, 1986.

The second motion, dated March 24, 1986, is brought under 10 CFR § 2.788 and petitions for an immediate stay. We can select from a handful of grounds for denying both requests. Two come to mind immediately. First we have no jurisdiction to stay this proceeding.

The Commission assigned that jurisdiction to the NRC Staff on March 5, 1986 pending the conclusion of the proceedings before this Board. Chilk letter, supra. Second, in view of today's order terminating the proceeding, Mr. Anthony cannot prevail under Section 2.788(e).

V. ORDER

1. Mr. Anthony's petition for leave to intervene on Amendment No. 1 is dismissed. The Board's memorandum of March 13, 1986 (LBP-86-6A, supra) granting that petition is vacated.

2. The petition of the Air and Water Pollution Patrol by Mr. Romano is denied.

3. Mr. Anthony's petition on Amendment No. 2 is denied.

4. The consolidated proceedings on Amendment Nos. 1 and 2 are terminated.

VI. Appealability

This order wholly denies the petitions for leave to intervene by the petitioners. Pursuant to the provisions of 10 CFR § 2.714a, this

order may be appealed to the Atomic Safety and Licensing Appeal Board within ten days after it is served.

ATOMIC SAFETY AND LICENSING BOARD

Richard F. Cole
ADMINISTRATIVE JUDGE

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

April 4, 1986

APPENDIX

During the prehearing conference on March 27, 1986 the Licensing Board inquired of the parties whether a hearing on the amendments would be required under the "Sholly Amendment" if, as it then seemed likely, the Limerick plant would shut down before any hearing and decision. Mr. Anthony and counsel for the NRC Staff believe that a hearing is required in any event. Counsel for the Licensee believes that the proceeding would become moot and that no hearing would be required. Tr. 143-44 (Wetterhahn). The Licensing Board would not have conducted an evidentiary hearing if the matter had become moot by a plant shutdown before any hearing and decision even if we had found litigable contentions. Yet in Mississippi Power and Light Company (Grand Gulf Unit 1), LBP-84-19, 19 NRC 1412 (1984), another Licensing Board would have conducted a hearing even where the amendment and action permitted under the "Sholly amendment" may have already been completed and the matter had become otherwise moot. Id. at 1414.

Counsel for Licensee has suggested that the Licensing Board may wish to certify the issue, if not for this case, then for future cases. In light of the disposition made of this proceeding in today's order, we do not believe we have jurisdiction or need to certify this issue for use in the Limerick amendments proceeding. Sooner or later, however, a Licensing Board will be faced with the decision as to whether it must conduct a hearing on mooted matters under the Sholly amendment. Prior guidance from the Appeal Board or the Commission may save either an unnecessary hearing or remand for a hearing.