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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

LBP-86-10

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In the Matter of
GPU NUCLEAR CORPORATION, et al.
(Three Mile Island Nuclear Station,
Unit No. 1)

Docket No. 50-289-OLA-1
50-289-OLA-2

(Steam Generator Plugging
Criteria)

April 9, 1986

MEMORANDUM AND ORDER
(Discussing Rulings On Admissibility Of Contentions)

MEMORANDUM

During the 10 CFR §2.751a special prehearing conference held on March 27, 1986, in these two currently consolidated cases, as memorialized in the Order of April 2, 1986 (unpublished), the Board heard oral argument upon five identical contentions proposed by Three Mile Island Alert Inc. (TMIA) in each case¹ (Tr. 15-120). In that

¹ In case OLA-1, at issue is the Licensee's application to amend the steam generator tube technical specifications. This proposed amendment, Technical Specification Change Request (TSCR) 148, would maintain the 40% throughwall limit on the secondary side of tubes but would replace the 40% limit on the primary side of tubes with a
(Footnote Continued)

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Conference, the Board stated that it would rule at that time only on the admissibility of the contentions in order to expedite the proceeding and thereafter would issue an Order discussing its reasons for rejecting or admitting contentions. The Board then admitted TMIA Contentions 1, 2, as clarified, and 5, as reworded, and rejected TMIA Contentions 3 and 4 in each case (Tr. 120-21).

I. Discussion

A. Legal Standards for the Admissibility of Contentions

The Commission's Rules of Practice, at 10 CFR §2.714(b), require that the bases for each contention be set forth with reasonable specificity. In Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), the Appeal Board stated that the purposes of the basis-for-contention requirement in §2.714 were:

(Footnote Continued)

sliding scale which goes from 40% to 70% throughwall depending upon the size of the defect. In case OLA-2, at issue is Licensee's application to amend the steam generator tube specifications. That proposed amendment, TSCR 153, would in substance change the repair criteria to allow the Licensee not to repair tubes, under certain circumstances, if a tube has a defect up to 50% tube wall penetration.

In case OLA-1, TMIA submitted five proposed contentions on March 10, 1986 and the Licensee and the NRC Staff respectively responded on March 20. In case OLA-2, on March 10, 1986, TMIA submitted a request for hearing which set forth five proposed contentions, the Licensee responded on March 20, and the Staff responded on March 25. Since TMIA deleted certain wording from the contentions during the special prehearing conference, the contentions proposed in each case are identical.

1. to help assure that the hearing process is not improperly invoked, for example, to attack statutory requirements or regulations;
2. to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose;
3. to assure that the proposed issues are proper for adjudication in the particular proceeding - i.e. generalized views of what applicable policies ought to be are not proper for adjudication;
4. to assure that the contentions apply to the facility at bar;
and
5. to assure that there has been sufficient foundation assigned for the contentions to warrant further exploration.

Further, with respect to the degree of specificity required, the Appeal Board noted in the Peach Bottom decision that this involves the exercise of judgment on a case-by-case basis. Moreover, the Appeal Board has stated that §2.714 does not require the petition to detail the evidence which will be offered in support of the contentions and that it is not the function of a licensing board to reach the merits of a contention at this stage of a proceeding.² At the petition level all that a

² Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973); Houston Lighting and Power
(Footnote Continued)

petitioner is required to do is to state the reasons (i.e. the basis) for each contention.³ Finally, while the doctrine of collateral estoppel may be raised in opposition to the admissibility of a contention, the petitioner may resist that affirmative defense, in whole or in part, on grounds outside the record of the prior proceeding; e.g., he may claim that, since the conclusion of the prior proceeding, there has been a material change in factual or legal circumstances, or that there exists some special public interest factor in the case. Confronted with such a claim, a Licensing Board may not reject the contention as barred by the doctrine of collateral estoppel.⁴

B. TMIA's Contentions

Contention 1 states:

Neither the Licensee nor the NRC Staff has demonstrated that allowing degraded tubes to remain in service under the proposed revised plugging criteria will provide reasonable assurance that TMI-1 can operate without endangering the public health and safety, because the form and rate of new tube degradation has not been determined.

Upon the assumption that, in using the words "new tube degradation", TMIA was claiming that corrosion had been reinitiated, the

(Footnote Continued)

Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980).

³ Allens Creek, supra, 11 NRC at 548.

⁴ Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 216, 218-19, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974).

Staff did not oppose the admissibility of this contention. The Staff opined that the contention raised an issue within the scope of the proceeding, was adequately specific and was supported on a minimally sufficient basis (Staff's Response, at 6; Tr. 47-49).⁵ The Staff also felt that the doctrine of collateral estoppel did not preclude the admissibility of this contention. First, it believed that TMIA's oral argument had made a particularized showing of changed circumstances (Tr. 50). Second, with respect to the kinetic expansion tube repair case,⁶ the Staff concluded that an integral part of the Appeal Board's conclusion as to the absence of new corrosion or of a different kind of corrosion was based on the assurance that tubes with greater than 40% throughwall would be plugged. The Staff also pointed to the fact that, while noting that the Licensee had requested permission to modify the tube plugging criteria, the Appeal Board stated that it had not considered the proposed revision and that it took no position regarding its acceptability. Third, the Staff advised that, in its reviews, it questioned the extent of the intergranular attack (IGA), requested additional assurance from the Licensee that the corrosion rate has been arrested, and queried about what expectations it should have as to the

⁵ Since the Licensee's and the Staff's written Responses in OLA-1 were substantially similar to those filed in OLA-2, the Board will cite their OLA-1 responses.

⁶ Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 NRC 1195 (1985).

extent of the enlargement of the IGA cracks or defects before the next plugging interval or the next cycle when the tubes are inspected (Tr. 53-54).

In its written response at pages 11-12, the Licensee argued that TMIA had provided no basis whatsoever for any of the allegations contained or implied in this contention, and at pages 13-15 urged that collateral estoppel barred the admissibility of the contention. After hearing TMIA's oral argument, the Licensee objected to this procedure in that, for the first time, the intervenor provided bases for its contention (Tr. 21-22). However, we conclude that, although in a negative way, TMIA did set forth a basis within the four corners of the contention in asserting that neither the Licensee nor the Staff has shown that there is no longer any on-going corrosion (Tr. 34). Faced with Licensee's objection that no basis had been set forth with reasonable specificity, in support of its contention TMIA adverted (1) to transcripts of meetings between Staff and Licensee, (2) to the Licensee's operating experience, and (3) to topical design reports (Tr. 15-18).

At this stage of the proceeding, it is not our function to reach the merits of a contention or to consider the evidence. Moreover, we were not convinced by the Licensee's arguments that all tube corrosion has stopped, since it has proceeded to seek permission to revise the plugging criteria from 40% throughwall to 50% for the short term and to 70% for the long term. Further, against this background of controversy

over whether or not there has been a material change in factual circumstances since the ALAB-807 decision,⁷ we could not and will not reject the contention because of collateral estoppel. For these reasons, then, we admitted TMIA Contention 1 in OLA-1 and OLA-2 during the special prehearing conference.

Contention 2, as clarified, states:

Neither the Licensee nor the NRC Staff has demonstrated that allowing degraded tubes to remain in service under the proposed revised plugging criteria will provide reasonable assurance that TMI-1 can operate without endangering the public health and safety, because the testing technique relied upon to define degraded tubes is inaccurate and inconclusive, in light of the particular method of degradation characterized by intergranular attack (IGA) and pitting.

As originally submitted by TMIA, Contention 2 did not continue the words "characterized by intergranular attack (IGA) and pitting". In its written response, the Staff urged rejection of this contention because the basis was not set forth with reasonable specificity. The Staff stated that, in using the words "particular method of degradation", TMIA had not made clear whether it was referring to intergranular stress corrosion cracking or to intergranular attack or to some other method of degradation, and it was not clear whether TMIA was challenging the eddy current testing (ECT) technique (Staff Response, at 2). The Licensee, as well, objected for these reasons, and in addition argued that TMIA

⁷ See n.6, supra.

had not explained how the accuracy of eddy current testing was germane to the proposed revision of the plugging criteria (Licensee Response, at 17).

During oral argument, TMIA clarified that it was alleging that there were new indications of degradation as characterized by IGA and pitting which eddy current testing would have difficulty in detecting. In support of its contention, TMIA adverted (1) to a statement by a NRC Staff member during a January 1986 meeting with the Licensee, (2) to TDRs 686 and 758, and (3) to statements by the Staff in meetings with the Licensee (Tr.56-60).

After hearing TMIA's clarification as to what it meant by the words "particular method of degradation", the Staff withdrew its lack-of-basis objection raised in cases OLA-1 and OLA-2. Further, since the added words served to clarify rather than amend the identical contentions, the Staff withdrew its untimeliness objection to adding these words to the OLA-1 contention and did not oppose TMIA's motion to amend in OLA-1 and OLA-2 (Tr. 70-75).

While the Licensee ultimately did not object to TMIA's motion to modify this wording (Tr. 76), it urged that the proposed Contention 2 (even as clarified) lacked a basis, and that there was no nexus between the alleged inaccuracy of the ECT testing and the proposed revised plugging criteria. The Licensee proceeded at length then to discuss the merits and address evidentiary matters (Tr. 60-70).

In the special prehearing conference, we treated TMIA's motion to amend as a motion to clarify or to supplement, and permitted the

addition of the above-mentioned wording (Tr. 77). We admitted Contention 2, as clarified in OLA-1 and OLA-2 (Tr. 120). We did so because a basis had been set forth with reasonable specificity, and because, at this stage of the proceeding, we could not consider the Licensee's arguments either upon the merits or upon the evidence. We rejected the Licensee's "lack of nexus" argument because it appeared obvious that if the method of measurement of crack size involves inaccuracies, a relaxation of the plugging requirements could only be allowed if those inaccuracies did not permit gross underestimation of that crack size.

Contention 3 states:

Neither the Licensee nor the NRC Staff has demonstrated that allowing degraded tubes to remain in service under the proposed revised plugging criteria, which could contribute to the frequency of leakage during plant operations, is consistent with the requirements of GDC 32.

In their written responses and in oral argument, the Licensee and the Staff opposed the admissibility of this contention because TMIA failed to show the relationship between GDC 32⁸ and the proposed change

⁸ General Design Criterion 32, "Inspection of reactor coolant pressure boundary," 10 CFR Part 50, App. A, states:

Components which are part of the reactor coolant pressure boundary shall be designed to permit (1) periodic inspection and testing of important areas and features to assess their structural and leak-tight integrity, and (2) an appropriate material surveillance program for the reactor pressure vessel.

in the plugging criteria (Licensee's Response, at 18-21; Staff's Response, at 7-8; Tr. 80-83).

During oral argument, TMIA stated that this matter came to its attention during the course of a Commission meeting with the Staff on February 1985 wherein one Staff member questioned why the Licensee had not demonstrated compliance with GDC 32. TMIA conceded that other than that one question or remark, it had no other independent basis in support of the contention. It alleged that, if the plugging criteria are amended, the current leak rate testing procedure might not be adequate to detect a crack before it ruptures (Tr. 79-80).

The Board agrees with the Licensee and the Staff. We see no nexus between revising the plugging criteria and the GDC 32 requirement that components of the reactor coolant pressure boundary should be designed to permit periodic inspection and testing to assure structural and leak tight integrity. Neither Staff nor the Licensee could know what they would have to defend against or oppose if we were to admit this contention. Moreover, contrary to the two Notices of Opportunity for Hearing in OLA-1 and OLA-2,⁹ to the extent it solely adverts to inspection and surveillance programs for components of the reactor coolant pressure boundary, this contention does not raise matters that are within the scope of the amendments under consideration. For these

⁹ See 51 Federal Register 459 (January 6, 1986) and 51 Federal Register 7157 (February 28, 1986).

reasons we rejected Contention 3, as proposed in both cases, during the special prehearing conference.

Contention 4 states:

Neither the Licensee nor the NRC Staff has demonstrated that allowing degraded tubes to remain in service under the proposed revised plugging criteria is consistent with the requirements of GDC 31, in that the criteria does not take into account environmental effects, including possible environmental corrosion even in the absence of active corrosion mechanisms.

In their written responses and in oral argument, the Staff supported admission of this contention and the Licensee opposed its admission. The Staff believes that the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis (Response at 8; Tr. 88-89). Licensee argued that the contention is vague, especially as regards the meaning of "environmental corrosion" or how the tubes could experience corrosion in the absence of corrosive mechanisms, and, in any event, urged that it had met the requirements of GDC 31 (Response at 21-24).

During oral argument, the Intervenor explained that "absence of corrosion mechanisms" referred to the absence of the sulfur that caused the 1981 corrosive attack, and that "environmental corrosion" referred to other types of corrosive mechanisms that can affect the tubes (Tr. 84-86). Licensee argued the Staff had asked about other environmental effects and that it had answered Staff's questions (Tr. 86-87). In response, the Staff argued that no final conclusion as to the adequacy of Licensee's documentation would be available until the Safety Evaluation is issued. Further Staff pointed out that the issue

raised in this contention is among the issues that Staff will be considering in reaching a decision as to whether to grant TSCR-148 and TSCR-153. Therefore Staff views Contention 4 to be set forth with adequate basis and to be relevant to both technical specification change requests (Tr. 88-89).

The Board agrees with the Staff as regards the basis and relevancy of this contention. But we have admitted Contention 1 which raises the general issue of unidentified new sources of tube degradation. Certainly new sources of tube degradation would include any new environmental corrosive mechanisms. Therefore we ruled at the prehearing conference that Contention 4 was subsumed under Contention 1 and hence was inadmissible as a separate contention (Tr. 120).

Contention 5, as reworded, states:¹⁰

Neither the Licensee nor the NRC Staff has demonstrated that allowing degraded tubes to remain in service under the proposed revised plugging criteria will meet GDCs 14, 15 and 31 in that it is inconsistent with Regulatory Guide 1.121, which provides that plugging criteria takes into account variations in tube thickness due to possible corrosion.
(Tr. 117)

¹⁰ As proposed, the original Contention 5 stated:

Neither the Licensee nor the NRC Staff has demonstrated that allowing degraded tubes to remain in service under the proposed revised plugging criteria is consistent with Reg. Guide 1.121, which requires that plugging criteria take into account variations in tube thickness due to possible corrosion.

Addressing the original wording of this contention, the NRC Staff said only "...the contention raises an issue within the scope of the proceeding, is adequately specific, and is supported by a minimally sufficient basis." Accordingly the Staff supported the admission of the contention (Staff's Response at 9). Licensee strongly objected to the contention's admission, however, arguing at the outset that Regulatory Guides are not requirements and that therefore a bald assertion that the plugging criteria are inconsistent with the Regulatory Guide "requirements" cannot constitute a viable contention (Licensee's Response at 24-25).

At the prehearing conference, Licensee's attorney made clear Licensee's view that Regulatory Guides need not be specifically followed and that, in this case, Licensee intended to employ some alternate method to assure safety and compliance with the regulations (Tr. 95-96). Licensee readily agreed that the Board might appropriately hear a dispute as to whether that alternate method was, in fact, effective, but saw no specificity or basis in the contention sufficient to support such a factual dispute (Tr. 97). In short, "...they have to first say what we have done wrong and what the basis is for saying that it is somehow inadequate or inconsistent either with a regulation or a requirement" (Tr. 98).

Staff's position at the conference was that the phrase "is inconsistent with" in the original contention did not merely signify a failure to follow the Guide but implied a failure to give safety

protection equivalent to the Guide, a matter perhaps subject to adjudication if properly clarified (Tr. 100).

After some extensive discussion as to the nature of the clarification here needed, and after several attempts to phrase a properly clarified contention, the Board directed the parties to confer upon possible clarification and rewording of Contention 5 (Tr. 100-115).

The resulting reworded contention is the one set forth in the text above (Tr. 117). Licensee still opposed the contention's admission, but no longer found the wording objectionable. The other parties had no objection to the contention (Tr. 119).

We believe the contention as reworded is admissible: It challenges neither regulations nor statutes; it is sufficiently clear so that adversary parties know what they must oppose; it is an issue proper for adjudication; it clearly applies to the facility at bar; and it has sufficient foundation to warrant farther inquiry. It seems to us to have the required basis and specificity, and it has clearly not been previously adjudicated. For these reasons, we admitted the reworded contention in OLA-1 and OLA-2 during the special prehearing conference.

ORDER

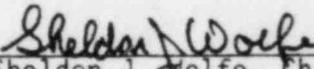
1. For the reasons set forth above, the Board confirms its rulings rendered during the special prehearing conference on March 27, 1986 that, in OLA-1 and OLA-2, TMIA Contentions 1, 2, as clarified, and

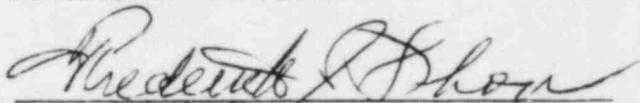
5, as reworded, are admitted and that TMIA Contentions 3 and 4 are rejected.

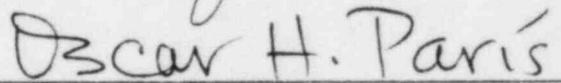
2. TMIA is admitted as an intervening party.

3. Pursuant to 10 CFR §2.714a(c), this Memorandum and Order may be appealed by the Licensee and/or the Staff to the Atomic Safety and Licensing Appeal Board within ten (10) days after service. However, the Intervenor TMIA may not so appeal because some of its contentions have been admitted as issues in controversy (See §2.714a(b)).

THE ATOMIC SAFETY AND LICENSING BOARD


Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE


Frederick J. Shon
ADMINISTRATIVE JUDGE


Dr. Oscar H. Paris
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 9th day of April, 1986.