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June 16, 1987

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 JUN 22 A9:57

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PHILADELPHIA ELECTRIC COMPANY)
)
(Limerick Generating Station,)
Unit 1))

Docket No. 50-352-*OLA*

NRC STAFF'S RESPONSE TO LICENSEE'S
ANSWER IN OPPOSITION TO REQUEST FOR HEARING
AND LEAVE TO INTERVENE BY AIR AND WATER POLLUTION PATROL

I. INTRODUCTION

In this license amendment proceeding, Philadelphia Electric Company (Licensee) applied to the Nuclear Regulatory Commission (NRC or Commission) to amend the technical specifications (TS) for its Limerick Generating Station, Unit 1. However, before the NRC published its notice of consideration of the amendment in the Federal Register pursuant to 10 C.F.R. § 2.105, ^{1/} the Air and Water Pollution Patrol (AWPP) ^{2/} and Mr. Robert Anthony (Anthony) filed petitions to intervene and requests for a hearing on the amendment with the Office of the Secretary (Secretary). The Secretary, rather than rejecting or explicitly accepting

1/ 10 C.F.R. § 2.105(a)(4)(i) (1987).

2/ Mr. Frank R. Romano asserts that he represents petitioner Air and Water Pollution Patrol. Mr. Romano makes no effort to meet the Commission's requirement to establish his eligibility or authority to act as AWPP's representative. See 10 C.F.R. § 2.713(b) (1987). Mr. Romano's participation in other proceedings regarding the Limerick facility does not establish his standing and eligibility to represent AWPP in the instant proceeding. For convenience, the Staff refers to Mr. Romano and the Air and Water Pollution Patrol as "AWPP."

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AWPP's and Anthony's (Petitioners) petitions, informed them that they had filed their petitions prematurely, but that the Secretary would refer their petitions to the Chairman of the Atomic Safety and Licensing Board Panel (the Panel) after the Staff had issued the appropriate notice. After the NRC published the appropriate notice, the Secretary referred Petitioners' requests for intervention to the Chairman of the Panel, who referred them to this Atomic Safety and Licensing Board (Licensing Board) for appropriate consideration. The Licensee objects to this procedure and contends that the Licensing Board should deny the petitions because the Licensing Board lacks jurisdiction to consider the matter and because Petitioners lack standing to participate in the proceeding. Pursuant to the Licensing Board's order dated May 22, 1987, the NRC Staff will address in this pleading whether the Secretary exceeded his authority by holding Petitioners' pleadings pending the Staff's publication of the appropriate notice in the Federal Register and then forwarding the pleadings to the Chairman of the Panel for further action. For the reasons set forth below, the Secretary acted within his discretion to control the Commission's docket and did not exceed his authority in dealing with Petitioners' pleadings as he did in this proceeding.

II. ISSUE

The Licensing Board faces an issue of first impression in this case:

Did the Secretary abuse his discretion by (a) refusing to reject or accept AWPP's and Anthony's petitions when Petitioners submitted them; (b) holding AWPP's and Anthony's petitions until the Staff issued notice of its consideration of the Licensee's proposed amendment; or (c) referring AWPP's and

Anthony's petitions to the Chairman of the Panel after the Staff published the appropriate notice in the Federal Register?

Subsidiary to this question, the Staff will analyze the Secretary's authority under the pertinent regulations.

III. BACKGROUND

On August 19, 1986, the Licensee applied to the NRC for an amendment of the TS for its Limerick Generating Station, Unit 1 (Facility Operating License NPF-39). In its application, the Licensee asked the NRC to amend the Limerick TS governing plant operation, given particular concentrations of radioiodine in the plant's reactor coolant, by changing those TS to match model TS for radioiodine in reactor coolant that the NRC proposed in Generic Letter No. 85-19, which the NRC issued on September 27, 1985.

On August 25, 1986, before the NRC published the amendment request in the Federal Register, AWPP filed its petition for leave to intervene and its motion for a hearing on the Licensee's proposed amendment. On September 4, 1986, Anthony filed a similar petition. The Secretary, on August 28, 1986, and September 10, 1986, replied to AWPP and Anthony, respectively. The Secretary informed the Petitioners that they had filed prematurely, but that the Commission would not act on their requests until the Staff published its notice of consideration of the proposed amendment. In his replies to the Petitioners, the Secretary also stated that he would forward their petitions to the Chairman of the Panel when the Staff issued the appropriate notice.

On March 12, 1987, the Staff published a notice in the Federal Register that stated that the Staff proposed to find that the Licensee's proposed amendment involved no significant hazards considerations. ^{3/} The notice stated that parties interested in the amendment had thirty days to file a request for a hearing. The notice stated explicitly that the thirty day time limit expired on April 13, 1987. ^{4/} On April 29, 1987, the Secretary referred AWPP's request for a hearing to the Chairman of the Panel. On May 7, 1987, the Chairman of the Panel designated this Licensing Board to preside over this matter and since that date, the Licensee has objected to the procedural and legal sufficiency of AWPP's requests. On May 20, 1987, the Secretary referred Anthony's request for a hearing to the Licensing Board. The Licensee argues against Anthony's petition for the same reasons it contests AWPP's petition.

On May 22, 1987, the Licensing Board directed the Staff to reply to the procedural argument in the Licensee's response to AWPP's petition dated May 20, 1987. The Licensee argues that the Secretary lacked the authority to hold Petitioners' requests and refer them to the Chairman of the Panel after the Staff issued the appropriate notice. In this brief, the Staff responds to that argument. ^{5/}

^{3/} 52 Fed. Reg. 7,675 at 7,693 (1987).

^{4/} Id. at 7,675.

^{5/} The Licensee also argued that petitioners lacked standing to intervene. At the Licensing Board's direction, the Staff does not address that argument in this pleading. The Staff will respond to the Licensee's standing argument only if the Licensing Board so directs.

IV. DISCUSSION

No regulation specifically limits the Secretary's authority to manage the Commission's docket. The regulations do not support the Licensee's argument to the contrary. The regulations that empower the Secretary to control the Commission's docket commit that power to the Secretary's discretion. Given the facts of this proceeding, the Secretary properly exercised his discretion to manage the Commission's docket by acting as he did in this matter. The Secretary made no error by holding the Petitioners' requests and referring them to the Chairman of the Panel after the Staff issued the notice appropriate in this case.

A. The Secretary's Authority

The Commission's Statement of Organization and General Information ^{6/} defines the Secretary's duties. In particular, "[t]he Office of the Secretary...[i]ssues decisions, orders, and rulings of the Commission, and maintains the official docket of the Commission[.]" ^{7/} This section, however, does not state specifically what powers the Secretary can use to "maintain the official docket of the Commission[.]" The regulations define the Secretary's general powers in question in this case in §§ 2.702 and 2.709. ^{8/} Section 2.702 provides:

^{6/} 10 C.F.R Part 1 (1987).

^{7/} 10 C.F.R. § 1.33 (1987).

^{8/} 10 C.F.R. §§ 2.702, 2.709 (1987).

The Secretary will maintain a docket for each proceeding subject to this part, commencing with the issuance of the initial notice of hearing, notice of consideration of issuance of facility operating license or other proposed action specified in § 2.105, or order to show cause. The Secretary will maintain all files and records, including the transcripts of testimony and exhibits and all papers, correspondence, decisions and orders filed or issued. ^{9/}

Although § 2.702 does not define how the Secretary accepts or rejects correspondence, it does demonstrate that the Commission has delegated to the Secretary responsibility to determine initially how to deal with correspondence, including AWPP's and Anthony's petitions. Section 2.702 states that the Secretary "will maintain a docket for each proceeding subject to this part, commencing with the notice of hearing... or other proposed action specified in § 2.105[.]" ^{10/} This statement commands the Secretary to maintain a docket ("[t]he Secretary will maintain") for the proceedings subject to 10 C.F.R. Part 2 and to start maintaining that docket upon the appropriate notice.

Section 2.702 admits of two possible interpretations relevant to the present issue. First, § 2.702 may direct the Secretary to maintain a docket for a proceeding subject to Part 2 beginning no later than publication of the appropriate notice. Under this interpretation, the Secretary could maintain the docket for a proceeding earlier than the publication of an appropriate notice, in his discretion. Accordingly, the

^{9/} 10 C.F.R. § 2.702 (1987). The Staff notes that the Licensee's proposed amendment is a "proposed action specified in § 2.105" covered by § 2.702.

^{10/} Because the Licensee proposed one of the "other actions specified in § 2.105" for which the regulations require the NRC to issue a notice of its proposed decision, the Staff will refer to the notice the NRC issued in this case as "the appropriate notice."

regulation would allow the Secretary's actions in the instant proceeding. The second interpretation of § 2.702 would require the Secretary to begin maintaining a docket for a proceeding when the NRC published the appropriate notice. Under this interpretation, the Secretary would have no authority to maintain a docket before the NRC issued the appropriate notice for a proceeding. Therefore, the Secretary would be powerless to accept a document for filing before the Staff issued the appropriate notice. In this case, however, the Staff need not address whether the Secretary accepted a document for filing too early because the Secretary did not accept or reject AWPP's and Anthony's petitions for filing before the NRC issued the appropriate notice. Rather, the Secretary held the petitions until the NRC issued the appropriate notice. Moreover, under the second interpretation, § 2.702 does not require the Secretary to reject a document for filing if no docket yet exists for a proceeding and does not preclude him from holding that document until he has the authority to accept it. For the Secretary's authority to reject a document for filing, we must examine § 2.709. ^{11/}

Section 2.709 authorizes the Secretary to accept or reject documents for filing. Section 2.709 reads:

^{11/} Section 2.709 applies only to the formal requirements, listed in § 2.708, for filing a document. The Licensee does not point out any other requirements the Petitioners' documents must meet (the Licensing Board had delayed inquiry into those of § 2.714), and the Staff believes that, for the purposes of this inquiry, Petitioners' documents meet the appropriate requirements except for those of § 2.708. For further discussion of the pleading requirements Petitioners must satisfy, see the text accompanying notes 15 through 20.

A document which fails to conform to the [formal] requirements of § 2.708 may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any matter so tendered but not accepted for filing shall not be entered on the Commission's docket. ^{12/}

Section 2.709 states that the Secretary may refuse to accept a document for filing. The regulation gives the Secretary the option of refusing to accept a document for filing. Section 2.709 vests discretion to accept or reject documents for filing in the Secretary and does not require him to return every document that fails to satisfy the formal requirements of § 2.708. The regulation further states that "any matter so tendered but not accepted for filing shall not be entered on the Commission's docket." ^{13/} Again, the regulation clearly precludes the Secretary from entering a document on the Commission's docket if the Secretary, in his discretion, rejects a document for filing. If the Secretary rejects a document for filing, § 2.709 is mandatory and precludes the Secretary from entering the document on the Commission's docket. ^{14/} If the Secretary does not reject a document for filing, § 2.709 does not require him to enter the document on the Commission's docket, nor does it preclude him from so entering the document in the appropriate circumstances. This provision is consistent with the idea that

^{12/} 10 C.F.R. § 2.709 (1987) (emphasis added).

^{13/} Id.

^{14/} Section 2.709 does not require the Secretary to reject documents for filing even if he doesn't have the power to accept them. The Secretary, in his discretion, may either reject the documents or hold them until he does have the power to accept them (when the NRC publishes the appropriate notice).

the Secretary may hold a document and not reject it or enter it on the Commission's docket. Under either interpretation of § 2.702, the Secretary has the authority to hold a document for filing until the NRC issues the appropriate notice. Moreover, § 2.709 does not require the Secretary to reject a document rather than hold it. In this proceeding, the Secretary did not violate the provisions of § 2.702 or 2.709 because the Secretary did not accept the Petitioners' documents for filing when he received them. Rather, the Secretary held those documents until the Staff issued the appropriate notice and then accepted them for filing. Under the circumstances before this Licensing Board the Secretary had discretion to accept or reject Petitioners' documents and, after deciding not to reject the petitions, did not abuse his discretion by holding them until the Staff issued the appropriate notice and then forwarding them to the Chairman of the Panel.

B. The Licensee's Position

The Licensee cites § 2.772(i) ^{15/} and argues that this subsection restricts the Secretary's discretion in accepting or rejecting documents for filing. ^{16/} Section 2.772(i) states, "[T]he Secretary...[is] authorized to...[d]eny a request for [a] hearing[s], where the request fails to comply with the Commission's pleading requirements set forth in this part, and fails to set forth an arguable basis for further

^{15/} 10 C.F.R. § 2.772(i) (1987).

^{16/} Licensee's Answer In Opposition To Request For Hearing And Leave To Intervene By Air And Water Pollution Patrol, at 10.

proceedings[.]" ^{17/} The Staff has examined "the pleading requirements set forth in this part," in § 2.714 and in § 2.708, and even if Petitioners' documents contain defects that these sections define, the Staff contends that § 2.772(i) does not require the Secretary to reject Petitioners' document. ^{18/} Section 2.714 contains the pleading requirements for intervention, including timeliness, standing or interest, and specificity or aspect requirements. ^{19/} While the Secretary has authority to dispose of petitions defective in these respects, § 2.772(i) does not require him to do so, and, in practice, the Secretary usually leaves such determinations to the Licensing Board. The Staff notes that the Licensee alleges that Petitioners lack standing, but the Licensing Board has deferred decision on this issue. The Licensee alleges no other particular pleading defects in the documents. ^{20/} The only defects that Petitioners' pleadings might

^{17/} 10 C.F.R. § 2.772(i) (1987).

^{18/} 10 C.F.R. § 2.714 (1987).

^{19/} Id.

^{20/} The Licensee does cite 10 C.F.R. § 2.717 (1987), which defines the presiding officer's jurisdiction but does not define the Secretary's authority. If the Licensee attacks the Licensing Board's jurisdiction to accept the petitions, the Staff believes the Licensee cannot support such a position. The Staff more reasonably interprets the Licensee's citation of § 2.717 in the context of the Licensee's argument concerning § 2.772(i) against the authority of the Secretary. The Staff has shown, however, that § 2.772(i) authorizes the Secretary to deny requests for a hearing for failure to satisfy pleading requirements. In particular, the Staff considered the formal pleading requirements of § 2.708. Section 2.717, while defining the presiding officer's jurisdiction in terms of the commencement of a proceeding, contains no pleading requirements. Section 2.714, which establishes the pleading requirements for intervention, require a prospective intervenor to request a hearing before a certain date, and not after any particular date. See 10 C.F.R. § 2.714(a)(1) (1987).

contain would be formal defects defined by § 2.708. As the Staff has already explained, the Secretary has discretion to accept documents that do not conform to the requirements of § 2.708. Furthermore, § 2.772(i) merely empowers the Secretary to deny a request for a hearing from a person who tenders such a request that fails to satisfy the Commission's pleading requirements. Section 2.772(i) does not require the Secretary to deny such a request. By vesting discretion in the Secretary to accept or deny a request for a hearing containing formal (§ 2.708) defects, the Commission protects unsophisticated intervenors who may not be well versed in the intricacies of the Commission's pleading requirements. The Staff urges the Licensing Board to reject the Licensee's argument.

C. The Secretary's Exercise of Discretion

The Secretary exercised his discretion by not rejecting AWPP's and Anthony's pleadings when he received them and by holding them and referring them to the Chairman of the Panel after the Staff issued the appropriate notice. The staff does not detect any abuse of discretion in the Secretary's action. Accordingly, the Staff believes that the Licensee has not shown that the Secretary abused his discretion and contends that the Licensing Board should not reject AWPP's and Anthony's pleadings on this basis.

D. Prejudice to Petitioners

If, notwithstanding the arguments made above, the Licensing Board decides to reject Petitioners' pleadings because the Secretary exceeded his authority by holding their petitions until the Staff published the appropriate notice, the Petitioners will be prejudiced because they relied on the Secretary's determination and will lose their rights to have the

Licensing Board consider their petitions. The instant facts do not justify such prejudice. On the contrary, the Secretary's agent who had authority to respond to Petitioners' requests told Petitioners how the Secretary would process their documents and, in fact, the Secretary performed as promised. Clearly, if the Secretary had rejected Petitioner's documents, they could have filed petitions during the period set out by the Staff's Federal Register notice for this amendment and preserved their hearing rights. Now, however, after Petitioners relied on the Secretary's representation, it is suggested that the Licensing Board reject their petitions. In a situation similar to that presented here, the Court of Appeals for the Ninth Circuit stated, "[t]o say to these [Petitioners], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." ^{21/}

Furthermore, the Secretary served copies of his replies to Petitioners on the Licensee. If the Licensee had successfully objected to

^{21/} Brandt v. Hickel, 427 F.d 53, 57 (9th Cir. 1970). This case, while not on all fours with the instant controversy, suggests that the Licensing Board might violate due process requirements if it denied Petitioners a hearing on the basis of the Secretary's actions. In Brandt, Brandt submitted a non-competitive oil and gas lease offer to the Bureau of Land Management's (Bureau) Los Angeles Office. The Los Angeles Office held Brandt's offer but allowed Brandt to file a new offer within thirty days to cure supposed defects in the first offer without losing priority. If Brandt did not file an amended offer, the Bureau would reject Brandt's initial offer. Brandt did file an amended offer, but one Hansen had filed an offer for the same lease in the interim. No statute authorized the Bureau to promise Brandt no loss of priority and Hansen challenged the Bureau's decision to award the lease to Brandt. Brandt resembles this proceeding because the Secretary of the Interior deprived an individual of a benefit (the oil and gas lease) based on the Bureau's promises to Brandt and because the Bureau held Brandt's document, rather than rejecting it outright.

the procedure the Secretary followed in this proceeding when the Licensee received the copies of the Secretary's replies to Petitioners, then Petitioners could have filed their pleadings during the period set out in the Staff's notice. The Petitioners in this case reasonably relied on a government official who had the authority to represent the Secretary. The Staff contends that the equities in this proceeding, on balance, favor the acceptance of Petitioners' pleading for consideration. ^{22/}

V. CONCLUSION

The regulations commit control of the Commission's docket to the Secretary's discretion. No regulation prohibits the Secretary from exercising his discretion by not rejecting a prematurely filed pleading, holding it until the appropriate time and then referring it to the Chairman of the Atomic Safety and Licensing Board Panel, or other entity. The Secretary did not abuse his discretion by proceeding as he did in this case. Because the regulations authorize the Secretary to manage the Commission's docket in his discretion, and because the Secretary did not abuse his discretion by managing the docket as he did in this case, the

^{22/} It should be noted that Mr. Anthony, in his response to the Licensee's brief, seems to imply that the Secretary will monitor the Federal Register for him and inform him of the progress on amendments for Limerick. While the Secretary acted within his discretion, he did not thereby commit to perform this service for Mr. Anthony. Because the law provides that publication in the Federal Register provides adequate notice of what an agency intends to do and starts the time running for persons to petition for intervention and request a hearing, Anthony must look to the Federal Register for notice of amendments of interest to him, just like any other person. 44 U.S.C. §§ 1507, 1508 (1982). 10 C.F.R. § 2.105 (1987).

Licensing Board should reject the Licensee's first argument against AWPP's and Anthony's requests for a hearing. ^{23/}

Respectfully submitted,

Robert M. Weisman

Robert M. Weisman
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 16th day of June 1987

^{23/} The Staff implies no opinion on AWPP's or Anthony's standing, nor on the merits of Petitioners' contentions, nor does the Staff imply an opinion on the sufficiency of those contentions. The Staff will answer those questions later in this proceeding only if the Licensing Board so directs.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 JUN 22 A9:57

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

FILE BY TELETYPE
DOCKETING & SERVICE
BRANCH

In the Matter of)	
)	
PHILADELPHIA ELECTRIC COMPANY)	Docket Nos. 50-352
)	50-353
(Limerick Generating Station,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO LICENSEE'S ANSWER IN OPPOSITION TO REQUEST FOR HEARING AND LEAVE TO INTERVENE BY AIR AND WATER POLLUTION PATROL" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of June, 1987:

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