

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PUBLIC SERVICE ELECTRIC &	)	Docket No. 50-272
GAS COMPANY	)	Proposed Issuance
	)	of Amendment to
(Salem Nuclear Generating	)	Facility Operating
Station, Unit No. 1)	)	License No. DPR-70

LICENSEE'S ANSWER TO "THE PUBLIC ADVOCATE'S  
MOTION FOR RECONSIDERATION OF PART  
OF THE BOARD'S ORDER OF MAY 24, 1978"

INTRODUCTION

On June 12, 1978, the Public Advocate of the State of New Jersey, on behalf of the intervenors which it represented in this proceeding, Alfred and Eleanor Coleman ("intervenors"), moved the presiding Atomic Safety and Licensing Board ("Licensing Board") for reconsideration of a part of its May 24, 1978 Order Following Special Prehearing Conference ("Order") which excluded from consideration as an issue in this proceeding, inter alia, intervenors' proposed Contention 13. As discussed below, the motion should be denied.

TIMELINESS

The timeliness of this motion is governed by the provisions of 10 CFR §2.751a(d) regarding objections to

an order following a special prehearing conference held pursuant to 10 CFR §2.751a.<sup>1/</sup> That subsection recites that "[o]bjections to the order may be filed by a party within five (5) days after service of the order...."<sup>2/</sup> By any calculation, the Coleman's motion has not been filed within the time period prescribed by the NRC's Rules of Practice<sup>3/</sup> and, therefore, should be stricken.

The Nuclear Regulatory Commission has recently revised its Rules of Practice "to set forth more reasonable time limits for certain portions of the review and hearing process...."<sup>4/</sup> The time limit in §2.751a(d) was unchanged by the Commission, and we submit this indicated a very recent Commission judgment of the reasonableness of this time period.

In these circumstances and in the absence of any

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<sup>1/</sup> See Order at 1.

<sup>2/</sup> The NRC staff is permitted 10 days in which to object.

<sup>3/</sup> This is true whether the date of service is calculated from May 24, 1978, the date on which the order was signed, or May 25, 1978 when received by the Docketing and Service Section. In any event, no reason for the untimeliness is given by counsel for the Colemans.

<sup>4/</sup> 43 Fed. Reg. 17799 (April 26, 1978). These regulations became effective May 26, 1978.

explanation accompanying the pleading showing good cause <sup>5/</sup>  
for its untimely filing, the Board should deny the motion.

DISCUSSION OF THE MERITS OF THE MOTION

Even should the merits of the pleading be considered, we submit that the Licensing Board's order was correct as to its ruling on Coleman's Contention 13 and sufficient reasons have not been stated which would require the ruling to which objection has been taken to be changed.

Initially, as seemingly admitted by counsel for the Colemans, the facts relating to the Licensee's plans with regard to Unit 2 were placed on the record, and counsel for the Colemans had been made aware of the Licensee's filings in Unit 2 <sup>6/</sup> prior to the time of the prehearing conference.

The Licensee's plans for expansion of the capacity for Salem Unit 1 are completely independent of and separate from any expansion of the Unit 2 fuel pool capacity. <sup>7/</sup>  
The actions in each case have an independent utility.

In paragraph 7 of its motion, the Colemans would have the Board "anticipate that the staff and the Licensee already

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<sup>5/</sup> See Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411, 413 n.2 (1975) for an example of an instance where an objection to a prehearing conference order was denied on timeliness grounds.

<sup>6/</sup> While he now complains that he has not been provided a copy of the Unit 2 filings, there is no indication that he sought to examine them in the local public document room.

<sup>7/</sup> Cf. Philadelphia Electric Company (Limerick Generating Station, ALAB-267, 1 NRC 163, 200-1 (1975)).

are conducting reviews of the 'cumulative impacts' of expanding spent fuel storage at the two units." No basis is given for this statement. The Colemans completely fail to define or give examples of cumulative effects in the context of this proceeding which they believe must be considered.

Notwithstanding the factual similarity between the requested actions, this Licensing Board has been constituted to decide only the issues relating to Unit 1<sup>8/</sup> and to require it to include within the scope of its responsibility all matters relating to Unit 2, as requested by the Colemans, would appear to be totally outside the scope of its jurisdiction as granted by the Commission and the Chairman of the Atomic Safety and Licensing Board Panel.<sup>9/</sup>

Nowhere have the Colemans alleged that, were the impacts of Salem Unit 2 to be considered for some purpose in the Board's review of the Licensee's application regarding Unit 1, the outcome of the proceeding would in any way be affected. The only other commonality

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<sup>8/</sup> Notice of Hearing on Amendment of Facility Operating License dated April 26, 1978 published in 43 Fed. Reg. 18803 (May 2, 1978) at 2.

<sup>9/</sup> Id. The staff's decision, for administrative convenience, to present the results of the units together cannot change the jurisdictional limitation on this Board.

alleged by the Colemans is the common ownership and operation of the two units,<sup>10/</sup> facts which give rise to no requirement that the units be treated together. It would seem that there would be no purpose for this Board to consider the two units together in this proceeding as suggested by the Colemans.<sup>11/</sup>

With regard to the procedures to be utilized with regard to NRC review of Salem Unit 2 facility and, in particular, with regard to the expansion of the Unit 2 fuel pool, the intervenors are in the wrong forum. This Board cannot direct or modify the staff's actions with regard to Unit 2. Importantly, the intervenors' motion does not allege that NRC's procedures with regard to Unit 2 are in any way contrary to its own regulations.<sup>12/</sup> There is no question that the NRC Staff's evaluation of Salem Unit 2 will be available for review by the public when completed. Thus no reason has been shown why, because of the pendency of a similar action on Unit 2, both units must somehow be considered together.

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<sup>10/</sup> Motion at 3.

<sup>11/</sup> However, with regard to the determinations made by this Licensing Board on Unit 1, the Licensee does not waive the application of res judicata principles should there be another proceeding.

<sup>12/</sup> Nothing herein should be taken as admitting the correctness of any aspect of the Coleman's legal analysis of the procedures needed for approval of fuel pool expansion for Unit 2.

CONCLUSION

For the foregoing reasons, the Coleman's objections to the Order Following Special Prehearing Conference should be overruled and their motion denied.

Respectfully submitted,

CONNER, MOORE & CORBER



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June 28, 1978