UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of PHILADELPHIA ELECTRIC COMPANY (Fulton Generating Station, Units 1 and 2)	))))	DOCKET NOS. 50-463, 50-464

APPLICANT'S OPPOSITION TO
"PETITION TO TERMINATE DOCKET. . ."

Philadelphia Electric Company (PE or the Applicant) hereby responds to the "Petition to Terminate Docket and to Quash Preapplication and Early Review of Site Suitability" (the Petition) filed by intervenor Save Solanco Environment Conservation Fund (Solanco), and urges that it be denied.[1] As will be shown more fully below, the basis for denial is that the Petition states no legal basis on which the relief sought ought to be granted. More specifically, in several respects the Petition rests on arguments which are challenges to Commission regulations and therefore not cognizable in a licensing proceeding absent special circumstances not here

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1/The certificate of service for the Petition (which is undated) bears the date of May 14, 1979. Because of tardy service on the Applicant, of which the Board and parties were notified in writing on May 25, this Opposition is being filed today.

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shown, 10 CFR § 2.758. To the limited extent that the Petition raises arguments which are within the jurisdiction of an Atomic Safety and Licensing Board, these arguments not yet ripe, and in any event are addressed merely to the discretionary authority of the Board over the initiation of hearings, and do not constitute arguments for dismissal of an application.

I. BACKGROUND

This proceeding involves an application for early site review including a partial initial decision by this Board in connection with a construction permit application, and is governed by §§ 2.101(a-1) and 2.600-2.606 of the Commission's regulations, 10 CFR §§ 2.101(a-1), 2.600- 2.606 (1978) (the Early Site Review Regulations or ESR Regulations).[2] The application constitutes, in fact, an amendment to an existing application in these dockets, originally filed in 1973, for permits to construct two nuclear generating units at Fulton. The units were originally designed as high-temperature-gas-cooled reactors (HTGRs). By September

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2/The Petition purports to be based on Appendix Q to Part 50 of the Commission's regulations, 10 CFR Part 50 Appendix Q (1978) (Petition at 5, 7). Since Appendix Q applies only to Staff Early Site Reviews not in conjunction with an application for a construction permit and not leading to a partial initial decision, the Petition's citation of authority is clearly in error. This Opposition assumes that the Petition was intended to be based on the correct regulatory authority.

1975, when the reactor manufacturer, the General Atomic Company, announced that it was suspending work on the project, NRC Regulatory Staff safety review had proceeded through the issuance of a Safety Evaluation Report with one Supplement and a letter from the Advisory Committee on Reactor Safeguards. Staff review of environmental issues had advanced through preparation of Draft and Final Environmental Impact Statements. Both safety and environmental reviews indicated Regulatory Staff approval of the Fulton site under prevailing standards for the construction and operation of reactors of the size and type applied for.[3] Hearings on the application had not yet begun.

Following the suspension of work on the project, PE notified the Commission that it wished to survey the available alternatives for Fulton; and following the Commission's issuance of the Early Site Review Regulations (ESR regulations) in May, 1977 (42 Fed. Reg. 22882 (1977)), PE notified the Commission that it wished to amend the Fulton application so as to secure an early site review and partial initial decision in accordance with the ESR Regulations,[4] looking toward

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3/A more detailed history of this application to date can be found in the Early Site Suitability Review Safety Report (Foreword and Chapter 1) and the Early Site Suitability Review Environmental Report (Foreword and Chapter 1) filed by PE in December 1978.

4/Letter, J. Lee Everett (PE) to Richard P. Denise

construction of a two-unit station to be completed in the mid-1990s. That amendment (the ESR amendment), containing two volumes,[5] was filed in December 1978. Together with the applicable parts of the original Fulton30 Preliminary Safety Analysis Report and Environmental Report, as amended, the ESR amendment sets forth the safety and environmental information called for by § 2.101(a-1)(1) of the Commission's regulations. The ESR amendment does not designate any one specific reactor design. Rather, it analyzes the Fulton site in terms of an envelope of reactor parameters encompassing standardized designs for both types of light-water-cooled reactors (PWR and BWR) as well as for an HTGR of the general characteristics previously applied for. The Regulatory Staff is in the preliminary stages of its review of the ESR amendment.

II. OBJECTIONS RAISED BY THE PETITION

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(NRC), March 8, 1978 (copy attached). As that letter notes, one principal reason for seeking early site review in the form of an amendment to the existing application rather than as a new application (with the previous application being dismissed) is to permit use of the large amounts of relevant information already filed and evaluated in the existing docket.

5/Early Site Suitability Review Safety Report (December 1978) (ESSR-Safety), Early Site Suitability Review Environmental Report (December 1978) (ESSR-Environmental).

The arguments and prayer for relief stated in the Petition are not always easy to follow. In various forms, they express two generalized challenges: first, to the concept of the Early Site Review regulations; and second, to the use in the ESR amendment of information from the pre-existing HTGR application. In addition, it contains a variety of more specific complaints which appear reducible to the following principal propositions:

1. Plant design:

   (a) The fact that no specific plant design has been chosen for the site means that "analysis of radiological consequences and environmental effects of accidents is purely speculative, conjunctural, and unrelated to any facts as proposed." (Petition, ¶10)

   (b) Environmental review of the site is inherently inadequate under the National Environmental Policy Act if no specific plant has been designated. To the extent that the ESR regulations permit such evaluations, they are inconsistent with NEPA. (Petition, ¶¶ 17, 18)

2. Need for site/plant:

   (a) PE has overestimated its load growth before. How can one be sure that this will not happen again? (Petition, ¶¶ 5, 12)

   (b) Any disposition of the need for generating capacity fifteen to

twenty years in the future is inherently so conjectural as to be unlikely to retain any validity in later reviews. (Petition, ¶13)

(c) Environmental review of the site on the basis of need for power projections available fifteen to twenty years in the future is inherently inadequate under NEPA. To the extent that the ESR regulations permit such review, they are inconsistent with NEPA. (Petition, ¶13)

3. Technical basis for application:

(a) Reliance in the ESR application on information contained in the original Fulton application is inherently inadequate, since the original application relies on "the premises and probability studies" of the NRC's 1975 Reactor Safety Study, which is "now disclaimed." (Petition, ¶¶ 9, 11, 14, 15)

(b) To the extent that the NRC's regulations permit safety analyses to be made without full attention to such matters on the Lewis Commission's report on WASH-1400 and the accident at the Three Mile Island plant, the regulations are deficient. (Petition, ¶15)

4. Consistency of ESR application with discretionary "Additional Considerations"

(a) Any showing of need for Fulton units has an insufficient degree of likelihood of retaining its validity in later reviews. (Petition, ¶¶ 13, 14)

(b) Cognizant governmental agencies have objected to the conduct of ESR proceedings. (Petition, ¶16)

(c) The public interest would be adversely affected by an early, not necessarily conclusive resolution of issues at this time. (Petition, ¶ 20)

These arguments will be dealt with in turn below, beginning with the generalized ones.

III. RESPONSES TO OBJECTIONS RAISED BY THE PETITION

A. General Opposition to Early Site Review Proceedings

The Early Site Review Regulations are an outgrowth of and an attempt to respond to the increasing instability of the nuclear licensing process in the mid-1970's, which had forced a number of applicants, like PE, to adjust earlier plans for nuclear plants and had discouraged other, potential applicants from even attempting to seek to build such plants. As the Commission noted in its preamble to the ESR regulations in the Federal Register:

> Within the past year or so, a number of utilities have found it necessary, for various economic and financial reasons, to cancel or postpone plans for the construction of nuclear power plants. It is the Commission's intent that the procedures for early review, hearing and partial decision of site suitability issues shall be available to all qualified construction permit applicants, including applicants who did not request early review

> of site suitability issues at the time of their initial application but who later decide, following postponement of the target date for the actual construction of the facility, that this procedure would be advantageous.

42 Fed. Reg. 22882, 22883 (May 5, 1977).

The purposes of the Commission's Early Site Review Regulations are likewise well stated in the preamble to their publication in the Federal Register. They are intended to

> permit an applicant for a construction permit to obtain resolution of important site-related issues which may prove dispositive of an application to construct a facility at a particular site well in advance of any substantial commitment of resources. By permitting early review and providing a measure of certainty in this important area, these procedures are expected to increase the effectiveness of the licensing process in resolving legitimate public concerns and to enhance the effectiveness of the nuclear facility planning process.

Id. at 22882.

The ESR regulations, both in their Federal Register form and as construed in more detail by the Regulatory Staff in NUREG-0180, Early Site Reviews for Nuclear Power Facilities (May 1977), contain numerous provisions to provide flexibility while still ensuring the efficacy of proceedings under them.[6]

6/For purposes of the following discussion, it will be assumed that the ESR application in question is filed in the context of a construction permit application and is thus governed by 10 CFR §§ 2.600, et seq. The discussion would apply equally to a Staff Site Review under Appendix

Under their terms, an ESR applicant may propose a specific reactor design or simply an envelope of design parameters. He may choose to obtain review of the entire range of site-related issues required for a construction permit, or may select a lesser number of issues.[7] The applicant may seek a "full" (CP-quality in depth and design specificity) determination, or may obtain a lesser, "generic" determination.[8] However, an early site review and partial initial decision sufficient to justify a Limited Work Authorization must contain "full" reviews on the entire range of issues under NEPA,[9] 10 CFR § 2.606(a) (1978), and the Regulatory Staff has taken the position that such a plenary review cannot be conducted in the absence of actual design information.[10]

As a convenient summary for the Board, the nature of the Fulton ESR application is as follows: It is an application in

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Q, except that no hearings leading to a partial initial decision and the possibility of a Limited Work Authorization would be available.

7/The regulations merely place no limit on the issues which an applicant can suggest for review. NUREG-0180 is more specific on the matter. See 42 Fed. Reg. 22882 col. 3 ¶(3), NUREG-0180 at I-1.

8/NUREG-0180 at IV-1 through IV-3.

9/10 CFR § 2.606(a) (1978).

10/E.g., NUREG-0180 at A-VIII-1 (need for site/plant).

conjunction with an application for a construction permit, and is therefore governed by 10 CFR §§ 2.600 et seq. No specific reactor design has been proposed; rather, an envelope of parameters covering all likely commercial reactor types -- PWR, BWR, HTGR -- has been used. All site-related issues necessary to justify a Limited Work Authorization ultimately have been treated. However, because of the absence at this point of a specific reactor design, it will be possible to obtain only a "generic" rather than a "full" resolution of at least some of these issues. Thus, on the basis of the present submittal alone, i.e., without a specific reactor design, PE does not appear able to obtain a Limited Work Authorization for the Fulton site.

The discussion above is intended only to place the ESR regulations and the present application in perspective, and to illustrate the general fitness of the Fulton licensing situation to the structure of the ESR regulations. It is not intended as a discussion on the merits of the ESR regulations. Indeed, questions relating to the validity or wisdom of the ESR regulations have no place in this proceeding. Under § 2.758 of the Commission's Rules of Practice, 10 CFR § 2.758 (1978), challenges to NRC regulations are not permitted in licensing proceedings except on the narrow ground that

> special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

10 CFR § 2.758(b) (1978).

There has been no attempt here to make the showing required under § 2.758(b). Nor could such a showing be made, since the Fulton situation is one to which the ESR regulations are clearly adapted. Therefore, to the extent that the Petition claims either the invalidity or the inadvisability of the ESR regulations, such claims are not properly before this Board and should be rejected. Thus, the objections in the Petition summarized above in ¶¶1(b) (absence of specific plant design), 2(c) (need for site/plant) and 3(b) (technical basis) should be dismissed under § 2.758 as being outside this Board's jurisdiction.

B. Use of Information from the HTGR Construction Permit Application

At various points the Petition refers to, and apparently questions, PE's reliance in its ESR amendment on information from the pre-existing HTGR-oriented construction permit application. Although the objections are so general as to leave some doubt about their intended thrust (e.g., Petition ¶¶ 9, 15, 16), the response is simple: the Fulton site possesses the same physical characteristics regardless of the

type of reactor ultimately proposed for it, and there is a wealth of baseline information on the site in the many volumes of the Fulton PSAR and ER. That information, on such matters as geology, hydrology, meteorology and biology, has been reviewed and evaluated by the Regulatory Staff already, and has been available to all other parties as well. While PE has updated and supplemented the information as appropriate in the ESR amendment[11] and doubtless will do so further in the course of Staff review, its reliance on and referencing to earlier-filed site-oriented information already in the record is merely a convenience to reviewers and consistent with the amendment of the existing application. As to the derivation and use of information based on the design characteristics of an HTGR, that type of reactor is one of the three types around which a design envelope has been drawn for the ESR amendment. Its suitability in the context of that overall envelope is a matter for subject-by-subject proof in this proceeding, not an inherent deficiency.

Thus, the use of site-related information from the pre-existing application and of HTGR-based analysis has a basis

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11/The assertion in that Petition (¶16) that PE is seeking early site review "without updating its application" is both literally inaccurate and misleading.

in both the record and common sense. The Petition's opposition to it is, at most, a factual matter for determination at hearing (when Solanco has actually placed any factual issues it chooses to in contention by prefiled testimony or other specific, documented submission) and is prematurely raised now. The objection should be dismissed.

C. Specific Objections[12]

1. Plant Design

a. The simple fact is that neither the Early Site Review regulations nor their regulatory implementation in NUREG-0180 require designation of a specific reactor design: indeed, NUREG-0180 specifically contemplates the use of design envelopes.[13] Thus to the extent that this objection to the ESR amendment's use of design envelopes rather than a specific reactor is based on an asserted inconsistency with the governing regulations, it is in error and should be dismissed. If the objection merely amounts to a factual assertion that the information presented by the specific envelope of reactor

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12/Objections in the Petition will be treated here in the order in which they are discussed in Part II above.

13/ See, e.g., NUREG-0180 at I-2: "[I]mpact analyses would normally be based on 'envelope' assumptions regarding plant design and operating characteristics. These assumptions would be necessary, since actual plant design would not usually be known."

characteristics set out in the ESR amendment is adequate to sustain the desired findings, then the objection is both premature and inadequately specific. Until the completion of Staff review and hearings, the sufficiency of the information presented with regard to any proposed factual finding cannot be properly assessed. Even then, any objection to the sufficiency of information presented must be made with more specificity than can be found in the Petition. This objection should thus be dismissed as both premature and as lacking in foundation.

b. The objection to conduct of environmental review under NEPA without designation of a specific plant is inherently a challenge to the ESR regulations to the extent that they permit such a result, and should be dismissed on that basis. 10 CFR § 2.758. In any event, NEPA review has not been completed, nor is it certain that it will be with construction permit specificity, on the basis of the presently filed application. The objection is thus premature and should thus be dismissed on that basis as well.

2. Need for Site/Plant

a. The sufficiency of PE's load forecasts to justify now approval of a site for completion of a plant in the mid-1990s, is purely a question of factual proof and is not ripe for disposition now. NUREG-0180, at A-VIII-1, summarizes existing guidance on this question, as follows:

> Need for Site (Regulatory Guide 4.2: Sections 8.1, 8.2, 9.1, 9.2) - Need for site is justified by a reasonable likelihood of future need for a nuclear base- load facility in the generating system of the applicant(s). The need would arise from one or both of two eventualities: (1) increased demand for electric power from baseload capacity where average total cost of electricity from the nuclear fueled facility is lower than that of any facility fueled with other fuels, and/or (2) where there is some other rationale for the addition, such as an economic advantage in new nuclear capacity replacing existing non- nuclear capacity, a need to diversify fuels, or some other rationale. The two major components of the need for site analysis are demand for baseload power and cost of alternative forms of baseload generating capacity. Potential impacts of rate restructuring, increasing price of electricity, price and availability of substitute forms of energy, and the application of conservation technology should be incorporated in the analysis of demand. The alternative of purchasing power from outside the system should also be considered.

NUREG-0180 at A-VIII-1.

NUREG-0180 goes on to note that "full" treatment at the Early Site Review stage "would be difficult to do, because of lack of specific cost data and high uncertainty in making very long range forecasts of need for power." Id. Thus, at the ESR stage, "generic" treatment is expected in order "to show a reasonable likelihood that a nuclear plant will be built on the site at some not [necessarily] well defined time in the future."[14] Id. The regulations and NUREG-0180, of course,

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14/A "reasonable outer limit" of some 15 to 20

contemplate that findings adequate ultimately to satisfy NEPA for a construction permit (or a limited work authorization) can be made only on the basis of "full", rather than "generic", treatment. In short, prior to completion of permit-level NEPA review a later, "full" review will be required on need for site/plant (as well as on any other issue initially given "generic" review).

In short, the adequacy of any need for site/plant showing for "generic" review is a question of fact, not yet ripe for resolution. The issue of its adequacy to fully satisfy NEPA for a construction permit becomes relevant only when "full" rather than "generic" resolution is proposed -- again, not a matter ripe for disposition. The objection should be dismissed.

b. The question of the likelihood that a 15-to-20 year need estimate will retain its validity is a question of factual proof and presently unripe for disposition. It cannot even be posed seriously until the factual record is considerably more developed than it is now, as by the filing of testimony by Solanco.[15] The objection should be dismissed.

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years is given in the next paragraph as a definition of the "not [necessarily] well defined" time. Id.

15/To the extent that this argument is directed

c. The assertion of a conflict between use of 15-to-20 year forecasts and NEPA is premature: as shown above, much depends on the use to which the forecast is put. This construction is also a challenge to Commission regulations and not litigable in this proceeding under 10 CFR § 2.758, and as such should dismissed.

3. Technical Basis for Application

a. Reliance on information contained in the previously filed of the Fulton application may or may not be proper for any given purpose; but this is an issue for subject-by-subject determination, as shown in Section III B, above. Certainly, use of information submitted in accordance with the Commission's still-effective regulations and using accepted analytical techniques is not invalidated by either the Lewis Commission's limited critique of the Reactor Safety Study, WASH-1400, or by the Three Mile Island event. WASH-1400 is not even directly relevant to the submission of the licensing information in question: WASH-1400 is not a

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to the question of whether the Board should decline, as a matter of discretion, to initiate hearings because of inadequate likelihood that the decision would retain its validity, the means for such a request would be by a focused motion at the time the pre-filed evidentiary record of all parties had been submitted.

licensing document, and the regulations under which the information was submitted were formulated long before the publication of WASH-1400. Indeed, WASH-1400 was not even published in final form until October 1975, a month after the cessation of work on the Fulton HTGRs! As to the relevance of the Three Mile Island event, the inquiries into its significance may in time lead to changes in regulations -- or they may not. In any event, until such time the mere fact of the occurrence of Three Mile Island does not automatically invalidate information which has been submitted in accordance with still effective standards. The objection should be dismissed.

b. Any assertion that the regulations and other standards under which information is submitted or evaluated are illegal or unwise is beyond the scope of this this proceeding under 10 CFR § 2.758. The objection should be dismissed.

4. "Additional Considerations"

The Petition contains various objections addressed to the discretionary provisions of the "Additional Considerations" section of the ESR regulations, at 10 CFR § 2.605(b)(2). It suggests that the need for plant forecast is unlikely to retain its validity (§ 2.605(b)(2)(1)); that various local governmental bodies oppose the conduct of an early site review (§ 2.605(b)(2)(2)); and that resolution of various

site-suitability issues now would not be in the public interest (§ 2.605(b)(2)(3)).

Each of these issues has factual aspects and the facts vary with each. What is central, though, are the following three characteristics of § 2.605(b): First, its provisions are discretionary (by contrast with § 2.605(a)). Second, the action the Commission (or its agent, the Board) may take is to "decline to initiate an early hearing or render an early initial decision on any issue or issues of site suitability" -- not to dismiss an application, which is the relief requested by the Petition. Third, since all of the issues have factual components -- and all of them require further development before the Petition's complaints can be taken as more than mere averments -- the time for these issues to be presented to the Board is not now, but after the evidentiary record has been developed. The objection should be dismissed.[16]

16/Section 2.606(b) contemplates a balancing of the three factually oriented tests enumerated in it. As noted above, the ease with which this balancing can be performed varies directly with the completeness of the factual record, and the question of whether to proceed to hearing can best be measured when the prefiled record is relatively complete -- certainly not the case at this point. Still, if a balancing were to be performed now -- however prematurely -- on the question of whether to proceed toward a hearing, two of the three criteria would point clearly in favor of proceeding. As to the likelihood of a determination's retaining is validity later, PE has covered the entire scope of issues for a partial initial decision; and, as NUREG-0180 notes, the broader the range

IV. CONCLUSION

The Petition is based entirely on arguments which either are outside this Board's jurisdiction under 10 CFR § 2.758 because they amount to challenges to Commission regulations, or are premature. In the former case, this Board simply cannot entertain them as submitted. In the latter case, the issues posed by the Petition can be posed squarely, if ever, only after this proceeding's factual record is considerably more developed and the Petition's averments are made with more specificity and some foundation.

The Petition as filed provides no colorable basis for the Board to decline to initiate hearings, and none whatever for dismissal of the application or termination of the Early Site Review. The Petition should be dismissed without prejudice to its being refiled, limited to issues within this Board's

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of issues proposed and reviewed, the greater the likelihood of the continued validity of any early findings on them. NUREG-0180 at II-1. Of these issues, the Petition challenges the continued validity of only one -- need for plant/site; and the ESR amendment's treatment of this issue is consistent with the guidance in NUREG-0180 and not controverted by any substantive assertions of fact. Similarly, as to the public interest in securing an early decision on site suitability issues at Fulton, this is clearly in the interest of all concerned: both PE and the local opponents of the Fulton plant share an interest in knowing as soon as possible whether the site qualifies for a nuclear generating station. This interest is shared as well by all of PE's customers, to whom it is obligated to provide and plan for reliable service.

jurisdiction, at such time as the factual record has been developed adequately to permit disposition of such factual issues.[17] Any such refiled Petition should be properly supported by specific averments of material fact, with specific references to the record.[18]

Respectfully submitted,

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17/The inevitably developing nature of any issues which may be eventually posed by a successor Petition, and the need for further proof on them, illustrate why this Petition should be dismissed now. Only later confusion could result from the Board's taking any other action on the Petition, such as declining to rule on it at this time.

18/The Petition requests in passing, at 7, certification of "such issues as the Board may deem necessary" to the Commission. The request should not be granted. Not only does the Petition fail to suggest any such issues; it fails even to attempt to show, as required by § 2.730(f), why such certification would be "necessary to prevent detriment to the public interest or unusual delay or expense. . . ."

Attachment: Letter, Everett to Denise, March 8, 1978

DATED: June 5, 1979