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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

APPLICANT'S ANSWER TO FRIENDS OF THE EARTH
PETITION FOR EXTENSION OF TIME AND SCHEDULING OF
EVIDENTIARY HEARINGS AFTER JANUARY 1, 1984 AND
MOTION TO DISMISS CONTENTIONS V-3a AND V-3b OR,
ALTERNATIVELY, FOR OTHER SANCTIONS

Preliminary Statement

In its Memorandum and Order dated September 13, 1983, the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") required intervenors to affirmatively state whether they still wished to pursue their contentions as admitted, withdraw them, or reword them to focus upon remaining issues more specifically.^{1/} On September 27, 1983, intervenor Friends of the Earth ("FOE"), by its representative, Robert Anthony, submitted a response which, contrary to the Board's clear intent, requested an extension

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Memorandum and Order Regarding Establishment of Hearing Schedule and Granting AWPP Motion to Compel Discovery" (September 13, 1983) (slip op. at 2).

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of time to pursue discovery and postponement of the evidentiary hearing until some unspecified time next year.^{2/}

This request by FOE, in the context of its overall responses to discovery and participation in the case, plainly indicates that it has failed to meet its obligations as an intervenor in preparing for the upcoming hearing. Indeed, FOE's admitted unpreparedness amounts to a statement of default on its two contentions.^{3/} Recognizing that the issues of scheduling and related matters will be discussed at the prehearing conference commencing on October 17, 1983, Applicant wishes to advise the Board and parties as far in advance as possible that, in its view, the failure by FOE to provide adequate discovery responses and its expressed inability to be ready for the evidentiary hearing warrant dismissal of its contentions or such other sanctions as the Board may deem appropriate.

^{2/} R.L. Anthony and Friends of the Earth Response to the Board Order of September 13, 1983 and Petition for Extension [sic] of Time and Scheduling of Evidentiary Hearing After January 1, 1984 (September 27, 1983). In its "Memorandum and Order Regarding Hearing Schedules Proposed by Parties" (October 4, 1983) (slip op. at 2), the Board stated that FOE's request for a postponement would probably be denied, given the insubstantial reasons advanced in support of its request. The instant answer and motion by Applicant sets forth its formal opposition to FOE's motion and states further grounds for affirmative relief.

^{3/} FOE's two contentions, V-3a and V-3b, were admitted by the Board in Limerick, supra, "Order (Concerning Proposed FOE Contentions on Hazards From Industrial Activities)" (November 22, 1982).

Argument

FOE's responses to Applicant's requests for discovery indicate a woeful state of unpreparedness on FOE's part. Applicant served its discovery requests on June 3, 1983,^{4/} to which FOE responded on June 20, 1983.^{5/} In answer to specific interrogatories attempting to pin down FOE's position, FOE simply stated that "[w]e intend to present expert witnesses," that the "gathering of documents is in progress," that its "answers are and will be based on all the published or unpublished material that is available," and that its "research is still in progress," and the like.^{6/}

Making every attempt to be reasonable,^{7/} Applicant wrote FOE on July 18, 1983, requesting the names of

^{4/} Applicant's First Set of Interrogatories and Request for Production of Documents to Friends of the Earth (June 3, 1983).

^{5/} FOE and R.L. Anthony's Answer to Applicant's First Set of Interrogatories (June 20, 1983).

^{6/} Id. at 1. In fact, in response to a particular interrogatory asking FOE to identify NRC regulations or other regulatory requirements which FOE asserts are applicable to Limerick in the context of its contentions, FOE stated: "We do not think that it is the function of a citizen intervenor to site [sic] all the regulations and design criteria." Id. at 2.

^{7/} The Board has required that the parties attempt to resolve discovery problems with each other prior to seeking relief from the Board. It was Applicant's understanding that the Board did not wish to become involved with discovery disputes between parties unless
(Footnote Continued)

witnesses and other information responsive to the interrogatories and document requests as soon as possible, noting that a month had already elapsed. The next communication received by Applicant was a postcard from Mr. Anthony dated July 30, 1983, which contained a cryptic statement that FOE's "research is still in progress." It also purported to identify three "potential experts." As reflected in Applicant's letter to the Licensing Board and parties, dated August 8, 1983, counsel contacted the named individuals and agencies. None of the contacted individuals indicated that he had agreed to testify on behalf of FOE. With regard to the Pennsylvania Public Utilities Commission, counsel was unable to determine the identity of the individual or individuals Mr. Anthony had allegedly contacted.^{8/}

It was Applicant's clear understanding, based upon the exchanges of information with FOE that, as of the close of discovery, FOE had no studies or data which supported its case and, at most, expected to call three witnesses and perhaps a fourth from the Pennsylvania Public Utilities Commission. As of its September 27, 1983 filing, FOE had

(Footnote Continued)

resolution were otherwise impossible. See Limerick, supra, "Memorandum and Order Confirming Schedules Established During Prehearing Conference" (May 16, 1983) (slip op. at 3).

^{8/} The letter from Applicant's counsel also continued to elicit, to no avail, appropriate discovery responses from FOE.

not provided Applicant with any additional studies, nor had it noted it would need additional time for preparation.^{9/}

FOE's recent response to the Licensing Board's Memorandum and Order of September 13, 1983 confirms its total lack of readiness to litigate its contentions. FOE states therein that it "will be required to seek further advice from experts and secure additional witnesses" (Emphasis added).^{10/} Either FOE is being disingenuous with the Board in attempting to convey the impression that it has already obtained advice from experts and secured witnesses, or it has failed to honor its discovery obligations to Applicant in providing the identities of such individuals.

Moreover, FOE states that it "will not be prepared for evidentiary hearings before January 1984" because of the need to establish its case in chief.^{11/} FOE's statement that it "will need more time to work out new wording and

^{9/} FOE alluded to the position expressed in its request for a postponement during conference calls among their discussing the parties' September 30, 1983 report to the Licensing Board.

^{10/} R.L. Anthony and Friends of the Earth Response to the Board Order of Sept. 13, 1983 and Petition for Extention [sic] of Time and Scheduling of Evidentiary Hearing After January 1, 1984 (September 27, 1983). It is also entirely unclear what "evidence" FOE expects to result from the Limerick site visit or limited appearance statements.

^{11/} Id.

specific points" in its contentions^{12/} and its request for leave to amend its contentions until what would be the end of November 1983 are yet further evidence of its total failure to participate in this proceeding in a responsible manner. FOE has had almost an entire year since the admission of its two contentions to prepare its case and pursue informal and formal discovery.

It is quite evident that FOE intends to change its contentions for the purpose of expanding rather than narrowing them. The Board already permitted FOE one opportunity to reformulate its contentions before the Board ruled on them and specified their wording.^{13/} Thus, further amendment is clearly contrary to the Board's Memorandum and Order of September 13, 1983 and would, in any event, violate the Commission's requirements for admitting late contentions.^{14/}

^{12/} Id.

^{13/} Limerick, supra, "Order (Concerning Proposed FOE Contentions on Hazards from Industrial Activities)" (November 22, 1982) (slip op. at 3, 5-7).

^{14/} See generally Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC ____ (June 30, 1983). Aside from this, FOE's desire to pursue "prospects of further avenues" cannot be permitted. The time for discovery on its contentions has long since passed. See Limerick, supra, "Memorandum and Order Confirming Schedules Established During Prehearing Conference" (May 16, 1983) (slip op. at 2).

Given the current state of the record establishing FOE's default on discovery requested by Applicant and its acknowledged unpreparedness to proceed to an evidentiary hearing, FOE has no right to litigate its contentions. FOE's request that the hearing be postponed until next year is particularly egregious in light of the Board's explicit statement in its September 13, 1983 Memorandum and Order directing the parties to confer and propose a schedule for remaining prehearing actions and "the earliest date for commencement of the evidentiary hearing on the four contentions" ^{15/} As the Appeal Board stated in an early case, "the right of participation in an administrative proceeding carries with it the obligation of a party to assist in 'making the system work' and to aid the agency in discharging the statutory obligations with which it is charged."^{16/} FOE has not met this obligation.

With specific regard to discovery, the Appeal Board explained in Susquehanna that discovery is necessary "to help litigants learn the nature of an adversary's case in

^{15/} Limerick, supra, "Memorandum and Order Regarding Establishment of Hearing Schedule and Granting AWPP Motion to Compel Discovery" (September 13, 1983) (slip op. at 1). Moreover, the Board stated its belief "that it should be reasonable for the hearing schedule to permit hearings to be held on at least some of the issues in November or December 1983." Id. at 3.

^{16/} Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332 (1973).

advance of trial," i.e., "to eliminate, insofar as possible, the element of surprise in modern litigation" and "to shorten the actual trial, with its attendant expense and inconvenience for all concerned, while increasing the parties' ability to develop a complete record for decisional purposes."^{17/} In utilizing discovery for the purpose of learning the bases of an intervenor's contentions, an applicant may "solicit positive solutions from the litigant for deficiencies alleged to exist."^{18/}

In the Byron proceeding, the Appeal Board summarized an intervenor's important discovery obligations as follows:

Not only does the failure to fulfill discovery obligations unnecessarily delay a proceeding, it is also manifestly unfair to the other parties. We reiterate the pointed comment of the Licensing Board in Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977) (previously quoted with approval in Susquehanna, 12 NRC at 338):

The Applicants in particular carry an unrelieved burden of

^{17/} Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321-22 (1980). See also Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978) (discovery enables parties to ascertain facts in complex litigation, refine issues, and prepare adequately for an expeditious hearing).

^{18/} Union Electric Company (Callaway Plant, Unit 1), Docket No. STN 50-483 OL, "Memorandum and Order (Applicant's Motion to Compel)" (December 9, 1982) (slip op. at 3). As noted in note 6, supra, Applicant's efforts to obtain this basic information were met with apparent indignation by FOE.

proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record [footnote omitted].

The [intervenor's] failure to comply with the Board's discovery order in this case effectively stalled the proceeding in its tracks. The [intervenor] proffered an extraordinarily large number of contentions, skeletal in outline, and refused to divulge any information whatsoever about any of the 114 contentions admitted by the Board. A board cannot move a proceeding forward, and a party cannot prepare its case, in the face of that kind of obstructionism. The [intervenor's] obligation to answer [applicant's] interrogatories was an important one; a deliberate failure to meet it is worthy of serious sanction.^{19/}

In Applicant's view, these sound principles dictate that, in the context of FOE's total default on its discovery obligations and its obligation to prepare its case in the more than reasonable time granted by this Board, Contentions V-3a and V-3b be dismissed.^{20/} No doubt, the Board could

^{19/} Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417 (1982).

^{20/} See generally Statement of Policy on Conduct of
(Footnote Continued)

formulate milder sanctions, such as permitting FOE's contentions to go to a hearing but precluding FOE from offering direct testimony. As the Board held in Three Mile Island, however, such an approach would serve no useful purpose where the intervenor is totally unprepared to support its contention and the parties and the Board are therefore totally in the dark themselves. The Board stated:

The other alternative we considered was to deny the motion and to allow ECNP's contentions to go to hearing despite the default. The question of due process aside, we could see no value in this approach. As we noted above (at 898, supra) we would not know how to force licensee to defend itself against ECNP's allegations if licensee is not informed concerning their specifics. If licensee were to prepare its direct testimony and other evidence to meet ECNP's unclarified charges, it would have to postulate the grounds for them. It would be naive to expect licensee to postulate the particulars of ECNP's contentions, then present a losing case against them. We do not believe that the evidentiary record would be enhanced by a show of the licensee defending against strawman contentions cast into litigable form by licensee itself.^{21/}

(Footnote Continued)

Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). See also Susquehanna, supra, ALAB-613, 12 NRC at 322, 339; Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-17, 11 NRC 893, 903-04 (1980); Northern States Power Company (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1302 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); Public Service Electric and Gas Company (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702, 705-06 (1975).

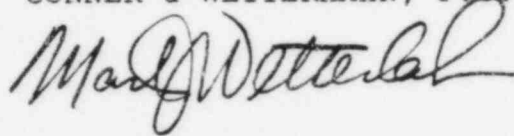
^{21/} Three Mile Island, supra, LBP-80-17, 11 NRC at 904.

Conclusion

For the reasons discussed above, FOE's contentions V-3a and V-3b should be dismissed. Alternatively, FOE should be barred from offering any direct evidence at the hearing on its contentions.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in dark ink, appearing to read "Mark J. Wetterhahn", written in a cursive style.

Troy B. Conner, Jr.
Mark J. Wetterhahn
Robert M. Rader

Counsel for the Applicant

October 6, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

APPLICANT'S ANSWER TO MOTIONS TO
REWORD CONTENTIONS I-62 AND V-4

By a pleading served on September 28, 1983, intervenor Marvin I. Lewis moved the Atomic Safety and Licensing Board ("Licensing Board") to accept a proposed rewording of Contention I-62.^{1/} On September 26, 1983, intervenor Air & Water Pollution Patrol ("AWPP") submitted its "Motion to Reword Contention V-4. Applicant opposes both such motions.

The Licensing Board's September 13, 1983 Memorandum and Order requires, inter alia, that each intervenor shall state whether its contention "should be reworded to more specifically focus on what is still in contention."^{2/} Neither of the intervenors has more specifically focused the contentions. While some wording in each has been changed,

^{1/} Motion to Reword Contention I-62 in Response to the Board's Memorandum and Order of September 13, 1983.

^{2/} Memorandum and Order Regarding Establishment of Hearing Schedule and Granting AWPP Motion to Compel Discovery (September 13, 1983) (slip op. at 3).

neither contention has been narrowed in the sense that issues for litigation have been eliminated or reduced.

The Licensing Board itself restated Contention V-4.^{3/} As so specified, the contention deals with aircraft flying into the Limerick cooling tower plumes. AWPP would change this to aircraft "flying into the airspace that may be affected by emissions from the Limerick cooling towers." No definition of such airspace is given nor is any justification presented for this change which could broaden the issues.

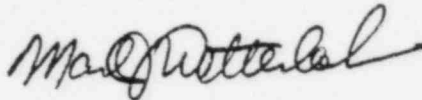
Mr. Lewis states that his proposed charge is the result of "material disclosed during discovery," but does not specify what material or how such material requires the proposed changes. As restated, the contention makes unsupported statements regarding the manner of Staff review of pressurized thermal shock in boiling water reactors.

^{3/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1514-15 (1982).

The two motions do not fulfill the Board's requirement that intervenor's more specifically focus their contentions are otherwise unsupported, and should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in dark ink, appearing to read "Mark J. Wetterhahn", written in a cursive style.

Mark J. Wetterhahn
Counsel for Philadelphia
Electric Company

October 6, 1983

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October 6, 1983

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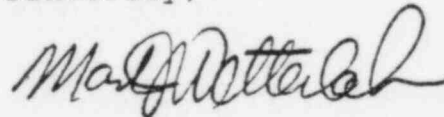
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

In the Matter of
Philadelphia Electric Company
(Limerick Generating Station, Units 1 and 2)
Docket Nos. 50-352 and 50-353

Dear Sir:

Enclosed is the original of the "Affidavit of Vincent S. Boyer, Senior Vice President, Nuclear Power, Philadelphia Electric Company Regarding Contention V-4" to replace the facsimile that was sent to you on October 5, 1983.

Sincerely,



Mark J. Wetterhahn
Counsel for Philadelphia
Electric Company

MJW:sdd
Enclosure
cc: Service List

8310110284 831006
PDR ADOCK 05000352
G PDR

BEFORE THE
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

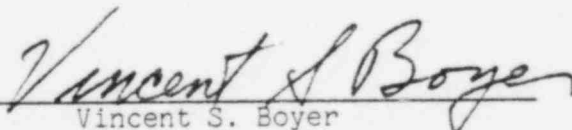
In the Matter of)	
)	
Philadelphia Electric Company)	Docket Nos. 50-352
)	50-353
(Limerick Generating Station,)	
Units 1 and 2))	

AFFIDAVIT OF VINCENT S. BOYER, SENIOR VICE
PRESIDENT, NUCLEAR POWER, PHILADELPHIA
ELECTRIC COMPANY REGARDING CONTENTION V-4

Vincent S. Boyer, being duly sworn according to the law, deposes
and says:

1. My name is Vincent S. Boyer. I am Senior Vice President,
Nuclear Power, Philadelphia Electric Company.
2. Section 3.4.3 of the Environmental Report-Operating License
Stage ("EROL") for the Limerick Generating Station was prepared under my
direction and supervision. This section discusses the cross-flow natural
draft evaporative cooling towers for the Limerick facility and their opera-
tion.
3. The statements therein are true and correct to the best
of my knowledge, information and belief.

Sworn to and subscribed before me
this 5th day of OCT... 1983


Vincent S. Boyer


Notary Public

PATRICIA D. SCHOLL
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires February 10, 1986