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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 MOTION TO DISMISS PARTICULAR ONSITE EMERGENCY PLANNING CONTENTIONS FOR WHICH DISCOVERY HAS NOT BEEN PROVIDED OR NO LITIGABLE BASIS HAS BEEN SHOWN

Preliminary Statement

In an Order dated March 15, 1984, the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") stated that it had reviewed the apparent positions of the parties gleaned from discovery exchanges and expressed its belief "that many of the remaining disputes appear susceptible to settlement in whole or in part, provided the parties make a determined effort now both to fully discuss the issues and to make reasonable but earnest attempts to accommodate each other's interests to avoid unnecessary litigation."[1/]

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Order Directing Parties to Hold Settlement Conferences for Onsite Emergency Planning Contentions" March 15, 1984 (slip op. at 1).

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Applicant wholeheartedly agrees with the Board's conclusions and endorses this approach. Indeed, Applicant had previously expressed to LEA's counsel its willingness to meet informally to explain any possible misunderstanding regarding the provisions of the Limerick Emergency Plan and implementing procedures and thus avoid unnecessary litigation. Accordingly, arrangements have been made for such a meeting, as directed by the Board, to be held in Philadelphia on March 24, 1984.[2/]

While Applicant shares the Board's belief that many of the contentions may be resolved by negotiations, it must assume that it will be required to provide direct testimony or to move to strike contentions based upon the answers to interrogatories on each of the remaining contentions.

There are a number of contentions for which no litigable issue exists, as demonstrated by LEA's default in failing to answer interrogatories addressed to particular contentions. Further, particular answers clearly demonstrate the lack of any legal or factual basis for dispute.

2/ In addition to Applicant's counsel, its Director of Emergency Preparedness and possibly other representatives will attend the meeting. Applicant expressed its willingness to hold the meeting sooner, but an earlier date was unavailable due to scheduling conflicts on the part of LEA and the NRC Staff. In particular, Mr. Sears, the Staff's emergency planning witness, will be testifying in the Shoreham proceeding on March 21-23, 1984, and would therefore be unable to attend.

Of course, Applicant could simply prepare testimony as to each of the contentions and simply object to improper cross-examination at the time of the hearing if LEA pursues a legally erroneous position.[3/] This approach, however, would unnecessarily waste hearing time in requiring the Board to hear argument and to make rulings of law which it could make more suitably before the hearing.

Accordingly, as a protective measure in the event that Applicant is unable to persuade LEA that the concerns expressed in its answers to interrogatories on onsite emergency planning contentions lack legal basis, particularly where LEA has altogether failed to answer the interrogatory,[4/] Applicant moves that the contentions discussed below, in whole or in part, be dismissed.

Argument

The significance of prehearing discovery in defining and limiting issues for litigation has been explained by numerous boards, most notably, the Appeal Board in the Susquehanna proceeding, where it stated:

3/ LEA has indicated previously that it will not present any direct testimony. Accordingly, its case will consist only of cross-examination of witnesses provided by the Applicant, the Staff and possibly the Commonwealth.

4/ In a telephone conversation on March 14, 1984, counsel for Applicant informed counsel for LEA that the failure to provide such answers might require a motion to dismiss. Counsel for LEA responded that he would make

(Footnote Continued)

> Discovery is the descriptive term for procedures available to help litigants learn the nature of an adversary's case in advance of trial. Without recounting the development of the process chapter and verse, it is sufficient for this case to note that an important reason for allowing discovery is to eliminate, insofar as possible, the element of surprise in modern litigation. The underlying concept is 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.5/

Each of these salutory reasons for discovery -- limiting issues and providing parties with an opportunity to be forwarned of its opponent's factual contentions -- has to some degree been negated because LEA has not promptly provided discovery as agreed in advance of the submission of Applicant's written testimony on April 3, 1984.6/ Thus, LEA

(Footnote Continued)
every effort to provide the missing answers promptly, but did not make any specific commitment.

5/ Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321-22 (1980).

6/ As background, it is noted that Applicant's interrogatories were served on LEA on February 5, 1984. It was only due to the Staff's incorrect transcription of the Board's rulings during a conference call on scheduling and the subsequent inadvertent adoption of the error by the Board that LEA was granted until March 9, 1984 to respond to the interrogatories. Even so, no interrogatory answers were filed on that date. At a sidebar conference among counsel and the Chairman on March 7, 1984, the Chairman accepted the agreement between Applicant and LEA that LEA would answer as many interrogatories as possible by March 9 with the balance
(Footnote Continued)

has failed to provide answers to certain interrogatories following the deadline accepted by the Board for doing so upon Applicant's oral application for relief at the prehearing conference.

Particularly in view of the serious time constraints in preparing adequate testimony created by LEA's untimely discovery responses, the contentions related to unanswered interrogatories should be dismissed even if LEA subsequently provides answers to those interrogatories.7/ Specifically, the Board should dismiss the following onsite emergency planning contentions for failure to provide discovery: Contentions VIII-2 (Interrogatories 4-18), VIII-3 (Interrogatories 19 and 20), VIII-14(c) (Interrogatory 44), VIII-14(h) (Interrogatory 50), and VIII-17(c) (relating to Interrogatory 69).

Moreover, LEA has furnished what has been characterized in earlier cases as "toss-the-ball-back" answers to other

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(Footnote Continued)
to be answered no later than March 12, 1984. This agreement is reflected in LEA's transmittal letter of March 9, 1984. On March 9 and 12, 1984, LEA served answers to some, but not all, interrogatories. On March 14, 1984, counsel for Applicant spoke with counsel for LEA by telephone, advising that Applicant might seek dismissal of contentions for which interrogatories had not been answered. As noted, LEA's counsel indicated that he would attempt to provide answers, but gave no firm commitment.

7/ See generally Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416-17 (1982).

interrogatories. Licensing boards have uniformly found such answers to be unacceptable. The contentions to which those answers relate should also be dismissed. Thus, Applicant asked in Interrogatory 3 that LEA specify each postulated accident in the Limerick FSAR which LEA contends should not have been omitted from the Emergency Plan. LEA answered by simply restating the question, i.e., the plan should contain all accidents postulated in the FSAR. The Board in the Three Mile Island proceeding stated that such an answer to practically the identical interrogatory was "unacceptable."[8/] Thus, Contention VIII-2 should be dismissed for this and the other reasons discussed above.

In Interrogatory 23, Applicant asked LEA to specify procedures for notifying response organizations which LEA contends to be inconsistent. LEA's response that it does not understand the assertion of "inconsistency" is wholly unresponsive. Contention VIII-6(a) clearly asserts that Applicant has not demonstrated that the bases established for its notification of response organizations "are mutually agreeable." Yet, LEA has not explained any alleged inconsistency. This contention should also be dismissed. In Interrogatory 32, Applicant asked LEA to identify all

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8/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289, "Memorandum and Order on Licensee's Motion to Compel Discovery of CEA" (April 16, 1980) (slip op. at 3).

emergency equipment, supplies and facilities which it contends to be missing from the Emergency Plan. LEA answered by simply citing three generally applicable NUREG documents. Such an unenlightening response does not tell the Applicant how LEA believes the plan fails to meet the regulatory requirements it had cited. Contention 8(b) should therefore be dismissed.

Similarly, Interrogatory 36 asked for LEA's definition of "the entire range of fires which may occur at the Limerick facility" as used in the contention. LEA simplistically answered that the phrase meant those which may require the assistance and response of one or more offsite fire companies. In other words, LEA is asserting that more fire companies must be enlisted in the emergency plan because fires might occur which would require more fire companies. Such meaningless tautologies provide no basis for litigation. Contention VIII-11 should therefore be dismissed.

Interrogatory 46 sought an explanation as to why the Emergency Plan fails to provide adequate onsite capability and resources to provide initial values and continuing assessment of radioactive releases. In response, LEA answered in part that certain data and monitoring systems are not described in sufficient detail. No explanation, however, is given as to what detail is missing which would establish their adequacy. Thus, Contention VIII-14(e) should be dismissed. Likewise, the answer to Interrogatory

49, relating to capacity to acquire and evaluate meteorological information, merely restates the question with a general reference to Regulatory Guide 1.23. Contention VIII-14(g) should also be dismissed.

Finally, Interrogatory 52 sought an explanation as to why LEA contends that the plan is inadequate for (1) relating various measured parameters to dose rates for key isotopes and gross radioactivity measurements; (2) estimating integrated dose from projected and actual dose rates; and (3) comparing those estimates with protective action guides. LEA's answer provided only a shotgun reference to previous answers, none of which is at all responsive to this particularized question. Accordingly, Contention 14(k) should be dismissed.

Another category relates to those contentions for which LEA's answers to interrogatories indicate that the only basis for the contention is without legal foundation. It is emphasized that Applicant is <u>not</u> attempting to relitigate the admissibility of any particular contention. On the other hand, there is no useful purpose in pursuing a contention at a hearing if the only matter LEA intends to litigate, as indicated by its discovery responses, is entirely lacking in legal foundation. Three such contentions discussed below should be dismissed.

In Interrogatory 38, Applicant asked LEA to specify medical services and facilities not described in the Limerick Emergency Plan which would be necessary for "the

potential number of persons contaminated by the spectrum of credible accident scenarios" cited by LEA in its contention. In its answer, LEA states its reliance upon WASH-1400 and the severe accident analysis contained in the Limerick Draft Environmental Statement, Supplement No. 1 (December 1983) ("DES"). As LEA acknowledges, each of these documents relates to offsite radiological consequences. Neither is relevant to the Applicant's responsibility under the Commission's decision in San Onofre to provide prompt medical treatment and facilities for contaminated, injured onsite personnel in the event of a radiological emergency at Limerick.[9/]

Moreover, the answer to the interrogatory reflects LEA's erroneous belief that advanced planning must be made for a large number of potential victims of radiological contamination, not otherwise "injured," whereas the Commission has expressly stated that "any treatment required [solely for radiation exposure] could be arranged for on an ad hoc basis."[10/] Thus, there exists no legal basis for litigating medical treatment for onsite personnel who are radiologically contaminated, but not otherwise injured. There is also no basis for litigating the medical care

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9/ See generally Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528 (1983).

10/ Id. at 536.

necessary for contaminated, injured individuals onsite in the range of population discussed in WASH-1400 or the Limerick DES Supplement.

In response to Interrogatory 61, asking whether LEA contends that any regulation prohibits an onsite emergency worker from receiving more than a given maximum dose, LEA stated that the occupational exposure limits in 10 C.F.R. Part 20 provide no exception for emergency conditions. This answer demonstrates that Contentions VIII-16(b) and (c) are premised upon an erroneous legal assumption. As stated in 10 C.F.R. §50.47(b)(11), radiological exposures for emergency workers are governed by the EPA emergency worker and lifesaving activity protective action guides in EPA-520/1-75/001, which are expressly incorporated in Table 6-1 of the Limerick Emergency Plan. Accordingly, Contention VIII-16(b) and (c) should be dismissed.

In Contention 20(b), LEA contends that the plan fails to provide for quarterly testing of communications with States within the ingestion pathway EPZ. In Interrogatory 72, Applicant asked why the assumption of this function by PEMA[11/] was inadequate. LEA answered that NUREG-0654, Criterion N.2(a) makes this a licensee obligation also. No legal basis exists for LEA's position that Applicant must

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11/ See Emergency Plan §8.1.2.5.f. See also Pennsylvania Disaster Operations Plan, Annex E, Appendix 20, Section III.A.1.b.

needlessly duplicate this function. Thus, Contention 20(b) should be dismissed.

As a final category, a number of interrogatory answers indicate that certain contentions have been withdrawn by LEA. Presumably, LEA will provide the Board with a complete listing of withdrawn contentions as a result of the March 24, 1984 meeting with Applicant and the Staff. Nonetheless, to protect the record, Applicant notes that the following contentions have been withdrawn and should be dismissed: VIII-7(a) and (e), VIII-9, and VIII-16(f) (as regards area access control).

Applicant also requests a ruling in limine to bar LEA's cross-examination of the witnesses[12/] as to the matters reasonably encompassed by the interrogatories and which were not included in the responses. For the reasons discussed at the outset, this is necessary in order for Applicant to make an orderly presentation in its written testimony and to prepare adequately for the hearing. If LEA is not so limited, it would be otherwise free to examine as to matters for which it has not given Applicant fair notice. In particular, there are several instances in which LEA's answers to interrogatories state that items are discussed "[b]y way of example of only" (e.g., answer to Interrogatory

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12/ As noted, LEA has stated that it will not present any direct evidence.

31). It is also unclear why LEA believes that the request for "all knowledge and information in intervenor's possession" exceeds the scope of permissible discovery under 10 C.F.R. §2.740,[13/] or how Applicant's requested supplementation of responses exceeds the requirements of 10 C.F.R. §2.740(e).[14/] Applicant believes that a ruling in limine would eliminate a needless waste of time at the hearing in objections and rulings based upon a failure to provide adequate discovery responses.

Conclusion

Applicant shares the Board's belief that many of the contentions discussed herein as well as the other remaining contentions can be eliminated by earnest negotiations, which Applicant will diligently pursue in good faith. Nonetheless, LEA's failure to provide prompt and full discovery and, in some cases, its evident misinterpretation of legal requirements, necessitates this request for relief. Accordingly, the Board should dismiss the contentions or portions thereof discussed above and, as to the remaining contentions, should rule that LEA's cross-examination of witnesses at the hearing will be limited to the specific

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13/ Answers and Objections of LEA to Applicant's First Set of Interrogatories at 1 (March 12, 1984).

14/ Id. at 2.

allegations for which LEA has afforded Applicant and the Staff fair notice in its answers to interrogatories.

Respectfully submitted,

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March 23, 1984

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Motion to Dismiss Particular Onsite Emergency Planning Contentions for Which Discovery has not Been Provided or no Litigable Basis has been Shown," dated March 23, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 23rd day of March, 1984:

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