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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 OL
) 50-353 OL
(Limerick Generating Station,)
Units 1 and 2))

APPLICANT'S ANSWER TO PETITION BY CITIZEN
ACTION IN THE NORTHEAST FOR LATE INTERVENTION
AND ADMISSION OF ITS FINANCIAL
QUALIFICATIONS CONTENTION

Preliminary Statement

In a pleading served and discussed before the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") on March 5, 1984, petitioner Citizen Action in the Northeast ("CANE") sought admission as an intervenor to this proceeding. CANE proposed a contention that Applicant has not demonstrated that it is financially qualified to operate and decommission the Limerick Generating Station ("Limerick") in compliance with the Commission's regulations. It sought to be represented by Marvin I. Lewis, an admitted intervenor in the proceeding until dismissed by order of the Board dated April 20, 1984.

At that time and in a subsequent confirmatory Order dated March 15, 1984, the Board ruled that CANE's contention must be denied on the basis of the Commission's Statement of Policy, issued February 27, 1984, which instructs licensing

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board's to continue to treat the present rule excluding financial qualifications contentions as valid. The Board noted the Commission's intent to conduct expedited rulemaking to respond to the decision in New England Coalition on Nuclear Pollution v. NRC, No. 82-1581 (D.C. Cir. February 7, 1984), invalidating the prior rule under 10 C.F.R. §50.33(f) which had eliminated financial qualifications review. The Board directed the NRC Staff to keep Mr. Lewis informed of further significant developments, and stated that CANE would be permitted to pursue such a contention only "[i]f in the future the Commission were to permit this Board to consider the issue of financial qualification."^{1/}

Without awaiting the issuance of the express authorization by the Commission as a prerequisite for resubmitting its contention, CANE served a renewed request on May 14, 1984. The only stated basis for the resubmission was an Order dated April 13, 1984 by the Court of Appeals in the New England Coalition on Nuclear Pollution case, denying a stay of the issuance of mandate. Whatever the effect of that order in the court proceedings, it does not authorize this Licensing Board to accept financial qualifications contentions in contravention of the stated policy of the

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Order Confirming Miscellaneous Oral Record Rulings" (March 15, 1984) (slip op. at 3).

Commission against considering them. Moreover, CANE has failed to justify its filing of a late contention and has failed to meet the Commission's requirements for pleading contentions with specificity and bases. Therefore, its proposed late contention on financial qualifications should be denied.

Argument

I. The Commission has not Authorized
Licensing Boards to Accept Contentions
on Financial Qualifications.

In its confirmatory written order of March 15, 1984, this Board correctly observed that the Commission's Statement of Policy dated February 27, 1984 directed its adjudicatory boards "to continue to treat the [financial qualifications] rule as valid."^{2/} As the Board is aware, the Commission met in public session on April 27, 1984 to consider interim Commission guidance to adjudicatory boards on proposed contentions regarding the financial qualifications pending the completion of rulemaking. As of this

^{2/} Limerick, supra, "Order Confirming Miscellaneous Oral Record Rulings" (March 15, 1984) (slip op. at 2). See 49 Fed. Reg. 7981 (March 5, 1984). The Commission's expectation that its rulemaking would be completed prior to the issuance of mandate by the Court of Appeals does not affect the obligation of adjudicatory boards to give full force and effect to the Commission's instructions. The unanticipated lapse would certainly not be a proper basis for any Board to determine unilaterally what the Commission policy ought to be regarding the admission of contentions on financial qualifications.

date, the Secretary of the Commission advises that the interim guidance has not yet been provided. Until such time as the Commission expressly authorizes its Boards to admit such contentions, therefore, its previous Statement of Policy remains in effect. As the Appeal Board in Grand Gulf succinctly stated in denying a contention because Commission guidance barred its admission: "A Commission policy statement is, of course, binding on its adjudicatory boards."^{3/} Accordingly, this Licensing Board lacks authority to admit the proposed contention until the Commission formally changes its previously stated policy and authorizes the Board to do so.

II. CANE has Failed to Meet the Requirements for Late Intervention.

In order for a licensing board to admit a late petitioner and accept a proposed late contention, it must find that, on balance, the five factors enumerated in 10 C.F.R. §2.714(a)(1)(i)-(v) weigh in the petitioner's favor.^{4/} Even assuming that the Licensing Board may consider the proposed

^{3/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982). See also Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445 and 50-446, "Rulings on Objections to Board's Order of June 16, 1980 and on Miscellaneous Motions" (October 31, 1980) (slip op. at 5).

^{4/} Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

contention, CANE has failed to meet the Commission's requirements for late intervention, especially at this very advanced stage of the proceeding. Foremost, CANE has failed to show "good cause" for waiting until now to file its proposed contention, almost three years after notice of the proceeding was given in the Federal Register on August 21, 1981.^{5/}

The only attempted justification by CANE for filing so late is that its representative, an admitted intervenor in the proceeding, assumed that the NRC would adopt a new rule eliminating financial qualifications review, which would result in the denial of the contention. CANE's correct prediction of the outcome of the previous rulemaking is, however, no excuse for failing to submit its proposed contention on a timely basis. Since the new rule was not published and effective until March 31, 1982,^{6/} CANE could and should have pursued its contention in the joint submission filed by the intervenors on November 24, 1981.^{7/}

^{5/} 46 Fed. Reg. 42557 (August 21, 1981). The Licensing Board required contentions to be filed by coordinating petitioners on November 24, 1981. See Limerick, supra, LBP-82-43A, 15 NRC 1423, 1431 (1982).

^{6/} See 47 Fed. Reg. 13750 (March 31, 1982).

^{7/} Indeed, a financial qualifications contention was filed by two intervenors. See Limerick, supra, LBP-82-43A, 15 NRC at 1510.

The Commission's rules do not permit late intervention simply because a petitioner assumes that its contention will be denied. To the contrary, intervenors are obliged to raise matters as promptly as possible so that the Commission can serve the "substantial public interest in efficient and expeditious administrative proceeding^{8/}." CANE's subjective reasoning does not even approximate "good cause" for almost three years delay in filing its proposed contention.^{9/}

Nor has CANE met the other requirements for late intervention. As regards the second factor, the Licensing Board has previously been advised by Applicant of the proceedings before the Pennsylvania Public Utility Commission regarding financing for the Limerick reactors. CANE acknowledges that it has participated in those proceedings. As regards the third factor, CANE has not complied with the requirement of Grand Gulf that "[w]hen a petition addresses this criterion it should set out with as much particularity

8/ Catawba, supra, CLI-83-19, 17 NRC 1041, 1048 (1983).

9/ In the WPPSS case, the Appeal Board emphasized that "the true importance of the tardiness will generally hinge upon the posture of the proceeding at the time the petition surfaces." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). The Appeal Board stated that, in the less critical situation where the proceeding had just commenced, "even a four-month unjustified delay in seeking intervention is not to be ignored." Id. (emphasis in original).

as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."^{10/} On the fourth factor, it is irrelevant whether an existing party will protect CANE's particular interest in financial qualifications since the Commission has expressly stated that such interest has no bearing on nuclear reactor licensing.

Most significantly, it is incontestable that admission of CANE to the proceeding as a new intervenor and acceptance of its proposed late contention will greatly broaden the issues and delay the outcome of the proceeding. The situation here is indistinguishable from the Fermi proceeding, where the Appeal Board agreed with the Licensing Board's conclusion that acceptance of the late contentions would be tantamount to a new case, involving more discovery, an additional prehearing conference, and another evidentiary hearing, and a new set of proposed findings.^{11/} Thus, none of the five factors weighs in favor of CANE's new petition and the particularly weak showing on the first, third and

^{10/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also WPPSS, supra, ALAB-747, 18 NRC at 1177; Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399-400 (1983).

^{11/} Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765-66 (1982).

fifth factors virtually requires that the petition be denied.^{12/}

III. The Proposed Contention Lacks Specificity and Basis.

In addition to the infirmities discussed above, CANE's proposed late contention should be denied for lacking the requisite specificity and bases as required under 10 C.F.R. §2.714(b). Shorn of its rhetoric, the only bases suggested by CANE for its contention are that construction costs for Limerick have increased and that Applicant has sought a loan to finance Unit 2. Neither of these matters is relevant or provides any basis for litigating the Applicant's financial qualifications.

As the Board is well aware, upwardly increasing estimates of completion are quite common among utilities which have recently placed nuclear units on line or are about to do so in the near future. Nothing unusual has been shown about Limerick. Moreover, although Applicant strongly disagrees with CANE's position as to funding for construction of the Limerick units, nothing in the contention asserts with specificity any basis for contending that Applicant lacks "reasonable assurance of obtaining the

^{12/} The Appeal Board held in Summer that the second and fourth criteria are entitled to less weight than the others. South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

necessary funds" to cover estimated operating costs, including decommissioning, for Limerick.^{13/} Put differently, the Commission never required, even when it reviewed financial qualifications, "a demonstration of near certainty that an Applicant will never be pressed for funds," but simply a showing that the Applicant has "a reasonable financing plan in light of relevant circumstances."^{14/} At this particularly late stage of the proceeding, it is incumbent upon CANE to give very specific reasons why it believes that Applicant will lack sufficient funds to operate and decommission Limerick safely. Its inaccurate and unsupported characterizations of Applicant's financial condition wholly fail to do so.

Conclusion

For the reasons discussed more fully above, the Board has not yet been authorized to accept CANE's proposed contention. In any event, the proposed intervention and

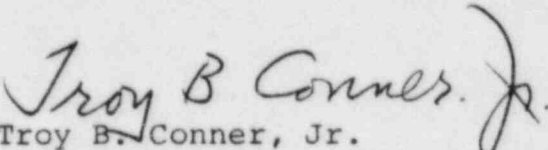
^{13/} See 10 C.F.R. §50.33(f). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 17 (1978).

^{14/} Id. at 18. For example, the Commission rejected as speculative petitioner's allegations that the Applicant's bond rating might be reduced or devalued. Id. at 20. See also Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 333-34 (1978).

contention should be rejected as inexcusably late and lacking in the requisite specificity and bases.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.


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Counsel for the Applicant

May 29, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Petition by Citizen Action in the Northeast for Late Intervention and Admission of its Financial Qualifications Contention," in the captioned matter have been served upon the following by deposit in the United States mail this 29th day of May, 1984:

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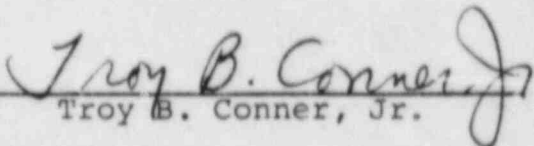
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