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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'85 MAY -8 AIO:46

In the Matter of)
Philadelphia Electric Company)
(Limerick Generating Station,)
Units 1 and 2))

Docket Nos. 50-352
50-353
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

APPLICANT'S ANSWER TO PETITION BY ANTHONY/FRIENDS
OF THE EARTH TO REOPEN THE RECORD BASED ON
INFORMATION RELATING TO OFFSITE EFFLUENT RELEASES

Preliminary Statement

On April 30, 1985, petitioner Friends of the Earth ("FOE"), for the first time, sought to raise the issue of Applicant's calculation of offsite effluent releases.^{1/} The petition is wholly deficient because it fails to satisfy the Commission's requirements for reopening the record and admitting late contentions. Moreover, petitioner's allegations are practically undecipherable and certainly lacking in the requisite bases and specificity under the regulations.

Although far from clear, it appears that the presiding Atomic Safety and Licensing Board ("Licensing Board" or

^{1/} See Petition by Anthony/FOE to Reopen the Record on the Basis of New Information in Philadelphia Electric Company's Semi-Annual Effluent Release Report, February 1985 (April 30, 1985) ("FOE Petition to Reopen").

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"Board") has jurisdiction to rule upon the petition. As a practical matter, the Appeal Board would not be in any better position. Accordingly, for the reasons discussed more fully below, Applicant opposes the petition and asks that it be denied.

Argument

I. Jurisdiction

In an earlier aspect of this proceeding, the Appeal Board held that the Licensing Board has jurisdiction to decide motions to reopen until jurisdiction over an appealed issue vests with the Appeal Board. Specifically, the Appeal Board held:

We hold that, until exceptions to an initial decision have been filed, jurisdiction to rule on a motion to reopen resides with the licensing board.4/

4/ We agree with the Board that whether those exceptions are to a partial initial decision on some issues, or to an initial decision on all issues, is not an important factor. Thus, as used in our holding and elsewhere in this opinion, "initial decision" encompasses "partial initial decision." We also attach little or no significance to the subject matter raised by such a motion to reopen - i.e., whether it relates to issues already decided by the Board, still pending before it, or not previously raised at all.2/

2/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 (1983).

Arguably, the issue addressed in the petition has sufficient nexus to issues previously decided by the Licensing Board to support a finding of jurisdiction before the Appeal Board. Thus, in its Second Partial Initial Decision, this Board decided contentions relating to the adequacy of Applicant's onsite monitoring systems,^{3/} methods for calculating and monitoring offsite doses^{4/} and methodologies for projecting doses when instrumentation is inoperable.^{5/} Nonetheless, it appears that FOE is attempting to raise issues relating to compliance with 10 C.F.R. Part 20 and Part 50, Appendix I, which relate to effluent releases for normal operating conditions rather than emergency conditions. Further, the practical considerations cited by the Appeal Board strongly suggest that this Board simply decide the matter.^{6/}

II. The Petition Fails to Meet the Commission's
Requirements for Reopening the Record and
Admitting Late Contentions.

The Commission has held that where a party moves to reopen the record on new contentions, it "must satisfy both

^{3/} Limerick, supra, LBP-84-31, 20 NRC 446, 518 (1984).

^{4/} Id. at 540.

^{5/} Id. at 542.

^{6/} The Appeal Board has previously noted the Licensing Board's greater familiarity with the case and the likelihood that the petition would be ruled upon more quickly. Limerick, supra, ALAB-726, 17 NRC 755, 758 n.6.

the standards for admitting late-filed contentions, 10 CFR 2.174(a), and the criteria establish by case law for reopening the record."^{7/} The Appeal Board recently restated the requirements for reopening a record in Waterford as follows:

We explained in ALAB-753 that a successful motion to reopen must be timely and address a significant safety or environmental issue. It must also show that a different result might have been reached had the newly proffered material been considered initially. We stressed as well the need for more than bare allegations, and we observed that a newspaper article alone does not provide a basis for reopening a closed adjudicatory record. . . . The burden of satisfying these requirements is on the proponent of a motion to reopen and it is a "heavy" one.^{8/}

Here, FOE fails to meet any of the three criteria. Its motion is untimely even if the information it asserts as a basis for its motion were first available, at the earliest, on April 2, 1985. In fact, the methodology for calculating offsite effluent releases at the plant boundary are contained in the application for an operating license^{9/} and

^{7/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-82-39, 16 NRC 1712, 1715 (1982), citing Diablo Canyon, supra, CLI-81-5, 13 NRC 361 (1981).

^{8/} Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984) (citations omitted). See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984).

^{9/} See Environmental Report Operating License Stage,
(Footnote Continued)

have therefore been available to FOE for years. Nor has FOE shown any significant safety issue.^{10/} Bare allegations are entirely insufficient.^{11/} In particular, the Commission has

(Footnote Continued)

Sections 5.2 and 6.1.5, and Final Safety Analysis Report, Chapter 11, and Sections 12.2 through 12.4. See also Regulatory Guide 1.109, "Calculation of Annual Doses to Man from Routine Releases of Reactor Effluents for the Purpose of Evaluating Compliance with 10 C.F.R. Part 50, Appendix I," which was last revised in October, 1977, and which forms the basis of the dose calculations contained in the application.

^{10/} FOE's single page pleading is made up of a number of unrelated observations and unsupported conclusions which, whether viewed individually or collectively, do not raise any substantial issue. While FOE argues that "[o]ur health and safety are in danger," no specific violation of the NRC's rules and regulations, the operating license or accompanying technical specifications is asserted. In its pleading, FOE makes the assumption that merely because the distance from the release point to the railroad is less than to the site boundary, the calculated dose would be greater at the closer point than at the site boundary in the critical sector. No basis has been shown for such assertion. Moreover, FOE gives no consideration to the occupancy factor at such locations. The pleading also contains a number of errors of fact. For example, in its assertion regarding fish in the fifth paragraph, FOE confuses an unrelated downstream sampling location with the assumed location of the fish for dose calculational purposes, which is at the plant outfall. The "one-day delay" assumed in this calculation is taken directly from Regulatory Guide 1.109 at Table E-15, entry t_p, 2 & A-3 (page 1.109-69). No basis for disputing this assumption has been given.

^{11/} See Waterford, supra, ALAB-786, 20 NRC 1087, 1090-91. In Waterford, the Appeal Board cited with approval the standard of specificity required for a successful motion to reopen as delineated in the Diablo Canyon proceeding:

At a minimum, therefore, the new material in support of a motion to
(Footnote Continued)

emphasized that late contentions lack specificity for admission where they fail to identify the particular structures, systems or components for which it is claimed the safety function has been compromised.^{12/} Finally, FOE concedes that its allegations, even if accepted as true, would not change the result of the proceeding, but only would result in a different methodology for calculating offsite effluent releases.

Additionally, FOE has failed to address, let alone meet, the separate requirements for admitting a late contention. The requirements under 10 C.F.R. §2.714(a)(1)(i)-(v) are well understood by this Board. As to the first factor, good cause for lateness, FOE has failed

(Footnote Continued)

reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence. And, if such evidence is to affect materially the previous decision (as required by the Commission), it must possess the attributes set forth in 10 C.F.R. 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be "relevant, material, and reliable."

Waterford, supra, ALAB-786, 20 NRC 1087, 1090 n.4, quoting Diablo Canyon, supra, ALAB-775, 19 NRC 1361, 1366-67 (1984) (footnote omitted).

^{12/} Diablo Canyon, supra, CLI-84-14, 20 NRC 285, 286 (1984).

to show any reason for not previously coming forward with the information available in the FSAR and EROL.^{13/} Moreover, even judged by the availability of the proffered information in February 1985, the motion is inexcusably late, particularly given the status of full-power licensing for Limerick.^{14/}

Regarding the second and fourth factors, other means or parties are available to protect intervenor's interests. It is clear that the NRC Staff will adequately protect whatever interest is asserted by FOE, either by way of informal requests or a petition under 10 C.F.R. §2.206.^{15/}

^{13/} In Catawba, the Commission held that "an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in the publicly available documentary material." It added that "[t]aken together, [administrative hearing] principles require intervenors to diligently uncover and apply all publicly available information to the prompt formulation of contentions." Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

^{14/} As in Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-624, 12 NRC 680, 682 (1980), intervenor has "offered no coherent or plausible excuse" for its delay, which at this very advanced stage of the proceeding has special significance. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983).

^{15/} In the North Anna proceeding, the Appeal Board denied reopening for a new contention, noting that the petitioner's request "falls within the staff's baliwick" and can be treated as a request pursuant to 10 C.F.R. §2.206 "subject to full ventilation and the grant of such relief as might be warranted by the disclosures of record." Virginia Electric and Power
(Footnote Continued)

FOE has made no showing whatever on the third factor, that its participation may reasonably be expected to assist in developing a sound record. It has not particularized precise issues, identified prospective witnesses or summarized their proposed testimony or otherwise demonstrated any expertise in this matter.^{16/} On the final factor, delay of the proceeding and broadening the issues, it is indisputable that reopening the proceeding following the disposition by this Board of every other contested issue will result in substantial delay.^{17/}

Conclusion

For the reasons discussed more fully above, FOE has failed to meet either the standards for reopening a closed record or the separate criteria for admitting late

(Footnote Continued)

Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 709 (1979). The same result was reached in Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579 11 NRC 223, 226 (1980).

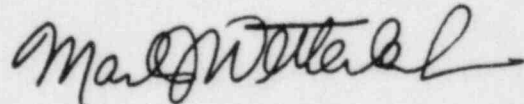
^{16/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983).

^{17/} It is noted that the fifth factor involves delay of the proceeding, not delay of the operation of the facility. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982), citing Fermi, supra, LBP-82-96, 16 NRC 1408, 1434 (1982); Shoreham, supra, LBP-83-30, 17 NRC 1132, 1146 (1983).

contentions. Additionally, its motion is utterly lacking in the requisite specificity and bases, which, at this juncture, must be tantamount to the submission of admissible evidence. The petition should therefore be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in dark ink, appearing to read "Troy B. Conner, Jr.", with a stylized flourish at the end.

Troy B. Conner, Jr.
Robert M. Rader

Counsel for the Applicant

May 7, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Petition by Anthony/Friends of the Earth to Reopen the Record Based on Information Relating to Offsite Effluent Releases" dated May 7, 1985 in the captioned matter have been served upon the following by deposit in the United States mail this 7th day of May, 1985:

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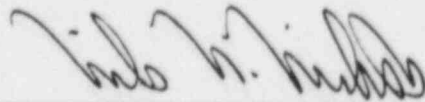
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