

329
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

BEFORE ADMINISTRATIVE JUDGES:

Helen F. Hoyt, Chairperson

Dr. Richard F. Cole

Dr. Jerry Harbour

DOCKETED
USNRC

'85 JUN -5 P12:24

In the Matter of
PHILADELPHIA ELECTRIC COMPANY
(Limerick Generating Station,
Units 1 and 2)

Docket Nos. 50-352-OL
50-353-OL

ASLBP No. 81-465-07 OL

June 4, 19854

SERVED JUN - 5 1985

MEMORANDUM AND ORDER
DENYING PETITION BY ANTHONY/FOE TO REOPEN
THE RECORD ON THE BASIS OF NEW INFORMATION IN
PHILADELPHIA ELECTRIC CO.'S SEMI-ANNUAL
EFFLUENT RELEASE REPORT, FEB. 1985

On May 7, 1985, Philadelphia Electric Company (Applicant) filed Applicant's Answer to Petition by Anthony/Friends of the Earth to Reopen the Record Based on Information Relating to Offsite Effluent Releases. Attached to Applicant's Answer was a single page pleading titled Petition by Anthony/FOE to Reopen the Record on the Basis of New Information in Philadelphia Electric Co.'s Semi-Annual Effluent Release Report, Feb. , 1985.

The Board's research determined that the Anthony/FOE Petition had not been served on the Board, nor was a copy of this Petition on file with the Commission's Secretary in the Docketing Branch. In view of petitioner's service failures, the Board extended to May 22, 1985 time

8506070511 850604
PDR ADOCK 05000352
PDR

DS02

for response¹ for other parties to this proceeding who the Board assumed may not have been served.

On May 17, 1985 the Board received Anthony/FOE Response to the Board's Order of 5/8/85 in Reply to Our Petition of 4/30/85 to Reopen the Record on PECO's No. 1 Effluent Release Report and Response to Applicant's Answer to Our Petition, 5/7/85.² Applicant filed Applicant's Response to Robert L. Anthony/FOE Unauthorized Reply on May 22, 1985 and on May 28, 1985 we received NRC Staff Response to Anthony/FOE Petition to Reopen the Record on the Basis of New Information in Applicant's Semi-Annual Effluent Release Report of February 1985.

The Board has considered all of the pleadings noted above.

If this proceeding were in a different stage of development, the petitioner's procedural failures generated by either an inability or unwillingness to comply with the rules of this Commission would have resulted in a dismissal of the petition. However, in dealing with these matters at a trial level, we take a pragmatic approach, and reach a decision on the merits and in accordance with Commission Rules, regulations and case law. It is the Board's view that this is in the

¹ Board Order, May 8, 1985.

² The time was further extended for responses by Board Order of May 21, 1985 to permit parties to consider this second pleading. The new response date was May 28, 1985.

best interests of all the parties who have made good faith attempts to meet this late challenge of the intervenor/petitioner.

Jurisdiction of the Board

The jurisdiction of the Board to decide a motion to reopen was addressed by Applicant in its Answer of May 7, 1985. Applicant's position is that it is far from clear, but it appears that this Board has jurisdiction to rule on the Anthony/FOE's Petition. Applicant finds Anthony/FOE's Petition is attempting to raise issues relating to compliance with 10 CFR Part 20 and Part 50, Appendix I, which relate to effluent releases for normal operating conditions. In suggesting that the Licensing Board "simply decide the matter" rather than debate whether jurisdiction has passed to the Appeal Board, Applicant has relied on an earlier decision in this proceeding.³

There is some support for the approach that this Board rule on the merits of the motion in ALAB-726 where the Appeal Board noted that "Given the absence of any clear administrative guidance on the matter, common sense and the realities of litigation dictate this result." This Licensing Board has a significant familiarity with the case and is prepared to rule initially since the issues raised by the motion appear to be of a nature that, if accepted, would require this Board to preside over litigation which would determine new matters based on 10 CFR Parts

³ Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983).

20 and 50 dealing with effluent releases for normal operating conditions rather than the releases under emergency conditions which were the subjects of the Board's earlier decision in its Second Partial Initial Decision.⁴

Staff in its response agrees that this Board should assert jurisdiction based on the Licensing Board's inherent right to consider ab initio relief specifically sought of it.⁵

The Petition to Reopen and Commission
Standards for Reopening Record to Admit
Late Filed Contentions

Petitioner apparently seeks to establish that after it was provided with Applicant's Semi-Annual Effluent Release Report in February 1985 Applicant's method for calculating doses at the site boundaries was found not to comply with Commission's regulations. Petitioner asserts that Applicant should have used the nearest approaches to the plant rather than site boundaries for dose calculations. The petitioner's position is that a railroad right-of-way and the Schuylkill River, which traverse the site, are nearer to the plant and should have been used for dose calculations. In addition, petitioner alleges, Applicant should have used a same day ingestion assumption rather than a one-day delay ingestion assumption in making dose calculations regarding the fish

⁴ LBP-84-31, 20 NRC 446 (1984).

⁵ Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

ingestion pathway. Finally, petitioner asserts that changes in the Offsite Dose Calculation Manual - Revision 1 - (ODCM) are "degrading the standards, with substantial increase in radiation risk to the public."

Commission Standards for Reopening a Record

Case law has provided three criteria which must be met by any petitioner seeking to reopen a record. These are: (1) motion must be timely, (2) address a significant safety or environmental issue and (3) demonstrate that a different result might have been reached had the newly proffered material been considered initially. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321 (1983) and ALAB-786, 20 NRC 1087 (1984). The burden of satisfying the requirements for reopening a closed record is on the proponent of the motion and is a heavy one. ALAB-753 and Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320 (1978).

(1) Motion Must Be Timely

Anthony/FOE characterizes the effluent report as new material which was not available to it earlier. Both Applicant and Staff find that petitioner has failed to satisfy this timely requirement because the information concerning the site boundaries and location of the Schuylkill River and the railroad have always been known to the petitioner.

The Board agrees. The fact that the Schuylkill River and the railroad are closer than other portions of the site boundaries has long been known and in no way could be claimed as "new information" first derived from the semi-annual effluent release report. For example, see

NUREG-0974, Draft Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2 (DES) at Table 5.9, page 5-55 (giving boundary distances); Figure 4.3, page 4-11 (Map showing railroad running through the site); Appendix D Table D-2, page D-5 (showing relative dispersion factors and relative deposition values for maximum site boundary and receptor locations near the facility). If petitioner believed that a discrepancy in site boundary distances existed, it could have challenged the conclusion that "there will be no measurable radiological impact on any member of the public from routine operation of the Limerick facility" (DES, page 5-48) when the DES was issued in June 1983.

The methodology used which petitioner now objects to is that used for calculating doses at the site boundary when the application was filed. Section 5.9 and Appendix D of both the DES and the FES (issued April 1984) discuss the matters in considerable detail.

The calculational changes in the Offsite Dose Calculation Manual (ODCM) also relied upon in the Anthony/FOE contention, are unchanged from the original ODCM submitted by the Applicant on September 14, 1984 and approved by the NRC Staff on October 3, 1984. According to the NRC Staff Response (at note 3 page 4), its records indicate that Anthony/FOE received both the Applicant's submittal and the Staff document approving it about seven months prior to the "April 30, 1985" filing of this motion to reopen the record.

Thus, the motion to reopen cannot be considered timely on any count.

(2) Petition Must Raise a Significant Safety Issue

The significant safety issue that a petitioner must specify is wholly missing from the FOE/Anthony petition. We are treated to unrelated observations and unsupported conclusions. There is no specific violation of any NRC rule or regulation, the operating license, or accompanying technical specifications asserted. Petitioner must provide more than "bare allegations or simple submission of new contentions."⁶

In its pleading, petitioner 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, petitioner 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, petitioner confuses an unrelated downstream sampling location with the assumed location of the fish caught for dose calculation 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.

⁶ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

Petitioner has not pointed to any safety regulation that in its opinion the Applicant might have violated in making the calculations complained of and in making the changes documented in the note from G.M. Leitch to R. A. Mulford, dated January 28, 1985 (Attachment D1 to the Semi-Annual Effluent Releases Report), which covers the revised ODCM. Anthony/FOE asserts that the Applicant's statement in Attachment D1 to the Semi-Annual Effluent Release Report that the modification of the containment purge isolation set point basis will "allow LGS flexibility in set point for isolation," "amounts to degrading the standards, with substantial increases in radiation risk to the public." Anthony/FOE states that "[it] petition[s] against this degrading, and also against the modifications of release point weighting factor, and the averaging of emissions from north and south stacks." In an Affidavit attached to NRC Staff Response, Marie T. Miller, Radiation Specialist in Region I, states, that contrary to the allegations made by FOE,

The changes to the ODCM, transmitted by Philadelphia Electric Company to NRC Region I on February 28, 1985, in accordance with Limerick Technical Specification Section 6.14.2, are consistent with the Commission's regulations in 10 CFR 20 and the Licensee's Technical Specifications and do not increase the radiation risk to the public. . . . The new set point for the containment purge isolation cited in the ODCM agrees with the trip set point requirement in Technical Specification, Section T3.3.2 - 2C. In my review of the equations used in the revised method to determine alarm set points for the North and South vent monitors, I determined that the revised method represents a refinement of the previously approved calculation method. The revised method allows the set points to be determined more efficiently by the licensee. The revision continues to

demonstrate compliance with Technical Specifications and assures 10 CFR 20 limits will not be exceeded. In addition, the releases from the North and South Vents are calculated based on the fractional contribution from both vents. The above method does not average releases from the vents.

Anthony/FOE is factually incorrect in asserting that emissions have been averaged and has not pointed to any violation of NRC regulations or demonstrated how any significant safety issue is raised by the referenced changes.

The petitioner's allegations concerning error in the site boundaries used in calculating set points and assumptions concerning fish consumption are addressed in an affidavit of Dr. Edward F. Branagan, Jr. of the Radiological Assessment Branch attached to NRC Staff Response. Dr. Branagan states that, contrary to FOE's allegations, the site boundaries listed in the ODCM, Rev. 1 are appropriate for limiting exposure to radioactive effluents (Paragraph 6 of the Affidavit). He states that the doses from eating fish are not underestimated either because of the assumption as to where fish are caught or because of the assumption of a one day delay before consumption (Paragraph 7 and 8 of the Affidavit). Further, Dr. Branagan states that, contrary to Anthony/FOE's allegations, the assumptions on which the Applicant's calculations are based are consistent with the Staff's recommendations in Regulatory Guide 1.109, Rev. 1 (Paragraph 8 of the Affidavit).

(3) Demonstrate That a Different Result Might Have Been Reached Had the Newly Proffered Material Been Considered Initially

Again Anthony/FOE fails to do more than issue conclusionary statements in support of its petition. Indeed, from the affidavits in the NRC Staff Response, there cannot be a successful demonstration of petitioner's assertion that "lowered radiation isolation set points will result from calculations" which are contained in its pleading. Paragraph 6 of Anthony/FOE Petition of April 30, 1985. Any attempt to insert testimony of an expert without specifying in detail the content of the testimony and how this expected testimony of the expert would demonstrate a different result, is wholly unacceptable.

Late-Filed Contentions - Criteria for Admitting

In addition to the above standards which must be met for a successful motion to reopen, a petitioner must satisfy a balancing of five criteria for admitting a late-filed contention as set forth in 10 CFR § 2.714(a)(1). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power, Units 1 and 2, CLI-82-39, 16 NRC 1712, 1714-15 (1982), including the Catawba Appeal Board's test for good cause.⁷

The Board notes that it has taken into consideration the unauthorized response of Anthony/FOE Response to the Board Order of 5/3/85 in Reply to Our Petition of 4/30/85 to Reopen the Record on

⁷ Cf. Footnote 6 and 7 of Staff, p. 7-8.

PECo.'s No. 1 Effluent Release Report and Response to Applicant's Answer to Our Petition, 5/7/85. Although under 10 CFR § 2.730 a moving party has no right to reply except when permitted by the presiding officer and permission was neither asked for nor given, the Board has taken into consideration the manner in which this matter was raised and in the interest of all parties to dispose quickly of it, simply has taken all pleadings into consideration.⁸ We make this point to emphasize that it was not until the second pleading of petitioner on May 14, 1985 that any attempt was made to discuss the five criteria of § 2.714(a)(1).

(1) Good Cause

The material previously available in the ODCM of September 1984, Applicant's documents and in the FES rather than Revision 1 to ODCM were the sources petitioner could have relied on to formulate an issue much earlier. Even after Revision 1 to the ODCM was issued petitioner waited a month before filing its contention. Good cause has not been demonstrated and this factor weighs against petitioner.

(2) Availability of Other Means to Protect Petitioner's Interest

The petitioner merely asserts an interest without specifying what interest it has. Assuming that it does have an interest, there is no other means available to protect it. Petitioner prevails on this factor.

(3) Assistance In Development of a Sound Record

What regulation petitioner perceives has been violated or how the

⁸ This also includes Applicant's Response to Robert L. Anthony/FOE Unauthorized Reply, dated May 22, 1985.

public's health and safety is threatened cannot be discerned from this intervenor's petition. Anthony/FOE offers nothing to demonstrate that the issue it seeks to raise would assist in the development of a sound record.

FOE has merely identified by name, profession and university association its expert. It has failed to "set out with as much particularity as possible the precise issues it plans to cover, . . . , and summarize its prospective testimony. "Vague assertions regarding petitioner's ability . . . are insufficient." (Emphasis supplied.) Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

This factor weighs against petitioner.

(4) Representation by Existing Parties

There is no other existing party representing whatever interest petitioner may have. If the Anthony/FOE's interest is a real one and not elsewhere represented, then this factor weighs in favor of petitioner.

(5) Delay and Broadening of the Issues

The only remaining issues before this Board are emergency planning contentions of the Graterford inmates not yet ruled on by this Board. Although assuming that some part of those contentions may be litigated before this Board, any additional contention would broaden the issues before us and serve to delay the proceeding further. This factor weighs against petitioner.

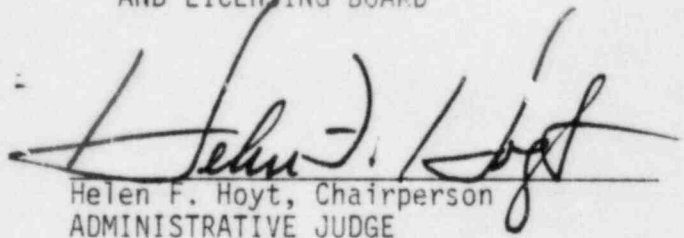
A balancing of all factors for admission clearly weighs against Anthony/FOE's assertion that health and safety are in danger. There are

simply no bases for the contention on the matter raised in the petitions.

Accordingly, the petitioner has (1) failed to make the showing required of a party seeking to reopen a record; and (2) failed to satisfy the five factors for admission of a late-filed contention and the basis and specificity requirements for admission of a contention.

Anthony/FOE Petition of April 30, 1985 as supplemented on May 14, 1985 is denied.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD



Helen F. Hoyt, Chairperson
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 4th day of June.