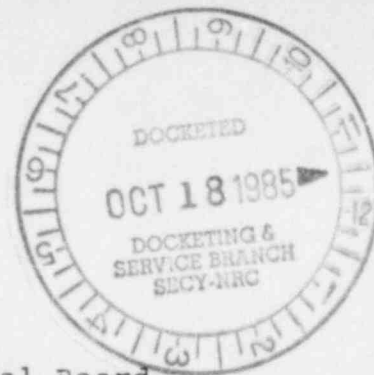


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Appeal Board

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

LICENSEE'S OPPOSITION TO AIR AND WATER POLLUTION
PATROL'S MOTION TO REOPEN THE RECORD TO ADMIT
A PREVIOUSLY DENIED CONTENTION RELATING TO
"GROSS ALPHA," RADIUM-226 AND RADIUM-228

Preliminary Statement

On September 27, 1985, Air and Water Pollution Patrol ("AWPP"), by its representative Frank R. Romano, filed a motion with the Atomic Safety and Licensing Board ("Licensing Board") to reopen the record to reconsider a previously denied contention. The motion is based on a change in drinking water regulations of the Pennsylvania Department of Environmental Resources ("PaDER") as to monitoring requirements for naturally occurring radionuclides. AWPP has erroneously construed the new requirement as a change in the maximum contaminant levels ("MCL's") for gross alpha particle activity "with involvement of Radium 226 and Radium 228."^{1/}

^{1/} Air & Water Pollution Patrol Moves Board Re-Opens
(Footnote Continued)

Licensee Philadelphia Electric Company hereby opposes AWPP's motion to reopen the record, which is unsupported by any new pertinent information, to reconsider a contention which the Licensing Board denied long ago.^{2/} Further, AWPP has not met the basis and specificity requirements of 10 C.F.R. §2.714(b) for the admission of a contention. Finally, AWPP has also completely failed to meet the requirements of 10 C.F.R. §2.714(a)(1) for the admissibility of late-filed contentions or the separate requirements for reopening the record. AWPP's motion should therefore be denied.

Argument

I. The Licensing Board's Previous Denial of This Contention, Not Appealed by AWPP, Bars its Reconsideration Now.

On June 27, 1984, AWPP filed a proposed contention in which it asserted that "neither Applicant nor Staff have adequately studied whether or not routine turbine stack, or other releases of radioactive nuclides will result in

(Footnote Continued)

Record on Above Docket Based on New Pennsylvania Division of Environmental Resources Regulations Re Gross Alpha, Radium 226 and Radium 228 (September 27, 1985) ("AWPP Motion to Reopen"). Although dated September 27, 1985, AWPP's motion was postmarked October 2, 1985.

^{2/} AWPP's pleading was directed to the Licensing Board, which appropriately forwarded it to the Atomic Safety and Licensing Appeal Board ("Appeal Board") as the body with jurisdiction over this matter since the issuance of the Licensing Board's final partial initial decision on July 22, 1985.

exceeding the EPA Maximum Contaminant Levels ("MCL") for gross alpha, radium 226, and radium 228."^{3/} The Licensing Board denied admission of the proposed contention, finding that "[n]either the contention nor the unauthorized response [by AWPP] says how a turbine stack could release alpha-emitters or radium 228" and that the "contention and the unauthorized [AWPP] Response do not even proffer a basis for thinking that these elements could reasonably be expected to be released from any point in the plant."^{4/} No appeal was taken from the Licensing Board's determination that no basis for the contention, clearly a prerequisite under 10 C.F.R. §2.714(b), had been shown.

In its most recent motion, AWPP seeks to reopen the record for the admission of a somewhat revised version of the same late-filed contention. It alleges that the MCL's for gross alpha particle activity in drinking water attributable to radium-226 and radium-228 have been lowered by the PaDER, thus making it likely that "higher than expected natural radioactivity . . . coupled with releases from

^{3/} New AWPP (Romano) Contention Re Gross Alpha (filed June 27, 1984).

^{4/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), "Memorandum and Order Rejecting Late-Filed Contentions from FOE and AWPP" (August 24, 1984) (slip op. at 15).

Limerick . . . could result in closing many well and water sources"^{5/}

AWPP has totally failed to address, let alone present any new basis for reconsidering, the Licensing Board's finding that Limerick will not release any radium-226 or radium-228 and that its contention lacks the requisite basis. Nor has it presented any other new information which warrants admitting the proposed contention after the completion of hearings on all contested issues and issuance of a full-power license for Limerick.

Further, the PaDER notification relied upon by AWPP has only changed the monitoring requirements for radiological contaminants, not the underlying MCL's, which remain at 15 pCi/l for gross alpha particle activity and 5 pCi/l for combined radium (radium-226 and radium-228).^{6/} As previously found by the Licensing Board, operation of Limerick does not result in releases of either radium-226 or radium-228. Neither monitoring requirements nor MCL's for those isotopes could therefore be affected by operation of Limerick.

Although the most recent AWPP submission alleges that the MCL's for naturally occurring radionuclides have been

^{5/} AWPP Motion to Reopen at 3.

^{6/} Licensee received a copy of the PaDER notification relied upon by AWPP from counsel for the Commonwealth of Pennsylvania through the NRC Staff. A copy of this notification is attached for the convenience of the Appeal Board and parties.

lowered by PaDER, an assertion which is demonstrably wrong, the underlying premise of AWPP's revised contention remains the same as stated earlier in its original contention. Both versions assume, but fail to establish, that "the plant might regularly release alpha-emitters and radium 228."^{7/} The Licensing Board correctly rejected this unfounded premise in denying the contention initially proposed and AWPP did not appeal. AWPP is therefore barred from collaterally challenging that finding in its new submission.^{8/}

II. AWPP Has Not Satisfied the Requirements for Admitting a Late Contention.

The late contention proposed by AWPP may not be admitted unless, on balance, the five factors enumerated in 10 C.F.R. §2.714(a)(1)(i)-(v) weigh in intervenor's favor.^{9/} In this instance, none of the five factors favors AWPP's

^{7/} Limerick, supra, "Memorandum and Order Rejecting Late-Filed Contentions from FOE and AWPP" at 15 (August 24, 1984).

^{8/} As this Board held in Prairie Island, a party which fails "either to raise satisfactorily a particular factual issue or (once the record has been closed) to express himself in the prescribed manner regarding how that issue should be resolved . . . is scarcely in a position, legally or equitably, to protest the determinations made by the Board in connection with it." Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974).

^{9/} Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 331 (Footnote Continued)

request to admit its late-filed contention.^{10/} On balance, AWPP has therefore failed to "affirmatively demonstrate" that it has met the criteria for lateness.^{11/}

As to the first criterion, good cause for lateness, AWPP asserts that Mr. Romano has been ill or convalescing since PaDER issued the notification in question on August 16, 1985 and that "[c]ontentions are Romano responsibility for AWPP."^{12/} The latter self-serving declaration is legally unavailing. Mr. Romano had previously testified in this proceeding that AWPP has approximately 25 or 30 members (Tr. 6734).

As the Commission stressed in Catawba, it is only the "institutional unavailability of a licensing-related document," not the temporary unavailability of one of the party's representatives, which gives rise to a showing of

(Footnote Continued)

(1983); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983).

^{10/} Preliminarily, AWPP has not even met the threshold requirement of actually stating a proposed contention. The request should be denied on that basis alone. It is not the function of the Board to craft AWPP's disjointed and sometimes incoherent allegations intuitively into a contention, especially at this stage of the proceeding, after the full-power operating license for Limerick Unit 1 has already issued.

^{11/} Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

^{12/} AWPP Motion to Reopen at 1.

good cause for lateness.^{13/} Here, there is no reason why some other member of AWPP could not have undertaken to represent this organizational intervenor during the period Mr. Romano was personally indisposed. Further, the surfacing of this proposed contention long after hearings had concluded and months after the issuance of a full-power operating license for Limerick renders AWPP's tardiness even more significant.^{14/}

Moreover, no other good cause for lateness exists. AWPP first advanced this contention more than a year ago. Since that time, there has been no change in the fact that Limerick does not emit radium-226 or radium-228, nor has AWPP alleged otherwise. Contrary to AWPP's misrepresentation, the MCL's for these naturally occurring radionuclides under PaDER's regulations have not changed since its contention was previously denied. Accordingly, this factor does not favor AWPP.

As to the second and fourth factors, the availability of other means whereby petitioner's interest will be protected and the extent to which petitioner's interest will be represented by existing parties, only conclusory averments

^{13/} Catawba, supra, CLI-83-19, 17 NRC at 1048.

^{14/} As this Board stated in WPPSS, "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).

have been made by AWPP. Clearly, any concern with regard to the quality of drinking water should be addressed to the regulatory agency with direct responsibility, which in this instance is PaDER. At most, these two factors are neutral on the question of admitting AWPP's late contention. Moreover, as the Appeal Board noted in the Summer proceeding, these two factors are to be given less weight than the others and do not, standing alone, justify admission of a late contention.^{15/}

As to the third criterion, AWPP has failed to demonstrate that it could assist the Board in establishing a sound record on its proposed contention. In particular, it has failed to comply with the requirements of Grand Gulf that "[w]hen a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."^{16/} Contrary to AWPP's assertion that Mr. Romano and other unnamed witnesses

^{15/} South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

^{16/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also WPPSS, supra, ALAB-767, 19 NRC 984 (1984); WPPSS, supra, ALAB-747, 18 NRC 1167, 1177 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983).

could "assist in factual evidence re this contention,"^{17/} Mr. Romano's previous testimony and participation before this Board demonstrate that he is unlikely to provide any meaningful assistance.^{18/}

The fifth criterion clearly weighs against AWPP. Hearings on all contested issues have long since been completed and Limerick has been granted a full-power operating license. It is indisputable that admission of new contentions after issuance of the license will greatly broaden the issues and will not only delay but nullify the conclusion of the proceeding,^{19/} as AWPP implicitly acknowledges.^{20/} Accordingly, AWPP has failed to satisfy the requirements for admission of a proposed late contention.

^{17/} AWPP Motion to Reopen at 3.

^{18/} In an earlier phase of this case, the Licensing Board found that, as a witness on another issue, Mr. Romano "displayed insufficient knowledge and expertise to be relied upon." Limerick, supra, LBP-84-31, 20 NRC 446, 455 (1984). As this Board found in Catawba, an intervenor's "bare assertion" of past effectiveness in other aspects of the proceeding, which is "unsupported by specific information from which a Board could draw an informed inference that the intervenors can and will make a valuable contribution on a particular issue in this proceeding, will not suffice." Catawba, supra, ALAB-813, 22 NRC 59, 85 (1985).

^{19/} See, e.g., Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765-66 (1982); Shoreham, supra, LBP-83-30, 17 NRC 1132, 1146 (1983).

^{20/} AWPP Motion to Reopen at 3.

III. AWPP Has Also Failed to Satisfy the Requirements for Reopening the Record.

In Diablo Canyon, the Commission held that where a party moves to reopen the record on new contentions, it "must satisfy both the standards for admitting late-filed contentions, 10 CFR 2.714(a), and the criteria established by case law for reopening the record."^{21/} Thus, AWPP must independently satisfy the requirements for reopening a closed record in addition to the five factors for admitting a late contention. Here again, AWPP has scarcely addressed the relevant standards except in conclusory fashion.

The Appeal Board restated the test for reopening a closed proceeding in Waterford as follows:

1. 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.^{22/}

^{21/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), citing Diablo Canyon, supra, CLI-81-5, 13 NRC 361 (1981).

^{22/} Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984). See also Three Mile Island, supra,
(Footnote Continued)

As to timeliness, it has already been demonstrated that AWPP has offered no plausible explanation for its delay in raising this contention at the time the information it cites from the PaDER notification became institutionally available to intervenor. Thus, its motion is untimely.

As to the second factor, demonstration of a significant environmental or safety issue, it has likewise been established that no issue of any significance whatever has been raised. Quite simply, none of the concerns asserted by AWPP regarding safe drinking water relates to emissions resulting from the operation of Limerick. The Licensing Board has so found and AWPP elected not to appeal that finding. Moreover, AWPP's most recent submission is totally devoid of any information of a scientific or technical nature demonstrating any real safety or environmental problem.^{23/}

Finally, AWPP has not even come close to meeting the third criterion, i.e., that a different result would have

(Footnote Continued)

ALAB-815, 22 NRC ____ (August 29, 1985) (slip op. at 3-4; Waterford, supra, ALAB-812, 22 NRC 5, 13-14 (1985); Three Mile Island, supra, ALAB-774, 19 NRC 1350, 1355 (1984)).

^{23/} In Diablo Canyon, the Appeal Board emphasized that a successful motion to reopen requires greater technical specificity than would be required for an admissible contention at the outset of a proceeding. It stated that information supporting a request to reopen "must be more than mere allegations; it must be tantamount to evidence," i.e., "it must possess the attributes set forth in 10 C.F.R. 2.743(c) defining admissible evidence for adjudicatory proceedings." Diablo Canyon, supra, ALAB-775, 19 NRC 1361, 1366-67 (1984).

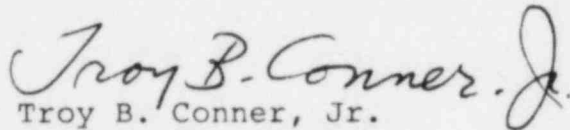
been reached in the decision of the Licensing Board to authorize issuance of a full-power operating license for Limerick. Indeed, it has not even seen fit to address this important requirement. Accordingly, AWPP has failed to meet the three-prong test for reopening a closed record.

Conclusion

For the reasons discussed above, AWPP's motion to reopen the record for admission of a revised late contention should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Troy B. Conner, Jr.
Mark J. Wetterhahn
Nils N. Nichols

Counsel for the Licensee

October 17, 1985



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Post Office Box 2357
Harrisburg, Pennsylvania 17120

August 16, 1985

Bureau of Community Environmental Control

717-783-3795

Dear Community Water Supplier:

This is to notify you of a change in the monitoring requirements for radiological contaminants. The primary purpose of this change is to assure the consumer is not receiving drinking water with unsafe levels of naturally occurring radionuclides. The Maximum Contaminant Levels (MCLs) for naturally occurring radionuclides are 15 pico Curies per liter (pCi/l) for gross alpha particle activity and 5 pCi/L for combined Radium (Radium-226 and Radium-228).

Under the present monitoring procedures, analysis for Radium-228 is conducted when the gross alpha exceeds 5 pCi/l and the Radium-226 level exceeds 3 pCi/l. This sampling procedure was based on the assumption that Radium-228 levels are less than Radium-226 levels. However, analysis of some water supplies in Pennsylvania indicated that levels of Radium 228 can greatly exceed the level of Radium-226. Therefore, violations of the combined Radium MCL of 5 pCi/l may be missed when the Radium-228 goes unanalyzed.

Since the occurrence of Radium-228 is not well known or documented, and Radium-228 is reportedly twice as radiotoxic as Radium-226, the public health is not adequately protected under the current monitoring procedures.

Therefore, the Department is exercising its option under Federal Regulations 40 CFR Part 141 and its authority under Section 109.302 of the Department's Regulations (25 Pa. Code § 109.302) to **require that whenever the gross alpha particle activity exceeds 2 pCi/l, the same or an equivalent sample must be analyzed for both Radium-226 and Radium-228.**

If you have not yet conducted your radionuclide monitoring for the current monitoring period (which began on June 24, 1984), when you collect a sample for laboratory analysis, you should inform your laboratory that the sample must be analyzed for both Radium-226 and Radium-228 if the gross alpha exceeds 2 pCi/l.

If you have already conducted the gross alpha monitoring for the current monitoring period, please review the results received from your laboratory. If the gross alpha result exceeded 2 pCi/l and the Radium-228 was not analyzed, you are advised to collect a sample and have it analyzed for Radium-228 (and, if applicable, for Radium-226) by March 31, 1986.

If you have any questions, please get in touch with the person on the enclosed contact list in your county for assistance.

We appreciate your cooperation in this matter, as well as in supplying safe drinking water.

Sincerely,

Frederick A. Marrocco, Chief
Division of Water Supplies
Bureau of Community Environmental Control

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Opposition to Air and Water Pollution Patrol's Motion to Reopen the Record to Admit a Previously Denied Contention Relating to 'Gross Alpha,' Radium-226 and Radium-228," dated October 17, 1985 in the captioned matter, have been served upon the following by deposit in the United States mail this 17th day of October, 1985:

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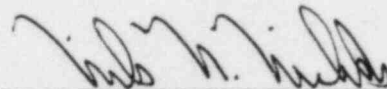
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