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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE COMMISSION

'86 FEB 18 P3:42

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

Docket Nos. 50-352
50-353

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NRC STAFF ANSWER IN OPPOSITION TO
ANTHONY/FOE PETITION FOR REVIEW OF ALAB 828

Ann P. Hodgdon
Counsel for NRC Staff

February 18, 1986

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NRC STAFF ANSWER IN OPPOSITION TO
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I. INTRODUCTION

On January 26, 1986, R. L. Anthony/Friends of the Earth in the Delaware Valley (collectively "FOE") filed a "Motion . . . for NRC Review of ALAB-828 . . ." (Petition). ^{1/} FOE requests the Commission to review and reverse ALAB-828. ^{2/} For the reasons that follow, the NRC staff opposes FOE's petition and urges that it be denied.

II. BACKGROUND

In ALAB-828, the Appeal Board affirmed the Licensing Board's denial of FOE's motion to reopen the record to consider late-filed contentions

^{1/} FOE did not serve the Staff with a copy of its petition. On February 4, 1986, after the Staff obtained a copy from another source, it sought and was granted an extension until February 18, 1986, to respond to the Petition. See, Staff counsel's letter of February 4, 1986, to the Secretary of the Commission.

^{2/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC ____ (January 16, 1986).

based on information in Philadelphia Electric Company's Semi-Annual Effluent Release Report. ^{3/}

In its April 30, 1985 Motion to Reopen the Record filed before the Licensing Board, FOE had asserted that:

1. Applicant Philadelphia Electric Co. had improperly used the site boundaries rather than the nearest approaches to the plant, namely the railroad right-of-way and the Schuylkill River, both of which pass through the Limerick site, in calculating the public's exposure to radiation from routine facility operation;
2. Philadelphia Electric Co. had miscalculated exposure from the fish ingestion pathway; and
3. A revision to Philadelphia Electric Co.'s Offsite Dose Calculation Manual (ODCM) had degraded standards for public protection. Motion at 1.

In ruling on FOE's motion, the Licensing Board determined among other things that FOE's motion failed to satisfy (1) the Commission's standards for reopening a closed record, which include a consideration of the timeliness of the request, the safety and environmental significance of the issue and whether a different result might have been reached had the newly proffered material been considered initially, and (2) the criteria set forth in 10 C.F.R. § 2.714(a)(1) concerning the admissibility of untimely

^{3/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum and Order Denying Petition by Anthony/FOE to Reopen the Record on the Basis of New Information in Philadelphia Electric Company's Semi-Annual Effluent Release Report, Feb. 1985, Unpublished opinion of June 4, 1985.

contentions. See, Licensing Board Memorandum and Order of June 4, 1985 (unpublished).

In ALAB-828, the Appeal Board affirmed the Licensing Board's determinations that FOE had not demonstrated in its motion that reopening was warranted and that FOE had not shown that a balancing of the five factors in 10 C.F.R. § 2.714(a)(1) favored admission and litigation of its untimely contention. In addition, the Appeal Board determined not to refer the matter to the Director of Nuclear Reactor Regulation for consideration under 10 C.F.R. § 2.206, because FOE's motion did not raise any significant safety issue. ^{4/}

III. DISCUSSION

Although the Commission has the discretion to review any decision of its subordinate boards, a petition for Commission review "will not ordinarily be granted" unless important safety, environmental, procedural, common defense, antitrust or public policy issues are implicated. 10 C.F.R. § 2.786(b)(4). Further, a petition for review based on factual matters will not be granted unless it appears that the Appeal Board resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Licensing Board. 10 C.F.R. § 2.786(b)(4)(ii). The Staff has considered the issues raised by FOE and believes that, when measured against the standards set forth in 10 C.F.R.

^{4/} ALAB-828, Slip op. at 14, fn. 26.

§ 2.786, they do not warrant the exercise of the Commission's discretion to grant review.

A. The Commission's Standards for Motions to Reopen

FOE contends that the Appeal Board improperly affirmed the Licensing Board's determination not to reopen the record to consider FOE's late-filed contentions. Petition at 1. The Commission's standards for determining whether to reopen a closed record are well-established; in ruling on such a motion adjudicatory boards will consider whether: 1) the motion is timely; 2) it addresses significant safety (or environmental) issues; and 3) a different result might have been reached if the newly proffered material had been considered initially. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983).

FOE charges that it was error on the part of the Appeal Board to sustain the Licensing Board's ruling that FOE's motion to reopen was untimely. Petition at 1. The Appeal Board's specific ruling was that the Licensing Board's conclusion that the motion was untimely insofar as it concerned dose calculations performed at the site boundary was correct. ^{5/}

^{5/} ALAB-828, Slip op. at 6. The Appeal Board also noted that the record was unclear regarding when FOE actually received Philadelphia Electric's revised Offsite Dose Calculation Manual (ODCM) in its Semi-Annual Effluent Release Report. Therefore, the Appeal Board assumed *arguendo* that the motion was timely to the extent it was based on any entirely new information in the February report. ALAB-828, Slip op. at 6, fn. 10. The Appeal Board ruled that FOE's argument concerning changes to the ODCM did not raise a matter of safety significance. Id. at 8. See, discussion, infra, at 6.

Moreover, the Appeal Board correctly found that FOE had information concerning the location where dose calculations would be made as early as 1983 and thus could have voiced their concerns much earlier. ^{6/}

The Appeal Board further stated that the most important factor to be considered in determining whether to reopen a record is whether the motion to reopen raises a significant safety issue. ^{7/} With regard to the safety significance of the matters raised in its motion, FOE baldly asserts that there is a "much higher frequency of exposure on the railroad right-of-way and the river than at the site boundaries where there are no habitations." Petition at 1. In ALAB-828, the Appeal Board recited, with approval, from the affidavit of Staff expert Dr. Edward F. Branagan, Jr., ^{8/} concerning the Staff's view that Philadelphia Electric's choice of the site boundaries rather than the railroad right-of-way or the Schuylkill River was appropriate. ^{9/} Relying on Dr. Branagan's affidavit and the affidavit of another Staff expert, Marie T. Miller, the Licensing Board found FOE's arguments to be premised on factual inaccuracies and unwarranted assumptions. ^{10/} The Appeal Board found no basis for

^{6/} ALAB-828, Slip op. at 6-7.

^{7/} ALAB-828, Slip op. at 6.

^{8/} Submitted by the Staff as a part of its "Response to Anthony/FOE Petition . . .", May 28, 1985.

^{9/} ALAB-828, Slip op. at 7.

^{10/} Memorandum and Order of June 4, 1985, at 7-9.

overturning the Licensing Board's conclusion that FOE's motion did not raise a significant safety issue. ^{11/}

The Appeal Board considered FOE's argument concerning Philadelphia Electric Co.'s revision of its Offsite Dose Calculation Manual to be "rather sketchy." ^{12/} Before the Commission, FOE attacks Ms. Miller's affidavit in which Ms. Miller explained the basis for the revisions to the manual. FOE characterizes these revisions as "careless" and "dangerous." Petition at 1. However, this characterization is lacking in basis and no more comprehensible than were FOE's arguments to the Appeal Board, which, as noted above, considered them "sketchy". Nothing other than FOE's unsupported opinion sustains its argument that the outcome of the proceeding would have been different if the railroad right-of-way and the river rather than the site boundaries had been used as a basis for the calculations of exposure to individuals from routine plant operation. See, Petition at 1.

FOE has not shown that the Appeal Board's conclusions with respect to the issue of reopening the record are erroneous. To the extent that issues of fact are involved, Commission review is not required under the regulations in that it does not appear that the Appeal Board resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that issue by the Licensing Board. 10 C.F.R. § 2.786(b)(4)(ii). Thus, FOE has not shown that the Appeal Board's

^{11/} ALAB-828, Slip op. at 7.

^{12/} ALAB-828, Slip op. at 8.

weighing of its motion to reopen against the standards appropriate for considering such motions raises any issue warranting Commission review.

B. The Commission's Regulations Concerning the Admissibility of Late-Filed Contentions

A party seeking to raise a new, previously uncontested issue through a motion to reopen the record must satisfy not only the standards for reopening but also the late-filed contention criteria set forth in 10 C.F.R. § 2.714(a)(1). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982). FOE argues that it has satisfied these criteria. Petition at 2. In ALAB-828, the Appeal Board stated that it will not overturn a Licensing Board determination weighing these criteria absent a showing that the Licensing Board abused its discretion and that no such showing had been made on FOE's appeal. ^{13/}

1. Good Cause. FOE bases its assertion of good cause on its ignorance of the existence of routine releases and the methodology for calculating their effects prior to its receipt of the February 1985 Effluent Release Report. Petition at 1. In ruling on the timeliness standard for reopening a record, the Licensing Board found and the Appeal Board correctly affirmed that information regarding these matters was available much earlier than February 1985. ^{14/}

^{13/} ALAB-828, Slip op. at 10.

^{14/} See, Memorandum and Order of June 4, 1985 at 5-6; ALAB-828 at 5, fn. 8; and discussion, supra, at 4.

2. Availability of other means to protect the petitioner's interest.

The Licensing Board found that FOE lacked other means to protect its interest and that it, therefore, prevailed on this factor. ^{15/} The Appeal Board nonetheless opined that there might be instances where a petition filed pursuant to 10 C.F.R. § 2.206 would be more protective of a petitioner's interest than an adjudicatory hearing. ^{16/} FOE disagrees with the Appeal Board. Petition at 2. As noted earlier, the Appeal Board determined not to refer FOE's motion to the Director of NRR, because of its lack of safety significance. FOE has provided no basis for its complaint regarding the Appeal Board's disposition of this factor.

3. Contribution to a Sound Record. The Licensing Board found and the Appeal Board affirmed that FOE had failed to show its ability to contribute to a sound record on its proposed contention. ^{17/} FOE now argues to the Commission that it was inequitable for the boards to consider the Staff's affidavits while rejecting the affidavit of Dr. Molholt, which was submitted by FOE to the Appeal Board in support of its brief on appeal. Petition at 2. Regarding Dr. Molholt's affidavit, the Appeal Board correctly concluded that FOE could not properly supplement on appeal the information that was before the Licensing Board at the time of its decision. ^{18/} Further, the Appeal Board observed that even if

^{15/} Memorandum and Order of June 4, 1985, at 11.

^{16/} ALAB-828, Slip op. at 11-14.

^{17/} Memorandum and Order of June 4, 1985 at 12; ALAB-828, Slip op. at 14-15.

^{18/} ALAB-828, Slip op. at 14.

Dr. Molholt's affidavit had been properly before it, there was nothing in the affidavit to cast doubt on the Licensing Board's conclusion concerning the lack of safety significance of FOE's newly proposed contention. ^{19/}

4. Representation of Petitioner's Interest by an Existing Party.

The Licensing Board and the Appeal Board agreed that no existing party could represent FOE's interest. ^{20/} FOE does not seek review of this determination.

5. Broadening the Issues and Delaying the Proceeding. On the fifth factor, FOE argues to the Commission that the matters raised in its motion should have been the subject of a hearing before the operating license was issued. Petition at 2. Both the Licensing Board and the Appeal Board found against FOE on this issue. ^{21/} While the Appeal Board agreed with FOE that the public health and safety must be a preeminent concern, it correctly concluded that the matters raised by FOE did not rise to that level. ^{22/}

FOE's arguments regarding the Appeal Board's ruling on the criteria governing consideration of late-filed contentions do not establish that ALAB-828 raises any important question of law or policy. To the extent that issues of fact are involved, the regulations in 10 C.F.R. § 2.786

^{19/} ALAB-828, Slip op. at 8-9.

^{20/} Memorandum and Order of June 4, 1985 at 12, ALAB-828, Slip op. at 15.

^{21/} Memorandum and Order of June 12, 1985 at 12; ALAB-828, Slip op. at 15.

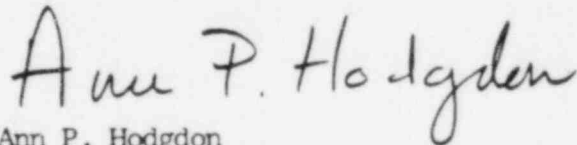
^{22/} ALAB-828, Slip op. at 15-16.

preclude review by the Commission, since it does not appear that the Appeal Board resolved a factual issue necessary for decision in an erroneous manner contrary to the resolution of that issue by the Licensing Board. Thus, FOE has not shown that the Appeal Board's consideration of the five factors governing the admissibility of late-filed contentions raises an issue that would warrant Commission review.

IV. CONCLUSION

As discussed above, FOE's petition fails to establish that ALAB-828 raises any issues suitable for Commission review. Accordingly, the Petition should be denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ann P. Hodgdon". The signature is written in dark ink and is positioned above the typed name and title.

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of February, 1986

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER IN OPPOSITION TO ANTHONY/FOE PETITION FOR REVIEW OF ALAB-828" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 18th day of February, 1986:

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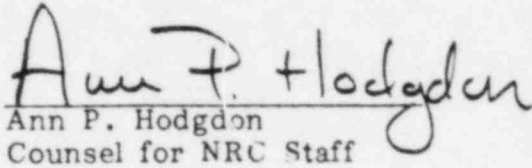
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Board Panel (8)
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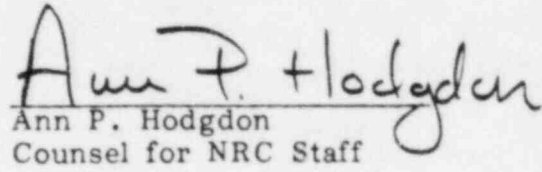
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