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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board <sup>24</sup> <sup>11 23</sup> 110:40

In the Matter of	)	
	)	
Philadelphia Electric Company	)	Docket Nos. 50-352 06
	)	50-353 06
(Limerick Generating Station,	)	
Units 1 and 2)	)	

APPLICANT'S RESPONSE TO FOE'S APPEAL  
OF THE LICENSING BOARD'S DENIAL OF  
ITS JUNE 18 AND 19, 1984 MOTIONS

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July 20, 1984

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ITS JUNE 18 AND 19, 1984 MOTIONS

I. Introduction

On July 3, 1984, Friends of the Earth ("FOE"), an intervenor in the captioned proceeding, appealed from the Atomic Safety and Licensing Board's ("Licensing Board") denial of its June 18 and 19, 1984 motions opposing the request by the Philadelphia Electric Company ("Applicant") to move new fuel to the reactor building refueling floor for inspection and storage in the fuel pool at the Limerick Generating Station ("Limerick") under its Part 70 license.<sup>1/</sup>

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<sup>1/</sup> Appeal From ASLB's Oral, Summary Denial of Anthony/FOE Motion of 6/18/84 vs. PECO "Remaining Portion of the License" (Part 70) and Motion vs. PECO Motion for Expedited Decision and Low Power License, by Anthony/FOE 6/19/84.

The Atomic Safety and Licensing Appeal Board ("Appeal Board") requested responses by July 20, 1984.<sup>2/</sup>

While difficult to comprehend, FOE's appeal apparently concerns two matters, (1) a revision to a special nuclear materials license which would allow unirradiated fuel to be moved from its present outdoor location to the reactor building and (2) the issuance of a low power license. FOE's appeal and motion for a stay on both matters are totally without merit and should be dismissed.

## II. Background

PECO filed an amended application to receive and store unirradiated nuclear fuel at Limerick on January 24, 1984. That application requested approval to bring fuel onsite, transfer it to the reactor building and to take all necessary action to prepare and store it for use upon receipt of

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<sup>2/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353, "Order" (July 6, 1984).

an operating license.<sup>3/</sup> On February 23 <sup>4/</sup> and 28, 1984,<sup>5/</sup> FOE filed contentions relating to that application, which it sought to litigate prior to the receipt of new (unirradiated) fuel at Limerick. On March 16, 1984, the Licensing Board denied FOE's contentions subject to the Applicant and Staff filing affidavits addressing whether any accident involving low-enriched uranium oxide fuel pellets could cause a violation of the Commission's regulations regarding radiation releases.<sup>6/</sup> Those affidavits confirmed the Board's judgment that no credible accident involving unirradiated fuel could cause releases in excess of applicable

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<sup>3/</sup> On April 3, 1984, the NRC issued License No. SNM-1926 which authorized, inter alia, the receipt, possession and storage of fuel assemblies to be stored in shipping containers in the outdoor New Fuel Storage Area at Limerick. Review of the remaining portions of the application seeking to transfer the fuel inside the reactor building and prepare it for use in the reactor is still ongoing. It was in response to requests for additional information regarding these activities that the Applicant submitted the June 7, 1984 letter which triggered FOE's filings upon which the instant appeal is based. Thus, contrary to FOE's assertion, no new application to amend the license has been filed.

<sup>4/</sup> Application by Anthony/FOE to File a Contention Based on New Matter, i.e., PECO's Application Part 70 to Store Fuel at the Limerick Plant, Served 2/21/84.

<sup>5/</sup> Addition to Anthony/FOE Application for Contention on New Matter, PECO's Application, Part 70, Docket #70-2988, to move to site and store 764 bundles of fuel.

<sup>6/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC \_\_\_\_\_ (1984).

limits and it confirmed its previous ruling.<sup>7/</sup> It also denied FOE's request for a stay.<sup>8/</sup>

FOE appealed the Licensing Board's March 16, 1984 decision to the Appeal Board which, on March 30, 1984, affirmed the Licensing Board's ruling dismissing FOE's proposed contentions.<sup>9/</sup> FOE had also requested a stay of the Licensing Board's March 16, 1984 Memorandum and Order.<sup>10/</sup> Inasmuch as the Director, NMSS was prepared to issue the requested Part 70 license, which would have mooted FOE's stay request, the Appeal Board issued a temporary stay, which it lifted upon issuing ALAB-765.<sup>11/</sup> On April 5, 1984, FOE petitioned the Nuclear Regulatory Commission ("Commission") to stay issuance of the license;<sup>12/</sup> the

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7/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Memorandum and Order Confirming March 21, 1984 Oral Ruling on Affidavits About Radiation Releases From Unirradiated New Fuel Rods" (March 26, 1984).

8/ Tr. 7922.

9/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC \_\_\_\_\_ (1984).

10/ See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353, "Order" (March 28, 1984).

11/ Limerick, supra, ALAB-765, 19 NRC \_\_\_\_ (slip op. at 2 n.1, 21 n.22).

12/ Appeal from the Memorandum and Order of the Appeal Board 3/30/84, and Petition for a Hearing on PECO's Application and Amendment for Part 70 License, and Stay of the License and the Delivery of Uranium Fuel to the Site, by R.L. Anthony/FOE.

Commission denied its petition on April 26, 1984.<sup>13/</sup> The Appeal Board's decision became final when the Commission's time to review it expired on June 8, 1984 without being exercised.<sup>14/</sup>

On June 28, 1984, FOE filed an appeal with the United States Court of Appeals for the Third Circuit seeking review of the Appeal Board's decision and an injunction prohibiting the Applicant from moving fuel into the reactor building. The Third Circuit denied FOE's petition on July 12, 1984. A copy of FOE's complaint and the Court of Appeal's ruling is attached as Appendix A.

Turning to the instant appeal, on June 7, 1984, the Applicant replied to a Staff request for information concerning the movement of new fuel into the reactor building for inspection and storage. On June 18<sup>15/</sup> and 19,<sup>16/</sup> 1984, respectively, FOE filed two new motions in which it

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<sup>13/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353, "Order" (April 26, 1984).

<sup>14/</sup> Memorandum for Board and Parties Concerning ALAB-765 (June 18, 1984).

<sup>15/</sup> R.L. Anthony/FOE Contentions Based on New Matter, Letter From J.W. Gallagher/J.S. Kemper, PECO., 6/7/84, Requesting "Remaining Portion of the License" (Part 70) to Move Fuel to the Refueling Floor, Inspection, and Storage in the Fuel Pool, and Petition for a Stay.

<sup>16/</sup> Anthony/FOE Motion in Addition to Motion of 5/18/84 vs. PECO Motion of 5/9/84 for Expedited Partial Decision and Low Power License.

asserted, inter alia, that unspecified accidents involving the movement and storage inside of the new fuel could have health and safety impacts. The Licensing Board orally denied FOE's motions on June 19, 1984, finding that its previous rulings on this subject were controlling.<sup>17/</sup> FOE then filed the instant appeal.

Also forming part of FOE's appeal are allegations related to the Applicant's May 9, 1984 motion for a low-power license for fuel loading and low-power testing. FOE had filed two motions opposing the Applicant's motion on May 18 and 30, 1984, respectively. The Licensing Board has not yet ruled on either of those motions or the Applicant's request.

### III. Argument

#### A. Jurisdiction Over June 18 and 19, 1984 Motions.

FOE contends that the Licensing Board's June 19, 1984 decision is incorrect because the previous decisions ruling on the health and safety impacts of new fuel were limited solely to consideration of its storage outdoors. FOE also appears to argue that the movement and storage of new fuel inside the reactor building presents potential hazards that have not yet been considered.<sup>18/</sup>

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<sup>17/</sup> Tr. 12057-62.

<sup>18/</sup> FOE also complains that the Applicant's June 7, 1984  
(Footnote Continued)



In its July 6, 1984 Order, the Appeal Board directed the parties to address the Licensing Board's jurisdiction to consider FOE's instant requests. Preliminarily, the Appeal Board held in ALAB-765 that the Licensing Board has jurisdiction over Part 70 matters to the extent they are "integral" to Limerick.<sup>19/</sup> Subject to that limitation, the law of the case is that the Board has jurisdiction over the entire matter of unirradiated fuel licensing.<sup>20/</sup>

The more significant question, however, is whether that jurisdiction terminated when the Licensing Board denied FOE's contentions, i.e., whether the Licensing Board's decision was dispositive of all matters relating to the license. A similar inquiry may be made regarding the Appeal Board's jurisdiction. FOE's argument that the Licensing Board and the Appeal Board only dealt with that portion of the application relating to outside storage is not borne out by an examination of either the previously submitted contentions or the decisions thereon. FOE's contentions

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(Footnote Continued)

letter does not contain a docket or license number. The significance of this fact is not readily evident. FOE was included on the service list and it is clear from the letter's subject hearing and body that it applies to the Limerick SNM license.

19/ Limerick, supra, ALAB-765, 19 NRC \_\_\_\_ (slip op. at 6).

20/ See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 746, 754 (1980); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-117, 16 NRC 1955, 1956 (1982).



related not only to outside storage, but to all aspects of the requested license including, inter alia, the ability of the buildings in which the fuel would be stored to resist the overpressures and impacts of postulated off-site pipeline accidents, and the qualification of the indoor overhead cranes to handle nuclear fuel.<sup>21/</sup> Importantly, to the extent it did not do so, FOE could have addressed all aspects of fuel storage onsite and its preparation for use in the reactor inasmuch as the Applicant's plans for all activities relating to the fuel were discussed in its January 24, 1984 application.

While the Licensing Board and Appeal Board decisions naturally focused more upon the outdoor storage of fuel since that was the subject of the stay request, a fair reading indicates that those opinions were intended to be dispositive of the entire Part 70 matter.<sup>22/</sup> For example, the Licensing Board found, and the Appeal Board affirmed, that the indoor overhead crane which would be used to move the fuel was non-conforming only with respect to very heavy

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<sup>21/</sup> Application by Anthony/FOE, supra, note 4 (Contentions 1 and 3).

<sup>22/</sup> It could be argued that because a license amendment would have to be issued to authorize transfer of the fuel to the reactor building, 10 C.F.R. §2.717(b) would again give the Board jurisdiction after its issuance. However, this argument is specious inasmuch as the Board has already anticipated and considered the subject matter of the forthcoming amendment.

loads, i.e., 100,000 lbs. and greater, and not as to fuel shipping containers weighing only 1,900 lbs.<sup>23/</sup>

While FOE denies it now, its actions and words demonstrate that it, too, apparently believes that the NRC has disposed of the entire matter. Its request for relief from the Third Circuit included, inter alia, a stay similar to the one being sought from the Appeal Board, i.e., a prohibition on the movement of nuclear fuel into the reactor building.<sup>24/</sup> Thus, the Applicant submits that the Licensing Board (and thus the Appeal Board) lacked jurisdiction to consider the motions under review. While the Applicant believes that the Appeal Board does not have jurisdiction to consider these matters, it nonetheless addresses their merits should the Appeal Board decide otherwise.

B. Merits of the Case

Inasmuch as FOE is again clearly concerned with the health and safety effects it believes would result from an accident involving the new fuel, the matters which FOE attempted to raise in its June 18 and 19, 1984 pleadings could have been raised in its February 23 and 28, 1984 pleadings. The subject of health and safety effects, no

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<sup>23/</sup> Limerick, supra, LBP-84-16, 19 NRC \_\_\_\_ (slip op. at 19-23); Limerick, supra, ALAB-765, 19 NRC \_\_\_\_ (slip op. at 16).

<sup>24/</sup> Complaint and Motion to Expedite for Injunctive Action by July 2, 1984 by Robert L. Anthony (Appendix A at pg. 5).

matter how they are triggered, is precisely the issue the Licensing Board and the Appeal Board dealt with in their previous consideration of this matter. With respect to this issue, the Appeal Board found that:

[F]or criticality -- i.e., a stable chain reaction -- to occur, four factors must be present: (1) a sufficient supply of uranium fuel; (2) a "moderator" (usually a significant amount of water); (3) a proper geometric pattern of fuel rods within each fuel assembly, and of the fuel assemblies themselves, with the fuel/moderator ratio within certain limits; and (4) careful control of the heat produced by fission. We went on to explain how each of these factors must be controlled to maintain criticality or else the chain reaction will terminate. Even construing FOE's contentions in a manner most favorable to FOE, we can see no way that these conditions can be achieved . . . . (Citations omitted).

FOE's fears of radiation hazard from unirradiated, noncritical fuel also are generalized and thus without basis. Moreover, even assuming the complete absence of the protective containers for the fuel assemblies (through unexplained means), the ceramic uranium dioxide fuel pellets, at the enrichment level involved here, would emit radiation at levels well below the dose limits set by the Commission in 10 C.F.R. Part 20. 14/

14/ FOE is apparently concerned with the release of uranium oxide "dust." As noted, the fuel is in ceramic pellet form. Only if removed from the fuel rod cladding and deliberately ground or cut could the pellets be transformed into "dust." FOE does not provide a credible

scenario as to how this could occur.  
(Citations omitted).<sup>25/</sup>

FOE has pointed to no instrumentality or means which could render inapplicable the previous rulings on this matter. Having previously ruled on the validity of FOE's claims regarding the health and safety effects of new fuel, it would be extremely difficult if not impossible for FOE to raise new issues that would not suffer the same fate for the same reason. Certainly, FOE has not met its burden in this regard. Moreover, even if it could be argued that the Licensing Board has jurisdiction over FOE's filings, FOE did not file any contentions. While FOE stated in its June 18, 1984 pleading that it had determined 15 revisions and conditions that would form the basis of its new contentions, no contentions were ever submitted.<sup>26/</sup>

C. New Evidence

FOE also includes in its appeal "evidence" it asserts it would have presented had the Licensing Board allowed a hearing on its motions. If FOE had such "evidence" it should have presented it to the Licensing Board with an explanation of how it provided a basis for specific contentions. Instead, it was presented for the first time on

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<sup>25/</sup> Limerick, supra, ALAB-765, 19 NRC \_\_\_\_ (slip op. at 13-14).

<sup>26/</sup> R.L. Anthony/FOE Contentions, supra, note 15.

appeal and thus is improperly before the Appeal Board.<sup>27/</sup> Moreover, there is no showing as to how the alleged "evidence," which merely consists of a recitation of the dates and identification numbers of various NRC inspection reports concerning unspecified matters relating to, inter alia, the control rooms, diesels, secondary containment, and the suppression pool, would result in any health or safety impacts concerning the storage of spent fuel. These matters apparently relate to completion of the unit and have no demonstrated relationship to the fuel license.

The same is true of the category of items entitled "Hazards in Attachment 1." Here, FOE merely presents unspecified allegations based on information accompanying the June 7, 1984 letter. Again, these unsupported charges were not presented to the Licensing Board and must be disregarded by the Appeal Board. More importantly, this "evidence" clearly could have been proffered by FOE in its February 23 and 28, 1984 motions. For example, the January 24, 1984 application indicated the possible use of an auxiliary hoist or cherry picker for handling fuel.<sup>28/</sup>

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<sup>27/</sup> See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978); Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976).

<sup>28/</sup> Amended Application for Special Nuclear Material License for Limerick Generating Station Unit No. 1,  
(Footnote Continued)

D. Low Power License

FOE also asserts that the Applicant's motion for a low power license is contrary to 10 C.F.R. §50.57(c) and, therefore, void. This argument is based on motions FOE filed on May 18<sup>29/</sup> and 30, 1984,<sup>30/</sup> respectively, asserting that PECO is not prepared to safely move fuel into the plant, or to load fuel and conduct low power testing.

FOE's low power application motions are not yet ripe for appellate review inasmuch as the Licensing Board has not yet ruled on them. While FOE referenced and briefly summarized its motions opposing a low power license in its June 18 and 19, 1984 filings, the Board's June 19, 1984 ruling did not encompass the earlier motions, or the portions of the June 18 and 19, 1984 motions summarizing those arguments. Indeed, Mr. Anthony inquired at that time when he would have an answer on the low power license contentions and the Board specifically stated that it had not yet ruled

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(Footnote Continued)

January 24, 1984, Section 2.2.5.4 at pg. 21. A copy of this application was previously served on the Appeal Board.

29/ Motion by R.L. Anthony/FOE (In the Delaware Valley) in Opposition to Applicant's Motion for an Expedited Partial Initial Decision and Issuance of a Low Power License for Loading and Testing; and Submission of Contentions Based on New Matter.

30/ Supplement to R.L. Anthony/FOE Motion vs. Applicant's Motion for Partial Decision and Low Power License, and Submission of Contentions on New Matter, Dated 5/18/84.



upon them.<sup>31/</sup> Clearly, the Appeal Board may not act on FOE's appeal until the Licensing Board has ruled on its contentions in the first instance.<sup>32/</sup>

IV. Request for a Stay

FOE has also requested that the Appeal Board issue a stay prohibiting revisions to the Part 70 license, movement of new fuel into the reactor building and granting of a low power license. Initially, in responding to the stay request in the Third Circuit, the Commission has determined that FOE has not demonstrated the need for a stay in this matter,<sup>33/</sup> which decision is binding upon the Appeal Board and which determination the Third Circuit held to be correct.<sup>34/</sup> Even if this were not so, FOE has not met the criteria by which an application for a stay must be judged.

In determining whether to grant or deny an application for a stay, the Appeal Board is required, pursuant to 10 C.F.R. §2.788(e), to consider:

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<sup>31/</sup> Tr. 12063-64.

<sup>32/</sup> See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1, ALAB-635, 13 NRC 309, 310 (1981)); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2, CLI-76-1, 3 NRC 73, 74 (1976)).

<sup>33/</sup> See Respondent U.S. Nuclear Regulatory Commission's Opposition to Motion to Expedite for Injunction Action, a copy of which is attached as Appendix B.

<sup>34/</sup> See Mississippi Power & Light Company (Grand Guif Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, (Footnote Continued)



(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties, and

(4) Where the public interest lies.<sup>35/</sup>

As the moving party, FOE bears the burden of proving that it is entitled to a stay.<sup>36/</sup> FOE has merely restated these criteria as conclusions and has not met its burden as to any of the four governing criteria; accordingly, its application for a stay should be denied.

As to the first factor, FOE's showing as to the likelihood of success was so weak that the Licensing Board summarily denied its motions. To meet this standard, FOE must do more than merely establish possible grounds for appeal.<sup>37/</sup> FOE has not, however, demonstrated that the Licensing Board

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(Footnote Continued)

1732 n.9 (1982); Consolidated Edison Company of New York (Indian Point, Unit No. 2), LBP-83-5, 17 NRC 134, 145 (1983).

<sup>35/</sup> See generally Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Environmental Radiation Protection Standards for Nuclear Power Operations, CLI-81-4, 13 NRC 298, 301 (1981); United States Department of Energy Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1982).

<sup>36/</sup> Farley, supra, CLI-81-27, 14 NRC at 797; Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

<sup>37/</sup> Farley, supra, CLI-81-27, 14 NRC at 797.

erred in rejecting its motions, but has simply readvanced the arguments it presented below.

The Licensing Board and the Appeal Board's previous rejection of claims virtually identical to those embodied in the instant motions clearly establish that FOE cannot possibly muster the showing necessary to establish a likelihood of prevailing on the technical merits of its argument.<sup>38/</sup> There is simply no credible claim that unirradiated fuel can achieve criticality, nor is there any credible non-criticality accident involving the new fuel which could threaten the public health and safety. This question has previously been addressed and resolved; FOE has alleged nothing new which would warrant changing this conclusion.

As to the second factor, involving possible irreparable injury, FOE has similarly failed to make the necessary showing for the same reasons. The Licensing Board and Appeal Board both previously correctly found that none of the accidents postulated by FOE presented any credible threat to the public health and safety. Accordingly, FOE has made no showing whatsoever as to the possibility of

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<sup>38/</sup> See, e.g., Limerick, supra, LBP-84-16, 19 NRC \_\_\_\_ (slip op. at 17-20); Limerick, supra, ALAB-765, 19 NRC \_\_\_\_ (slip op. at 11-13).

irreparable harm, perhaps the most critical of the four criteria.<sup>39/</sup>

As to the third factor, the granting of a stay for any extended period could inflict serious harm upon the Applicant. As indicated in an affidavit filed with the Licensing Board on July 5, 1984, a copy of which is attached as Appendix C, the Applicant has scheduled fuel loading for September 15, 1984. Thus, any interruption of the removal of fuel into the reactor building creates a potential for delay of fuel loading, low-power testing and, ultimately, commercial operation of Limerick.

As to the last factor, the public interest favors prompt completion of the Limerick licensing proceedings, the issuance of operating licenses and commencement of operation as soon as possible in order to provide the electrical power which will be generated from Limerick. It is not in the public interest to delay the licensing of Limerick in order to explore what has previously been determined to be imaginary and incredible risks postulated by FOE.

#### V. Conclusion

For the reasons discussed more fully above, the issues presented in FOE's motions relating to the onsite storage of

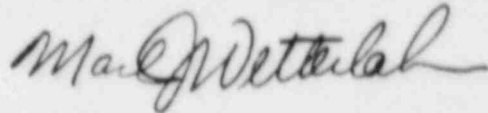
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<sup>39/</sup> See Environmental Radiation Protection Standards for Nuclear Power Operations, supra, CLI-81-4, 13 NRC at 301; Farley, supra, CLI-81-27, 14 NRC at 797; Clinch River, supra, ALAB-721, 17 NRC at 543.

unirradiated fuel have previously been considered and rejected. The Licensing Board and the Appeal Board, therefore, do not have jurisdiction over this matter. Even if they did have jurisdiction, FOE's appeal should be dismissed on the merits. The same is true with respect to FOE's low power license motions. FOE has also failed to carry its burden in establishing its entitlement to a stay.

Respectfully submitted,

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July 20, 1984

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Response to FOE's Appeal of the Licensing Board's Denial of its June 18 and 19, 1984 Motions," dated July 20, 1984 in the captioned matter, have been served upon the following by deposit in the United States mail this 20th day of July, 1984:

- |   |  |
|---|--|
| * Christine N. Kohl, Esq.<br>Chairman Atomic Safety and<br>Licensing<br>Appeal Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555 | Dr. Richard F. Cole<br>Atomic Safety and Licensing<br>Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555 |
| * Gary J. Edles<br>Atomic Safety and Licensing<br>Appeal Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                       | Dr. Peter A. Morris<br>Atomic Safety and Licensing<br>Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555 |
| * Dr. Reginald L. Gotchy<br>Atomic Safety and Licensing<br>Appeal Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555              | Atomic Safety and Licensing<br>Appeal Panel<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                 |
| Judge Lawrence Brenner, Esq.<br>Atomic Safety and Licensing<br>Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                 | Docketing and Service Section<br>Office of the Secretary<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555    |
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Atomic Safety and Licensing  
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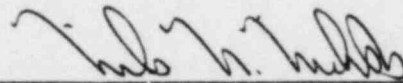
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Nils N. Nichols



JUL 16 1984

July 2, 1984

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-3409

ROBERT L. ANTHONY, Individually (pro se) and for FRIENDS OF THE EARTH  
IN THE DELAWARE VALLEY

vs.

PHILADELPHIA ELECTRIC COMPANY and UNITED STATES NUCLEAR REGULATORY COMMISSION

ROBERT L. ANTHONY, Petitioner

Present: HIGGINBOTHAM, BECKER and VAN DUSEN, Circuit Judges

Submitted is Robert Anthony et al's "Complaint  
and Motion to Expedite For Injunctive Action  
by July 2, 1984"

in the above-captioned case.

Respectfully,

*Sally Mervos 1014*

Clerk

SM/DFM/mk  
enc.

Upon consideration of the complaint and Motion to expedite for  
injunctive action by July 2, 1984 and opposition thereto, the foregoing  
motion is denied.

By the Court,

*Alan H. ...*  
Judge

Dated: July 12, 1984  
vy/cc R.L.A.  
(M.J.W.)  
(T.B.C., Jr.)  
A.L.R.

RECEIVED  
JUN 28 1984  
U.S.C.A. 3RD. CIR.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

ROBERT L. ANTHONY, Individually : CIVIL ACTION  
(pro se) and for FRIENDS OF THE :  
EARTH IN THE DELAWARE VALLEY :  
vs. :  
PHILADELPHIA ELECTRIC COMPANY and :  
UNITED STATES NUCLEAR REGULATORY :  
COMMISSION : NO.

COMPLAINT and Motion to Expedite for  
Injunctive action by July 2, 1984

I. JURISDICTION

1. This Complaint is filed in response to the final order of the U.S. Nuclear Regulatory Commission (NRC), dated June 15, 1984, citing the expiration of a review period and the declining of the commission to review Anthony/F.O.E. appeal of April 5, 1984. The NCR Appeal Board's decision of March 30, 1984, thereby "becomes final agency action on June 8, 1984". (Copy of NRC June 15, 1984 Memorandum enclosed as Exhibit A).

2. Since this action by NRC concludes all available remedies under NRC regulations, we now appeal to the U.S. <sup>3RD CIRCUIT</sup> District Court for relief. The Court's jurisdiction is based on 42 U.S.C. 1983, 1985; 28 U.S.C. 1331, 1343, and Administrative Procedure Act 5 U.S.C. 551 et seq. and 701 et seq.

PHILA. ELEC. CO + NUC. REG. COMMISS  
SERVED BY MAIL JUNE 28, 1984  
Robert L. Anthony

## II. PARTIES

3. Petitioner Robert L. Anthony, pro se, is a citizen of the United States and currently resides at 103 Vernon Lane, P.O. Box 186, Moylan, Pennsylvania 19065.

4. Petitioner Friends of the Earth in the Delaware Valley address is P.O. Box 186, Moylan, Pennsylvania 19065.

5. Defendant Philadelphia Electric Company's address is 2301 Market Street, Philadelphia, Pennsylvania 19101.

6. Defendant U.S. Nuclear Regulatory Commission's address is Washington, D.C. 20555.

## III. FACTS

7. In September 1981, Robert L. Anthony, the Petitioner, became an intervenor in the operating license proceedings before the Nuclear Regulatory Commission (NRC) for Philadelphia Electric Company's (PECO) Limerick nuclear generating station, pursuant to (10 CFR.2.714.) He applied to represent himself, his wife, and sixteen residents of Chester and Montgomery Counties living in the vicinity of the plant, and on behalf of the members of Friends of the Earth in the Delaware Valley (FOE).

8. Subsequently, NRC rejected more than thirty contentions the Petitioner submitted in defense of citizens' health and safety. Two, however, actually came to evidentiary hearing in late 1983 and early 1984. They are now awaiting NRC Board decisions. A third on evacuation plans in a Limerick nuclear

emergency is not yet scheduled. None of these pending contentions deal with this matter, i.e. nuclear fuel license (10 C.F.R., 70).

9. The Petitioner moved in February this year, when he learned of PECO's application to move uranium fuel to the plant site, the acceptance and hearing of new contentions on the danger to his health and safety from the transporting of this fuel, and storage outdoors. NRC denied these motions and subsequent appeals (see Exhibit A). This is the subject of the present Complaint. The Petitioner claimed that the NRC failed to enforce its regulations for licensing and safe handling of nuclear fuel, accepted plant use despite completion date of 1985, faulty cranes, lack of trained operators and health personnel, and disregarded risks from possible accidents and explosions from nearby pipelines and railroad, among other threats to the plant's safe operation.

10. By denying the Petitioner a hearing and a stay of nuclear fuel shipping and outdoor storage, NRC short-cut its own regulations, confirmed a bias toward PECO, and forced on the Petitioner the risk of a possible nuclear accident and radioactive releases to his environment. It also set the stage for successive threats to his health, welfare and property, resulting from the nuclear fuel loading and operation of the reactor, thus denying the Petitioner's due process and other constitutional rights.

11. Presently PECO is applying to NRC to transfer the fuel inside the building in July and to start operating the nuclear

reactor in August, 1984. In a NRC hearing, the Petitioner would have presented evidence that the plant and personnel are not adequate or prepared to safely handle nuclear fuel; fuel should not have been authorized for the site; and the Court should issue an immediate injunction to stop transfer of fuel into the reactor building. The petition claims collusion between PECO and NRC, an agency set up to protect the public interest, and seeks relief from the Court against the threat to his health and well-being posed by nuclear fuel at the Limerick nuclear plant. As evidence of such collusion, Petitioner relies on Exhibit B (attached), a letter from applicant to the agency asking them to comply with their request by July 2, 1984.

#### IV. LEGAL CLAIMS

12. The Petitioner claims that his rights and those of the citizens he represents, under the Fifth and Ninth Amendments are being violated by PECO and the NRC. The protection of his health and welfare and property under Due Process of Law has been violated and is further jeopardized by PECO and NRC. His rights under law for (1) Notice; (2) Opportunity to be Heard; (3) Fair and Impartial Tribunal; and (4) Reasoned Decision have been compromised or rejected.



V. RELIEF

13. The Petitioner respectfully requests from the Court the following relief for himself and those he represents.

(a) An immediate Injunction, i.e. a prohibition against PECO moving nuclear fuel into the reactor building, scheduled for July 9, 1984, and an Order to remove the improperly authorized nuclear fuel from the site, and restrain the NRC from issuance of pending amendment to fuel license;

(b) A Declaratory Judgment on the threat to the Petitioner's health, safety and property, under the circumstances of PECO's lack of readiness to handle nuclear fuel;

(c) Compensatory damages;

(d) Punative damages;

(e) Attorney's fees;

(f) Any other relief the Court deems just.

Respectfully submitted,

*Robert L. Anthony*

ROBERT L. ANTHONY  
FRIENDS OF THE EARTH  
Pro Se

Sworn to and Suscribed

before me this 28<sup>th</sup> day  
of April, 1984.

*Patricia G. Meyers*  
NOTARY PUBLIC

PATRICIA G. MEYERS  
NOTARY PUBLIC OF MONTGOMERY COUNTY  
COMMISSION EXPIRES JAN 11 1986



OFFICE OF THE SECRETARY

UNITED STATES NUCLEAR REGULATORY COMMISSION WASHINGTON, D.C. 20555

DOCKETED UNRUC

JUN 15 1984

'84 JUN 18 A8:16

Docket No. 50-352 OL 50-353 OL

REC'D CIVIL RIGHTS BRANCH

SERVED JUN 18 1984

MEMORANDUM FOR: Board and Parties in the Limerick Proceeding

SUBJECT: ALAB-765

This is to inform you that the time provided by NRC regulations within which the Commission may act to review the Appeal Board decision (ALAB-765) in this docket has expired. The Commission has declined any review. Accordingly, the decision became final agency action on June 8, 1984.



Handwritten signature of Samuel J. Chilk

Samuel J. Chilk Secretary of the Commission



PHILADELPHIA ELECTRIC COMPANY

2301 MARKET STREET

P.O. BOX 8699

PHILADELPHIA, PA. 19101

(215) 841-4502

JOHN S. KEMPLEH  
VICE PRESIDENT  
ENGINEERING AND RESEARCH

Mr. R. G. Page, Chief  
Uranium Fuel Licensing Branch  
Division of Fuel Cycle and  
Material Safety, NMESS  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

JUN 7 1984

Subject: Limerick Generating Station, Unit No. 1  
Special Nuclear Material License Application

Reference: Letter, B. L. Serini (NRC) to S. F. Payton (PE)  
dated April 25, 1984.

File: GOVT 1-1 (NRC)

Dear Mr. Page:

In reference letter, Mr. Serini of your staff requested additional information regarding our Special Nuclear Material (SNM) license application. We have reviewed this letter and have included the requested additional information to our SNM license application.

Attachment 1 to this letter includes the pages to our application that have been revised as a result of the additional information requested. All revisions to the text on each page are indicated by a vertical line in the right hand margin of the page. Attachment 2 includes copies of the applicable parts of the Limerick FSAR referenced in the revised sections of the license application.

In preparation for movement of new fuel to the fuel floor we have need to acquire additional calibration sources containing special nuclear material and source material. A replacement page to our application (included in attachment 1) contains the information regarding these sources.

EXHIBIT "B"

Our current construction schedule calls for fuel to be moved from the outdoor new fuel storage area to the refueling floor on July 9, 1984. To support this date we request that the remaining portion of the license authorizing the movement of fuel to the refueling floor for inspection and storage in the fuel pool be issued by July 2, 1984.

If you should have any questions or need clarification of any of this information please contact S. F. Payton (215-841-6384). Thank you for your cooperation.

Sincerely,

*JW Kallaghan*  
*for*  
*JS Kenyon*

SFP/gra/053084145

Attachments

cc: See Attached Service List

'JUL - 9 1984

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

ROBERT L. ANTHONY, Individually  
(pro se) and for FRIENDS OF THE  
EARTH IN THE DELAWARE VALLEY,

Petitioners,

v.

PHILADELPHIA ELECTRIC COMPANY  
and UNITED STATES NUCLEAR  
REGULATORY COMMISSION,

Respondents.

Civil Action  
No. 84-3409

RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION'S  
OPPOSITION TO MOTION TO EXPEDITE FOR INJUNCTION ACTION

Petitioners, Robert L. Anthony and Friends of the Earth in the Delaware Valley ("Petitioners") have moved this Court for an Order requiring the removal of nuclear fuel from the Limerick Generating Station site and for an injunction prohibiting Philadelphia Electric Company ("PECo"), the owner of Limerick, from moving the fuel into the reactor building and prohibiting the United States Nuclear Regulatory Commission ("NRC" or "Commission") from issuing the license amendment authorizing the movement of the fuel. Respondent U.S. Nuclear Regulatory Commission opposes preliminary relief on the grounds that Petitioners have not demonstrated a reasonable probability of success on the merits, or shown any irreparable injury resulting from the

presence of the fuel on-site either outdoors or, if the amendment issues, stored in the reactor building and because the stay would be contrary to the public interest. Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975); Hotel and Restaurant Employees and Bartenders Int. Union 54 v. Danziger, 709 F.2d 815 (3d Cir. 1983).

#### STATEMENT OF THE CASE

This case involves the Commission's decision to issue a license amendment authorizing PECO to receive and store unirradiated nuclear fuel on the site of the Limerick nuclear plant, which is approaching readiness to receive an operating license. PECO had filed an application for the amendment and made subsequent revisions of the application. Pursuant to an order by the NRC Atomic Safety and Licensing Board ("Licensing Board"), the application was served on all parties to the Limerick operating license proceeding, including Petitioners, on February 21, 1984. Following notification of the application, Petitioners raised contentions with the Licensing Board. The Licensing Board ordered the parties to submit affidavits addressing the allegations raised in these contentions. Based on these affidavits\* and the Licensing Board's expertise, the Licensing Board denied the contention for lack of basis and specificity. More specifically, the Licensing Board found

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\*See Appendices 2 and 3.

that there was no credible way for the unirradiated fuel to reach criticality accidentally or to cause injury to the public by accidental exposure to radiation.

Petitioners appealed the decision to the NRC Atomic Safety and Licensing Appeal Panel, which empanelled an Appeal Board. The Appeal Board stayed the issuance of the license amendment until it could review the decision. On March 30, 1984 the Appeal Board affirmed the dismissal of the contentions and lifted the stay. The license amendment was issued on April 3, 1984.

On April 6 Petitioners petitioned the Commission for an immediate stay of the amendment. The Commission denied the petition for an immediate stay on April 30, 1984.

On June 8, 1984 the Commission's time to review the Appeal Board's decision expired. Accordingly, the Appeal Board's decision became the final NRC action on the amendment. The fuel is currently on-site in five-sided metal boxes.

This case also concerns PECO's application for a further license amendment to permit it to move the fuel inside the reactor building for inspection and storage in the fuel pool. PECO sent Petitioners' notice of this application on June 11, 1984., On June 18 and 19, 1984 Petitioners submitted contentions to the Licensing Board concerning the application. The Licensing Board summarily denied these contentions. Petitioners have not appealed this decision to the Appeal Board.

The application was submitted to the Uranium Fuel Licensing Branch, Division of Fuel Cycle and Material Safety of the Nuclear Materials Safety and Safeguards (NMSS). Before NMSS will approve an application, the NRC Regional office in the area must inspect the facility to determine whether all NRC regulations have been complied with. These regulations require, inter alia, adequate training of employees, security and facilities to handle and store the fuel without undue risk to the employees or public. When the utility informs the NRC that the facility and staff are ready to move the fuel inside, the regional office will inspect them. The regional office will then prepare an inspection report which will be evaluated by NMSS. If no deficiencies are found and the application is complete, the amendment will be issued. The NRC review process takes a minimum of seven days.

PECo has recently informed NRC Region I that it will not be prepared for inspection until July 16, 1984. Therefore, the license amendment cannot be issued until July 23, 1984.



## ARGUMENT

### I. There Is No Need For Expedited Action

Petitioners have requested this Court to act by July 2, 1984. This request is based on the allegation that PECO could begin to move fuel into the reactor building by July 9, 1984. However, PECO will not even be ready to be inspected until July 16, 1984 and the NRC will not issue a license before July 23, 1984. Affidavit of Norman Ketzlach, Appendix 1. Therefore, there is no need for expedited action.

### II. Petitioners Have Not Demonstrated The Need For Injunctive Action

To justify their request for preliminary relief Petitioners must show (1) a reasonable probability of eventual success in the litigation and (2) that they will be irreparably injured pendente lite if relief is not granted. Oburn v. Shapp, 521 F.2d at 147. The Court should also consider "(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." Id.

Petitioners have not made the requisite showing on factors 1 and 2 and have not addressed factors 3 and 4.

1. Petitioners Have Not Demonstrated A Reasonable Possibility Of Success In The Litigation

Petitioners allege that the NRC has not provided adequate notice, opportunity to be heard, fair and impartial tribunal or reasoned decision. Complaint p. 4. Petitioners have not, however, alleged any inadequacies in any of these areas. Petitioners have therefore failed to show a reasonable probability of success in the litigation. Moreover, as shown in the NRC Statement of the Case, Petitioners received actual notice and full opportunity to present contentions and explain them at an oral hearing and in affidavits. The Licensing Board's denial of Petitioners' contentions was thoroughly explained in its lengthy written decision and further explained in the Appeal Board's affirmation and the Commission's denial of the petition for a stay of the license amendment. There is, therefore, no basis for Petitioners' allegations.

2. Petitioners Have Not Demonstrated That They Will Be Irreparably Injured

Petitioners have also failed to show they will be irreparably injured pendente lite if relief is not granted. Petitioners have merely alleged a risk of a possible nuclear accident and radioactive release to the environment. This allegation is addressed to the license amendment permitting only outdoor storage storage. Petitioners have not explained their basis for this alleged risk. As such, the allegation is insufficient to show irreparable injury.

Moreover, the Commission has addressed this allegation on several occasions. The Court should defer to the agency's expertise in this determination.

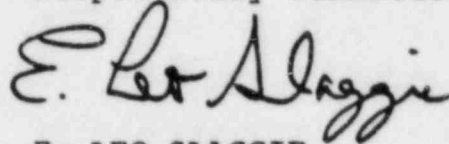
3. Factors 3 And 4 Favor The NRC

Petitioners have not addressed the last two factors but they also favor the NRC. Removal of the fuel from the site and its subsequent return is a very lengthy process. It took more than a month to bring the fuel on-site. PECO is attempting to get permission to load fuel and do low-power testing in September. This would not be possible if removal of the fuel was ordered. This delay would injure PECO and probably the ratepayers as well. Finally, the public interest lies in maintaining an orderly licensing process. Therefore, Petitioners have failed to meet their burden on all factors.

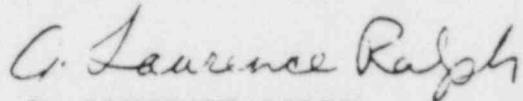
CONCLUSION

For the foregoing reasons, the Nuclear Regulatory Commission submits that the Motion for Injunctive Action should be denied. If the Court determines that the reasons set forth are insufficient, the Commission requests leave to file a more complete brief since we only had one day to respond.

Respectfully submitted,



E. LEO SLAGGIE  
Acting Solicitor



A. LAURENCE RALPH  
Attorney  
Office of the General Counsel  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

July 5, 1984

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

AFFIDAVIT OF VINCENT S. BOYER  
SENIOR VICE PRESIDENT, NUCLEAR POWER  
PHILADELPHIA ELECTRIC COMPANY

Vincent S. Boyer being first duly sworn according to law deposes and states:

1. My name is Vincent S. Boyer. I am Senior Vice President, Nuclear Power, of Philadelphia Electric Company. In this position I have overall responsibility for the nuclear power activities of the Company including Limerick Generating Station.

2. The purpose of this affidavit is to provide the Atomic Safety and Licensing Board with the Applicant's estimated date for fuel load of Limerick Unit 1 as requested by the Board on June 20, 1984. (Tr. 12,285)

3. Applicant currently estimates that the fuel loading date for Limerick Unit 1 will be on or about September 15, 1984.

4. Applicant's estimated fuel loading date is based upon the current completion status of plant construction, testing and startup activities, as

determined at monthly Project Review Meetings, weekly Integrated Schedule Review Meetings, and weekly Project Startup Test Results Review Meetings.

*V. S. Boyer*

Senior Vice President

Subscribed and sworn to  
before me this *29<sup>th</sup>* day  
of *June* 1984.

*Patricia D. Scholle*  
Notary Public

PATRICIA D. SCHOLLE  
Notary Public, Philadelphia, Philadelphia Co.  
My Commission Expires February 10, 1986