

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

November 5, 1984
(ALAB-789)

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

Docket Nos. 50-352 OL
50-353 OL

Robert L. Anthony, Moylan, Pennsylvania, for intervenor
Friends of the Earth.

Robert J. Sugarman, Philadelphia, Pennsylvania, for
intervenor Del-Aware Unlimited, Inc.

Troy B. Conner, Jr., Mark J. Wetterhahn, and Robert
M. Rader, Washington, D.C., for applicant
Philadelphia Electric Company.

Benjamin H. Vogler and Ann P. Hodgson for the
Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

In its second partial initial decision in this operating license proceeding, the Licensing Board authorized the issuance of a low-power license to applicant Philadelphia Electric Company (PECo). LBP-84-31, 20 NRC ___ (Aug. 29, 1984).¹ In two subsequent orders, the Board

¹ A low-power license permits fuel loading and low-power testing up to five percent of rated power.

declined to stay, and reaffirmed as well, the effectiveness of its low-power license authorization. Licensing Board Order of September 7, 1984 (unpublished); Licensing Board Memorandum and Order of October 15, 1984 (unpublished). In filings dated October 23 and 25, 1984, intervenors Friends of the Earth (FOE) and Del-Aware Unlimited, Inc., have asked us to stay, respectively, LBP-84-31 and the Board's October 15 order.² Although their precise requests differ, FOE and Del-Aware both seek the same ultimate relief -- a stay of the issuance of a low-power license to PECO. Applicant and the NRC staff oppose intervenors' requests.

On October 26, however -- unbeknown to us and before we had received either stay request -- the NRC's Director of Nuclear Reactor Regulation (NRR) issued a low-power license to PECO.³ Thus, in an order issued October 29, 1984, we indicated that we would treat the two stay requests as motions to suspend the underlying authorization for the license, and we expedited the time for filing replies. We also noted that the criteria applicable to deciding stay requests would apply.

² FOE has also appealed LBP-84-31 and a related order, and Del-Aware has appealed the Board's October 15 order.

³ We do not suggest that the Director acted improperly in issuing the license.

As explained below, both FOE and Del-Aware have failed to satisfy their burden of demonstrating that PECO's low-power license should be suspended. Accordingly, we deny the motions.

1. In ruling on a stay request, we are required by the Commission's Rules of Practice to consider the same four factors traditionally applied by the courts in deciding similar motions:

- (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.

10 C.F.R. § 2.788(e). Further, in several decisions, we have noted that the second factor, irreparable harm, is often the most important in determining the need for a stay. United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543-44 (1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977).

FOE has attempted, albeit briefly, to satisfy these criteria. It argues that (1) the reactor building is not able to withstand overpressures from postulated external explosions; (2) fuel was brought into the plant in violation of NRC regulations, the Atomic Energy Act, and the National Environmental Policy Act; and (3) once Limerick begins to

operate, an inexorable process will start, which will threaten safety, increase electric rates, impair the region's economy, and force FOE's representative (Robert L. Anthony) to move from the area. FOE acknowledges that a stay will delay testing at Limerick, but contends that the safety and economic concerns it has raised must take precedence.

FOE provides no citations to the record or substantive argument in support of its view that the reactor building is not able to withstand overpressures from external explosions. The Licensing Board addressed this matter at length during the hearing and in LBP-84-31 and a subsequent order denying FOE's motion to reopen on this issue. See LBP-84-31, supra, 20 NRC at ___ (slip opinion at 24-76D); Licensing Board Order of October 5, 1984 (unpublished). We have reviewed the Board's decision in this regard and, although we express no view on the merits of FOE's appeal, see no cause to suspend the low-power license on this basis.

As for the assertedly unlawful delivery and transfer of the fuel into the plant, we ourselves have discussed this matter at length on two earlier occasions. See ALAB-765, 19 NRC 645 (1984); ALAB-778, 20 NRC 42 (1984). FOE gives us no basis on which we could alter our earlier judgment that the fuel was moved properly and does not present a safety risk. As FOE has pointed out, this matter (specifically, review of ALAB-765) is pending before the U.S. Court of Appeals for

the Third Circuit. Anthony v. Philadelphia Electric Co., No. 84-3409 (3d Cir. filed June 28, 1984). The court, however, denied Mr. Anthony's request for a stay on July 12, 1984.

FOE is mistaken in its belief that issuance of a low-power license begins an "inexorable" process that threatens the public safety. In the first place, a full-power license will not and cannot be issued to any utility until it has demonstrated that the plant in question can be operated safely and in accordance with myriad regulatory requirements.⁴ Further, if a safety problem is revealed at any time during low-power operation or as a result of the merits review of the parties' appeals, the low-power license can be suspended. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30, 14 NRC 950 (1981). With respect to the economic concerns noted by FOE in this connection, they are not within the proper scope of issues litigated in NRC proceedings. The Commission has just recently reaffirmed its long-held view that a nuclear plant's possible effect on rates, the utility's solvency, and the like is best raised before state economic regulatory agencies. Public Service

⁴ The Licensing Board has not yet completed the hearing on issues that must be resolved before a full-power license can be issued.

Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984). And, finally, an individual's decision to move away from the vicinity of a nuclear plant is necessarily a personal one.

FOE has therefore failed to show that it is likely to prevail on the merits of its appeal and that it will be irreparably harmed unless the low-power license is lifted. Nor has it shown that such action is within the public interest.

Even if FOE had succeeded in its burden, however, its October 23 request is untimely under the Commission's rules and could be denied on that ground as well. FOE has requested a stay of LBP-84-31, which was issued August 29. Under 10 C.F.R. §§ 2.788(a) and 2.710, FOE was obliged to seek a stay within 15 days of the service date of that decision -- i.e., by September 13. FOE's motion to reopen, then pending before the Licensing Board, did not stay the effectiveness of the Board's unequivocal low-power license authorization embodied in LBP-84-31. Further, FOE was so advised of this in the Licensing Board's Order of September 7, supra. The delayed filing of FOE's appeal, pursuant to our permission, also did not stay the effect of LBP-84-31 or extend the time for seeking such a stay. See Appeal Board Order of September 28, 1984 (unpublished).

2. In ALAB-785, 20 NRC ___ (Sept. 26, 1984), we affirmed most of the Licensing Board's earlier partial

initial decision and related orders concerning the supplementary cooling water system (SCWS) for Limerick. We remanded, in part, however, in order to give Del-Aware the opportunity to reformulate and to resubmit two of its SCWS contentions that the Board had excluded from consideration. Id. at __, __, __ (slip opinion at 26-33, 42-45, 64-65). Following the issuance of ALAB-785, PECO asked the Licensing Board to confirm that, despite the partial remand of SCWS issues, the low-power license authorized in LBP-84-31 could nonetheless be issued. After obtaining the parties' comments on this matter, the Licensing Board agreed with PECO and reaffirmed the effectiveness of the license authorization made in LBP-84-31. Licensing Board Order of October 15, supra. It is that ruling that Del-Aware asks us to stay.

Del-Aware makes no effort to address the four factors in 10 C.F.R. § 2.788(e) pertinent to our decision. It asserts generally and without citation to the record that operation of the Limerick facility "may" be dependent on operation of the supplementary cooling water system. It claims further that supplemental cooling water is necessary for the safe shutdown of the plant in the event that a tornado were to destroy the cooling tower. In conclusion, Del-Aware simply states that "[a] stay is necessary and appropriate because of the environmental and safety implications of the low power testing without the

supplemental cooling water system, as set forth in Intervenor's Answer to Applicant's Motion (dated October 10, 1984)."⁵

The Licensing Board earlier explained to Del-Aware that the SCWS is not needed even for full-power operation during certain times of the year (e.g., the fall through spring months) and that it is not needed at all for safe shutdown of the plant. A fortiori, the SCWS is not necessary for low-power operation. See Licensing Board Memorandum and Order of August 24, 1984 (unpublished), at 23-25. See also LBP-84-31, supra, 20 NRC at ___ (slip opinion at 74); Letter from V.S. Boyer to A. Schwencer (Oct. 19, 1984), attached to Applicant's Opposition to Motions for Stay (Nov. 2, 1984). Having wholly failed to show any error in the Board's reasoning, Del-Aware has not persuaded us that a suspension

⁵ The other pleading to which Del-Aware refers, without even any particular page citations, is as generalized in its arguments as is the motion before us here.

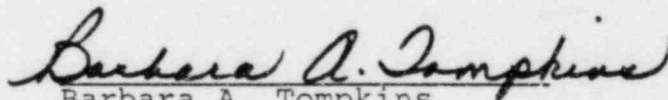
PECo argues that Del-Aware lacks standing to make the arguments put forth in its petition for stay and that we lack jurisdiction to rule on them. We need not decide either question, inasmuch as we find no basis to grant Del-Aware's stay request. PECO remains free to raise these issues again in response to Del-Aware's brief on appeal. We note, however, our preliminary view that Del-Aware's arguments -- though vague and generalized -- thus far clearly relate to the SCWS that it challenged below, we addressed in ALAB-785, and the Licensing Board considered again in its appealable October 15 order in response to PECO's own motion.

of the low-power license is warranted. Del-Aware's motion is therefore denied. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270-71 (1978).

FOE's motion for a stay of LBP-84-31 and Del-Aware's petition for a stay of the Licensing Board's October 15, 1984, order, treated as requests to suspend the underlying low-power license authorization, are denied.

It is so ORDERED.

FOR THE APPEAL BOARD


Barbara A. Tompkins
Secretary to the
Appeal Board