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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED
NRC

'84 NOV -6 P3:29

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

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Docket Nos. 50-352 *JK*
50-353 *JK*

NRC STAFF RESPONSE IN OPPOSITION TO ANTHONY/
FRIENDS OF THE EARTH'S AND
DEL-AWARE UNLIMITED, INC.'S REQUEST FOR A STAY

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November 2, 1984

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I. INTRODUCTION

On October 23, 1984, Intervenor Anthony/Friends of the Earth (FOE) requested the Appeal Board to stay the Licensing Board's Second Partial Initial Decision ^{1/} authorizing the issuance of a low-power license for Limerick. On October 25, 1984, Intervenor Del-Aware Unlimited, Inc. requested the Appeal Board to stay a Licensing Board Memorandum and Order of October 15, 1984, confirming the low-power authorization granted by the Licensing Board in its Second Partial Initial Decision.

On October 29, 1984, the Atomic Safety and Licensing Appeal Board issued an Order concerning the stay requests and, among other things, directed that the Staff reply to both stay requests in a single document to be filed by November 2, 1984 treating both requests as motions to suspend the underlying authorization for the low-power license and to

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) LBP-84-31, 20 NRC ___ (August 29, 1984).

apply the criteria in 10 C.F.R. § 2.788(e). For the reasons discussed below, the Staff opposes both FOE's and Del-Aware's requests.

II. BACKGROUND

FOE

On or about September 1, 1984 ^{2/} FOE filed a motion to set aside the Licensing Board's August 29, 1984 Second Partial Initial Decision (LBP-84-31) and to reopen the record on its Contention V-3a and V-3b. ^{3/} The motion was based upon Staff Board Notification BN-84-142 which concerned an allegation regarding the effect of blast overpressures on a Limerick reactor enclosure vent stack. Although FOE did not mention or request a stay, the Licensing Board reviewed the pleading to determine whether a stay of its decision was merited, since it believed FOE may have intended to apply for a stay, and concluded that FOE presented no basis to support such a request and declined to stay LBP-84-31. ^{4/} On October 5, 1984, the Licensing Board, after reviewing the submissions of the Applicant and Staff in response to FOE's motion to set aside and reopen the record, denied FOE's request. ^{5/} FOE's instant appeal

^{2/} Although the FOE motion was dated September 1, 1984 it was post-marked September 3, 1984 and was not received by the Staff until September 7, 1984.

^{3/} These contentions dealt with natural gas and petroleum pipe line accidents and the resulting blast overpressures on the nearby Limerick Generating Station structures.

^{4/} Order, Philadelphia Electric Company, (Limerick Generating Units 1 and 2). September 7, 1984.

^{5/} Order, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) October 5, 1984.

requesting, inter alia, a stay of LBP-84-31 was filed on October 23, 1984.

Del-Aware

Del-Aware was a participant in the hearings concerning the Supplementary Cooling Water System (SCWS) issues which were considered in the First Partial Initial Decision ^{6/} and also proposed contentions in response to the Applicant's motion for low power authorization. Del-Aware's low-power contentions were rejected and Del-Aware did not thereafter participate with respect to the issues considered in the Second Partial Initial Decision. It was in the Second Partial Initial Decision that the Licensing Board determined to authorize the Director of Nuclear Reactor Regulation to issue a low power license. ^{7/} Del-Aware made no effort to file a timely request for a stay of the Second Partial Initial Decision. It was not until after the Appeal Board in ALAB-785 determined to remand two issues for consideration by the Licensing Board and the subsequent Licensing Board Memorandum and Order dated October 15, 1984, holding that the two remanded issues did not alter its authorization to issue a low power license that Del-Aware filed its request for a stay.

^{6/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) LBP-83-11, 17 NRC 413 (1983).

^{7/} LBP-84-31, at 264.

III. DISCUSSION

A. FOE

At the outset, Staff notes that FOE's request for a stay of LPB-84-31 was not filed in a timely manner. ^{8/} In this case the Licensing Board denied FOE's implicit stay request on September 7, 1984 (See fn. 4 supra) and FOE failed to pursue the matter until its present request of October 23, 1984. FOE has not offered an explanation for this delay. However, the Staff has considered FOE's motion in light of the applicable regulations (10 C.F.R. § 2.788) and concludes that FOE's request has failed to satisfy the relevant criteria and should be denied.

Motion for Stay

Under the provisions of 10 C.F.R. 2.788(h) any party may file an application for stay of a decision denying or granting a stay in accordance with the procedures of 10 C.F.R. § 2.788(a)-(e). ^{9/} The burden of persuasion rests with the party seeking the stay. ^{10/} No one of the four factors to be considered in ruling upon a stay application is necessarily dispositive; rather the granting or denial of a stay application turns on

^{8/} 10 C.F.R. § 2.788 provides that stay requests must be filed within ten days after service of a decision.

^{9/} The four factors to be considered under § 2.788(e) are:

1. whether the movant 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 will harm the other parties; and
4. where the public interest lies.

^{10/} Public Service Company of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

a balancing of the four factors. ^{11/} The Commission has held that the weightiest of the § 2.788(e) factors is whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted. ^{12/} Although, FOE only briefly addresses the 10 C.F.R. § 2.788(e) factors in its filing, the Staff will examine each of FOE's allegations in support of its motion in light of the four standards found in § 2.788(e).

1. Likelihood of Prevailing on the Merits

With respect to the first criterion, the likelihood of prevailing on the merits, FOE alleges:

1. The reactor building is not able to withstand overpressures from postulated external explosions. The nuclear fuel was not brought to the plant in accordance with NRC regulations, and AEA and NEPA. A decision on this is pending in the U.S. Third Circuit Court (our appeal #84-3409). FCE Appeal from LBP-84-31 and Licensing Board's denial of FOE September 1, 1984 Motion to Set Aside and Reopen and Petition for a Stay. October 28, 1984.

The effect of blast overpressures on the Limerick reactor building was considered in connection with FOE's Contentions V-3a and V-3b. These contentions were thoroughly reviewed by the Licensing Board and resulted in a decision which found that FOE's position lacked merit. ^{13/} In view of the Licensing Board's careful analysis of the merits of these contentions, it is incumbent upon FOE to specifically set forth why it believes

^{11/} Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14-15 (1976).

^{12/} Westinghouse Electric Corporation (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980).

^{13/} See, LBP-84-31 at 24-76D.

that is likely to prevail upon the merits. However, in its request for a stay FOE has merely reasserted positions which have previously been considered and rejected. Therefore, FOE has not shown that it meets this standard for a stay.

FOE's second allegation, that the nuclear fuel was not brought to the Limerick plant in accordance with applicable regulations, is simply incorrect. FOE has pursued the issue of the Philadelphia Electric Company's request for a Part 70 authorization to store fuel at the Limerick site since at least February 23, 1984, and its requests for relief and stays have repeatedly been denied. ^{14/} FOE has failed to raise any new issues which would support its previously rejected position. Accordingly, FOE has not presented any likelihood of prevailing on the merits.

2. Whether the Party will be irreparably injured unless a stay is granted

This factor is the most important of the four stay criteria. (See Westinghouse Electric Corporation, supra). FOE argues that without a stay its members will be subject to the risk of the operation of the Limerick reactor; that such operation poses a threat to the regional economy and that intervenor Anthony will be forced to leave the area. However, FOE provides no basis in support of any of these assertions. All we have are the bare allegations, which are inadequate to establish

^{14/} See, e.g. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645 (March 30, 1984); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC ____ (July 23, 1984); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Commission Order (unpublished) October 5, 1984.

the necessary irreparable harm. Without more, it is evident that FOE has failed to satisfy the irreparable injury requirement.

3. Whether the granting of the stay would harm other parties

With respect to harm to other parties, FOE acknowledges that a suspension will delay Applicant's testing, but alleges that the suspension will benefit the Applicant because it will have some unspecified impact on its solvency and will in some way assist the local economy. As with FOE's treatment of the other factors necessary for a stay, there is no support for these bare assertions. The Staff notes that the Applicant received NRC permission for low power operation on October 26, 1984. Accordingly, a stay at this time could adversely impact the Applicant's low power testing schedule thereby adding to the costs of the Limerick facility.

4. Where the public interest lies

FOE makes no persuasive showing on this factor, but simply asserts that the public health and safety and the Applicant's solvency all favor the granting of a stay. In light of FOE's failure to make a persuasive showing on this factor, as well as on the other requisite factors necessary for the issuance of a stay, it is the Staff's view that FOE has not successfully established that the public interest supports its efforts to disturb the decisions below.^{15/} Consideration of all the criteria set forth in 10 C.F.R. § 2.788(e) clearly weigh against granting the relief requested by FOE.

^{15/} See, Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188-1189 (1977).

B. Del-Aware

Del-Aware's stay request is, by its terms, directed to the Licensing Board's confirmatory Memorandum of October 15, 1984 which merely confirms the prior authorization to issue a low power license and does not constitute a new authorization. Del-Aware offers no explanation as to why it did not file a request for a stay in connection with LBP-84-31. However, the Staff has considered Del-Aware's motion in light of the criteria set forth in 10 C.F.R. § 2.788. Although Del-Aware does not address the criteria for a stay, the Staff has reviewed the information provided by Del-Aware in order to determine whether the criteria are met. It is clear that Del-Aware fails to satisfy the requirements for a stay and its request should be denied. ^{16/}

Del-Aware's Request Lacks Merit

1. Likelihood of Prevailing on the Merits

There is little likelihood that Del-Aware will prevail on the merits of its appeal of the Licensing Board's Memorandum and Order of October 15, 1984. In support of its position, Del-Aware asserts that "The Licensing Board permitted issuance of the license despite the fact that the operation [of Limerick] may be dependent on the operation of an unapproved supplemental cooling water system, without limiting nor [sic] conditioning its approval accordingly." Contrary to Del-Aware's characterization, the record is clear that operation of Limerick in conformance with the Commission health and safety regulations does not depend on the

^{16/} footnote 9, supra.

SCWS ^{17/} and this fact is again confirmed in the Applicant's most recent submittal to the Staff setting forth the systems that it will rely upon for safe shutdown of the facility. ^{18/}

2. Whether the Party will be irreparably injured unless a stay is granted

Del-Aware fails to address the most important of the criteria for a stay, irreparable injury, ^{19/} and has accordingly not met its burden. This criterion weighs against Del-Aware.

3. Whether the granting of a stay would harm other parties

Del-Aware does not address harm to other parties; however, it is clear that the Applicant would be harmed by the granting of a stay as its low-power testing schedule would be deferred.

4. Where the Public interest lies

Del-Aware has not clearly addressed this criterion. However, in paragraph three of its pleading it asserts that a stay is necessary because of environmental and safety implications of low power testing without the SCWS. As stated above, the SCWS is not necessary for the operation of Limerick in conformance with the Commission's health and safety regulations. Therefore, Del-Aware has failed to establish that the public interest favors the granting of a stay.

^{17/} See Memorandum and Order of October 15, 1984, at 4.

^{18/} See, Letter from Vincent S. Boyer, Senior Vice-President Philadelphia Electric Company to A. Schwencer, U.S. Nuclear Regulatory Commission, dated October 19, 1984.

^{19/} See footnote 12, supra.

Accordingly, a balancing of the § 2.788(e) factors clearly demonstrates that Del-Aware should not prevail on its stay application.

IV. CONCLUSION

Based on the foregoing, the Staff believes that FOE and Del-Aware have failed to satisfy the requirements for issuance of a stay under 10 C.F.R. § 2.788. The Staff submits that FOE's and Del-Aware's motions should be denied.

Respectfully submitted

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Dated at Bethesda, Maryland
this 2nd day of November, 1984.

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DOCKET
OFFICE OF SPECIAL
COUNSEL & SERVICE
PHILADELPHIA
Docket Nos. 50-352
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO ANTHONY/FRIENDS OF THE EARTH'S (FOE) AND DEL-AWARE UNLIMITED, INC.'S REQUESTS FOR A STAY" 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, or as indicated by a double asterisk by hand-delivery, this 2nd day of November, 1984:

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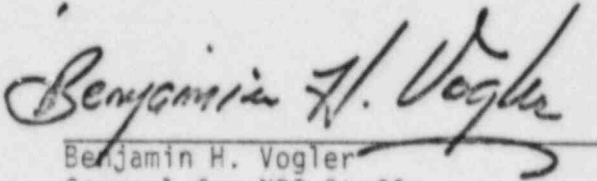
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