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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

}
Docket Nos. 50-352
50-353
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DOCKETED
USNRC

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NRC STAFF RESPONSE TO FOE'S PETITION
FOR REVIEW AND REQUEST FOR STAY OF ALAB-778

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August 15, 1984

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I. INTRODUCTION

On July 31, 1984, Intervenor Robert Anthony on behalf of himself and Friends of the Earth in the Delaware Valley^{1/} filed a combined petition for review and request for a stay ("petition") of the Appeal Board's decision in Philadelphia Electric Company (Limerick Generating Station Units 1 and 2), ALAB-778, ___ NRC ___ (July 23, 1984) ("ALAB-778"). In ALAB-778 the Appeal Board affirmed the Licensing Board's rejection from the bench of the contentions proffered by FOE claiming that movement of the cold fuel from outdoors to the refueling floor inside the plant poses a threat to public health and safety.^{2/} The Appeal Board declined to stay the Licensing Board's Order and denied FOE's requests that the matter be remanded to the Licensing Board for a hearing on its contentions. The Staff opposes both FOE's petition for review of ALAB-778 and its request that ALAB-778 be stayed.

^{1/} The Intervenor will be referred to as "FOE".

^{2/} See, Tr. 12,057-64.

II. BACKGROUND

This is the second Petition filed by FOE before the Commission seeking a review and a stay of an Appeal Board Memorandum and Order concerning the Philadelphia Electric Company's (PECo or Applicant) application under Part 70 of the Commission's Rules. On January 24, 1984 and February 6, 1984 PECo filed amendments to its Application under 10 C.F.R. Part 70, for authority to ship, receive and store bundles of unirradiated fuel outside, at the Limerick site. On February 23 and 28, 1984, FOE filed its contentions claiming that the receipt and storage of unirradiated fuel at Limerick would pose a health and safety threat and requested a stay of the issuance of the amendment. The Licensing Board on March 16, 1984 in a Memorandum and Order concluded that it had jurisdiction over the Part 70 application and denied all of FOE's contentions and its request for a stay.^{3/}

Thereafter, the Appeal Board^{4/} affirmed the Licensing Board's assertion of jurisdiction over the application and its decision to deny the requested stay. The Appeal Board also affirmed the Licensing Board's dismissal of FOE's contentions for lack of basis and specificity.^{5/} On April 5, 1984 FOE filed a combined petition for review and request for a stay of the

^{3/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum and Order on FOE's Contentions and LEP's Petition Based on a Part 70 Application to Store New Fuel, LEP-84-16, 18 NRC _____. (March 16, 1984), (as corrected and served March 27, 1984).

^{4/} The Appeal Board was delegated authority by the Commission to review these Part 70 issues. Unpublished Order, March 22, 1984.

^{5/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC _____. (March 30, 1984).

Appeal Board's decision (ALAB-765) before the Commission. On June 8, 1984 the Commission's time for review of ALAB-765 expired.^{6/}

On June 7, 1984, PECO sought a further amendment to its Part 70 license permitting it to move the fuel, now stored onsite, to the refueling floor for inspection and storage in the fuel pool. In two pleadings, dated June 18 and 19, 1984, FOE again sought to raise new contentions regarding the pending amendment to the application. These contentions dealt with alleged threats to the health and safety of the public from moving the fuel indoors. In a summary ruling issued from the bench on June 19, 1984, the Licensing Board denied the proposed contentions finding that there was no danger to the health and safety of the public posed by the actions to be taken under the Part 70 license. (Tr. 12,058). FOE's petition to the Appeal Board seeking a stay of the Licensing Board's order and a review of its decision followed on July 3, 1984. On July 23, 1984 the Appeal Board in a Memorandum and Order (ALAB-778) carefully reviewed FOE's proffered contentions, found them to be "clearly without merit" (Slip op. at 11-16) and denied FOE's combined petition for review and request for a Stay.

^{6/} On June 28, 1984, FOE appealed ALAB-765 to the United States Court of Appeals for the Third Circuit. In connection with its appeal, FOE has also requested the Court of Appeals to take action with respect to PECO's recent application to transfer the fuel into the reactor building. By Order dated July 12, 1984, the Court of Appeals ruled with respect to FOE's request and stated, "Upon consideration of the complaint and Motion to Expedite for injunctive action by July 2, 1984 and opposition thereto, the foregoing motion is denied."

III. DISCUSSION

A. Petition for Review

Although the Commission has the ultimate 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 and security, antitrust, or other public policy issues are involved. 10 C.F.R. § 2.86(b)(4). In the present petition FOE basically alleges three instances of appellate error as grounds for the granting of its petition. First, that the Appeal Board erred when it did not refer the four FOE contentions back to the Licensing Board for a hearing and disposition rather than ruling on the merits of the contentions. Second, that the Appeal Board should have reconsidered in ALAB-778 a group of contentions previously submitted in connection with an earlier PECO amendment application and dismissed by the Licensing Board. Third, that the Appeal Board erred in finding that a Licensing Board ruling that it was without authority to hear contentions based on amendments to PECO's Part 70 application was "harmless error."

As will be discussed more fully below in connection with FOE's request for a stay, the Staff submits that the matters asserted by FOE in its petition do not warrant the exercise of the Commission's discretion to take review of ALAB-778 in that no important questions of fact, law or policy are presented. 10 C.F.R. § 2.786(b)(1).

B. 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 in accordance with the procedures of

10 C.F.R. § 2.788(a)-(e).^{7/} The burden of persuasion rests with the party seeking the stay.^{8/} No one of these factors is necessarily dispositive, rather the granting or denial of a stay application turns on a balancing of the four factors.^{9/} 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.^{10/} FOE did not address the 10 C.F.R. § 2.788(e) factors in this filing, but chose to incorporate by reference its earlier discussion of those factors provided in its July 3, 1984 petition to the Appeal Board.

FOE alleges that the Appeal Board erroneously failed to evaluate or consider these § 2.788(e) criteria in ALAB-778. The Staff disagrees and submits that the Appeal Board acted correctly in directly addressing FOE's contentions. It is the Staff's view that had the § 2.788(e) factors been specifically considered, the Appeal Board's ultimate ruling in denying FOE's request for a stay would have been the same. The Staff will now examine each of FOE's allegations of appellate error against the four standards found in § 2.788(e).

^{7/} 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.

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

^{9/} Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14-15 (1976).

^{10/} Westinghouse Electric Corporation (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980).

1. Likelihood of Prevailing on the Merits

With regard to FOE's first allegation, the Appeal Board clearly stated that while it would ordinarily remand such matters to the Licensing Board for disposition, the four contentions raised by FOE in its filing before the Appeal Board were clearly without merit and such referral would result in an unproductive use of Commission resources. (ALAB-778 at 11). The Appeal Board specifically addressed each of the four contentions on pages 11-15 of ALAB-778 and found all of them to be without merit and dismissed them. FOE in pursuing a stay has not attempted to address any of the Appeal Board's reasoning in denying the admissibility of the contentions. FOE, thus, fails to show that its contentions are admissible under the Commission's Rules and further, FOE fails to demonstrate any likelihood of prevailing on the merits of its contentions.

FOE next alleges that the Appeal Board erred in failing to address the contentions which had been summarily dismissed by the Licensing Board on June 19, 1984. FOE originally raised those contentions in connection with an earlier PECO Part 70 amendment, and attached them to its July 3, 1984 appeal for consideration by the Appeal Board in ALAB-778. However, as the Appeal Board explained, those contentions were not considered because they should have been raised earlier inasmuch as they are based on PECO's earlier January 24, 1984 Part 70 application and the February 6, 1984 amendment to the application. The Appeal Board stated that:

FOE's argument that the two earlier Board decisions on PECO's Part 70 application concern only the outdoor storage of the new fuel assemblies is without merit. To be sure, the principal focus of both LBP-84-16 and ALAB-765 is the temporary storage of the fuel outside the plant But those decisions necessarily focus on the outside storage because that is the primary area to which FOE directed its arguments. PECO's original Part 70 application clearly included a

request for authority to move the fuel inside the plant for storage.... Thus, the fact that the licensing Board's and our earlier decision speak principally to outdoor storage of the new fuel is a direct reflection of FOE's concerns, as expressed to us. Further, it is too late now for FOE to raise issues in connection with PECO's original Part 70 application. [The Appeal Board considers the January 1984 revision as PECO's original application]. (ALAB-778 at 6-7; footnote omitted).

Thus, the Appeal Board properly chose to address only the four FOE contentions based on PECO's June 7, 1984 revision and filed with its July 3, 1984 appellate papers. FOE has not provided any contrary reasoning for its assertion that the Appeal Board should have considered the other contentions.

FOE next alleges that the Appeal Board erred in concluding that the Licensing Board's June 19, 1984 bench ruling that it was without authority to hear contentions based on PECO's June 7, 1984 revision and the Licensing Board's subsequent summary dismissal of FOE's petition constituted "harmless error." FOE alleges that it was, in effect, denied the opportunity to submit contentions to the Licensing Board based on the application's revision. The Appeal Board agreed that the Licensing Board erred (ALAB-778 at 9), but found the Licensing Board's ruling "harmless" because FOE did not submit any contentions at that time. Instead, FOE attempted to reserve the right to submit contentions at a later time based on its claim that the Part 70 revision was not properly submitted to the Board. The Appeal Board found that this reservation of such a right based on improper submission of documents to the Licensing Board must fail and stated:

FOE appears to base this claim on its view that the revisions to PECO's license application were not submitted to the Board. But all that the Commission's regulations seem to require with respect to Part 70 applications is submission to designated NRC staff offices. (ALAB-778 at 10).

Moreover, the Appeal Board noted FOE's receipt of the PECO revision in sufficient time to submit contentions along with its petition. Thus, the Appeal Board cured the "harmless error" of the Licensing Board by considering in ALAB-778 the contentions that FOE should have submitted with its filing before the Licensing Board. As noted earlier, the Appeal Board found FOE's contentions to be without merit and dismissed them. (ALAB-778 at 11-16).

Finally, in a related allegation, FOE takes issue with the Appeal Board's interpretation "that all the Commission's regulations seem to require with respect to Part 70 applications is submission to designated NRC staff offices. See 10 C.F.R. §§ 70.5, 70.21. Compare 10 C.F.R. § 2.101." (ALAB-778, at 10). FOE claims that the public's health and safety is "neglected by the loose requirements of Part 70 Applications," and FOE requests that the Commission require the Applicant to submit Part 70 application revisions to the Licensing Board and stay any decision regarding the fuel until the Licensing Board has a hearing on the revisions. The Appeal Board has held that a formal adjudicatory type hearing is not required by the Administrative Procedure Act for materials licenses.^{11/} Nor is there a requirement for such a formal hearing in the Commission's regulations. It follows, therefore, that there is no requirement for a formal adjudicatory hearing based on revisions to application for materials licenses.

^{11/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC ____, Slip op. at 7 (March 30, 1984).

In sum, FOE has failed to demonstrate how it would prevail on the merits regarding its entitlement to an adjudicatory hearing on these matters.

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

This factor, the most important of the four, see, Westinghouse Electric Corporation, supra, is only briefly referred to by FOE. FOE's argument is that without a stay it will be subject to the risk of operation of the Limerick reactor as well as accidental criticality from the unsafe handling of the fuel. FOE provides no support for the assertion that the receipt of unirradiated fuel onsite and the movement of same into the reactor building poses a threat to FOE's members. The assertion regarding operation of Limerick has no place in FOE's pleading, since the Part 70 license does not authorize plant operation. Viewed in this light, it is evident that FOE has failed to satisfy the irreparable injury requirement.

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

Regarding this factor, FOE infers that the stay will benefit PECO because it will save PECO from the loss of personnel, money and credibility resulting from an accident caused by the use of unsafe equipment and handling processes with the new fuel. As with FOE's treatment of the other factors necessary for a stay, there is no support for this bare assertion. The Staff notes that the Applicant has petitioned the NRC for permission to load fuel and for low power operation no later than September 15, 1984. Accordingly, a stay at this time could lead to licensing delays with its ensuing costs to PECO. This factor, therefore, clearly weighs against FOE.

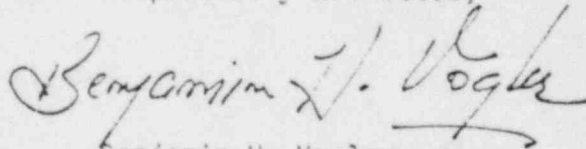
4. Where the public interest lies

FOE makes no meaningful attempt to address this issue, but simply states that the public interest is best served by the issuance 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 as discussed above, it is the Staff's view that FOE has not successfully established that the public interest supports their efforts to disturb the decisions below. See, Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188-1189 (1977).

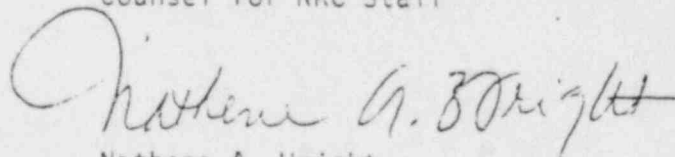
IV. CONCLUSION

Based on the foregoing, the Staff believes that FOE has failed to establish, pursuant to 10 C.F.R. § 2.786, the existence of any important issues of fact, law or policy warranting Commission review and further, has failed to satisfy the requirements for issuance of a stay under 10 C.F.R. § 2.788. Accordingly the Staff submits, FOE's combined petition should be denied.

Respectfully submitted,



Benjamin H. Vogler
Counsel for NRC Staff



Nathene A. Wright
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Dated at Bethesda, Maryland
this 15th day of August, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO FOE'S PETITION FOR REVIEW AND REQUEST FOR STAY OF ALAB-778" 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 15th day of August, 1984:

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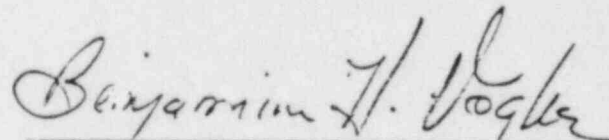
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