

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'84 NOV 27 10:06

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

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Docket Nos. 50-352
50-353

NRC STAFF RESPONSE IN OPPOSITION TO
ANTHONY/FRIENDS OF THE EARTH APPEAL OF THE
ISSUANCE OF A LOW POWER LICENSE AND REQUEST FOR A STAY

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Dated: November 26, 1984

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OFFICE OF REGULATION
& SAFETY
Docket Nos. 50-352
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I. INTRODUCTION

On November 10, 1984, Intervenor Robert L. Anthony/Friends of the Earth (FOE) filed an "Appeal to the Commission From The Issuing Of A Low Power Operating License To PECO . . ." for PECO's Limerick Unit 1. FOE also petitioned the Commission for an immediate stay. The authority to issue Limerick a low power license was granted by the Atomic Safety and Licensing Board in its Second Partial Initial Decision on August 29, 1984. ^{1/} On October 26, 1984, the Director, Office of Nuclear Reactor Regulation, issued facility operating license No. NPF-27 to the Applicant authorizing low power operation. For the reasons set forth below the NRC staff (Staff) opposes FOE's appeal and request for a stay.

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

II. BACKGROUND

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/} 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. The Licensing Board 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/}

Subsequently, on October 23, 1984, FOE filed before the Atomic Safety and Licensing Appeal Board (Appeal Board) a one page document containing (1) an appeal of the Licensing Board's denial of its motion to set aside and reopen the record, (2) a request for a stay of LBP-84-31, and (3) an appeal of LBP-84-31 as it pertains to the merits of FOE's Contention V-3a and V-3b. ^{6/} Treating the stay request as a motion to

^{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 Station, Units 1 and 2), September 7, 1984.

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

^{6/} FOE's brief on appeal is scheduled to be filed on November 23, 1984.

suspend the low power license authorization issued on October 26, 1984, the Appeal Board entered an Order on November 5, 1984, denying FOE's request. ^{7/} FOE's instant appeal, contesting the issuance of a low power license to the Limerick facility and requesting a stay, was filed on November 10, 1984.

III. DISCUSSION

A. FOE's Appeal

The present appeal is both procedurally flawed and substantively insufficient and should therefore be denied. Direct appeals to the Commission from decisions of the Licensing Board are not permitted under the Commission's regulations. ^{8/} FOE's present effort to obtain Commission review of the Licensing Board's decision (LBP-84-31) authorizing a low power license for the Limerick facility is thus improperly filed and should not be entertained. Moreover, FOE currently has pending before the Appeal Board an appeal of the decision of the Licensing Board in LBP-84-31 authorizing a low power license for Limerick. To date, all briefs of the parties have not been filed and no decision of the Appeal board has been rendered. The present appeal to the Commission seeking simultaneous review of the same decision is clearly impermissible and should not be sanctioned. Any petition for Commission review of the low power

^{7/} Order, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-789, ___ NRC ___ (November 5, 1984).

^{8/} See, 10 C.F.R. §§ 2.785, 2.786.

authorization granted in this proceeding should appropriately await completion of the Appeal Board's pending review of that matter.

Finally, in support of its "appeal", FOE claims that the Limerick facility cannot be safely operated at low power because of the more than "twenty safety exemptions" that have been granted. However, FOE fails to set forth with any specificity the reasons why the plant will not be able to operate safely or why it is entitled to raise these issues before the Commission at this time. The matters which concerned FOE during litigation were considered by the Licensing Board in LBP-84-31 and the Appeal Board is currently considering FOE's appeal of that decision. ^{9/}

FOE further claims that the issuance of the low power license prejudices its case before the United States Court of Appeals for the Third Circuit challenging the Commission's decision to permit the movement of unirradiated fuel into the Limerick reactor building. ^{10/} While it is true that Mr. Anthony's appeal to that court concerning the movement of fuel into the plant is in fact still pending, that court did, however, deny his request for a stay of the Commission's action on July 12, 1984. Thus, having failed to obtain a stay in the Court of Appeals, the pendency of that litigation clearly does not now provide support for the present appeal to this Commission.

^{9/} If there are new concerns that FOE intends to raise by this appeal, it has failed to set them forth with reasonable specificity and basis or to state why it is appropriate for the Commission to consider them in the first instance.

^{10/} Anthony v. Philadelphia Electric Company, No. 84-3409 (3d. Cir. filed June 28, 1984).

B. FOE's Request For A Stay

With regard to FOE's present request for a stay, the Staff submits that FOE's request has failed to satisfy the relevant criteria and should be denied. 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). ^{11/} The burden of persuasion rests with the party seeking the stay. ^{12/} 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 a balancing of the four factors. ^{13/} 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. ^{14/} Although, FOE only briefly addresses the 10 C.F.R § 2.788(e) factors in its filing, the Staff will examine each of

^{11/} 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.

^{12/} Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

^{13/} Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14-15 (1976).

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

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:

- a) We expect the Appeals Court will decide in our favor and will order the fuel removed as we have requested. Appeal To The Commission From The Issuing Of A Low Power Operating License To PECO, From R. L. Anthony/FOE, and Request For An Immediate Stay. (November 10, 1984.)

FOE offers no basis or supporting statements to justify its bare assertion that it expects the Court of Appeals to decide in its favor that the fuel was improperly shipped, stored and subsequently moved into the Limerick reactor building. FOE has pursued the issue of the Philadelphia Electric Company's request for a Part 70 authorization to store fuel at the Limerick site before the Licensing Board, the Appeal Board and the Commission, since at least February 23, 1984, and its requests for relief and stays have repeatedly been denied.^{15/} FOE has failed to raise any new issues which would support its previously rejected position. Accordingly, FOE has not established a reasonable likelihood of prevailing on the merits.

^{15/} 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. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-789, ____ NRC ____, (November 5, 1984).

2. Whether the Party Will Be Irreparably Injured Unless A Stay Is Granted

The second factor - irreparable injury - is the most important of the four stay criteria. (See, Westinghouse Electric Corporation, supra.) FOE argues that the "start of the reaction process sets in motion an inexorable chain of operation" that will damage the environment and FOE's health and safety. FOE provides no basis or evidence in support of its assertions of damage. The Appeal Board in ALAB-789 ^{16/} considered FOE's "inexorable" chain of events argument and rejected it. In view thereof, FOE has failed to satisfy the irreparable injury criterion.

3. Whether the Granting of the Stay Will Harm Other Parties

With respect to the question of harm to other parties, FOE acknowledges that a stay will delay Applicant's testing and operation of the Limerick reactor, but alleges that the full power operating license will be held up for years by litigation. 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.

^{16/} ALAB-789, at 5.

4. Where the Public Interest Lies

FOE makes no persuasive showing on the public interest factor and simply asserts that if the Applicant were to "cancel" Limerick immediately the investment could be paid off over ten years and electric rates for the public would be lower. FOE also states that a cancellation would improve the Applicants financial situation. This economic argument by FOE was recently considered and rejected by the Appeal Board in ALAB-789 wherein it noted:

. . . 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 Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984). . . .

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.
ALAB-789, at 5-6.

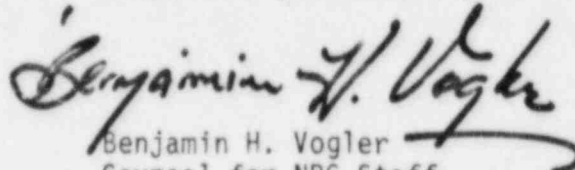
In light of FOE's failure to make a persuasive showing on this factor, as well as on the other requisite factors necessary for the issuance of a stay, it is the Staff's view that FOE has not successfully established that the public interest supports its efforts to disturb the decisions below. ^{17/} Considerations of all the criteria set forth in 10 C.F.R. § 2.788(e) clearly weigh against granting the relief requested by FOE.

^{17/} 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's appeal from the issuance of a low power license to the Applicant is not properly before the Commission and should be dismissed and that FOE has failed to satisfy the requirements for the issuance of a stay under 10 C.F.R. § 2.788; its request for a stay should be denied.

Respectfully submitted,


Benjamin H. Vogler
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of November, 1984

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OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO ANTHONY/FRIENDS OF THE EARTH APPEAL OF THE ISSUANCE OF A LOW POWER LICENSE AND REQUEST 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, this 26th day of November 1984:

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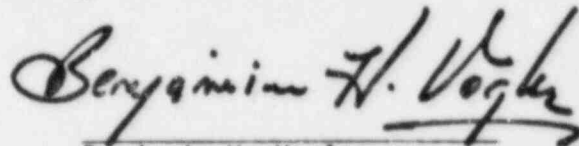
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