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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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USNRC

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OFFICE OF SECRETARY  
DOCKET 84-31

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,  
Units 1 and 2)

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Docket Nos. 50-352  
50-353

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NRC STAFF RESPONSE TO LEA MOTION  
FOR STAY OF LBP-84-31 AND OTHER RELIEF

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December 26, 1984

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1. INTRODUCTION

On December 10, 1984, Limerick Ecology Action (LEA), an Intervenor in this proceeding, filed a "Motion for Stay of LBP-84-31, Suspension of Low-Power Facility Operating License NPF-27, and/or Prohibition of Low-Power Testing." LBP-84-31, which was issued on August 29, 1984, constituted the Atomic Safety and Licensing Board's Second Partial Initial Decision in this proceeding and authorized the issuance of low power (up to five percent of rated power) licenses for the Limerick units. On October 26, 1984, the Director of Nuclear Reactor Regulation issued a facility operating license (NPF-27) for Unit 1 which permitted operation limited to five percent of rated power.

By motion filed with the Atomic Safety and Licensing Appeal Board on November 16, 1984, LEA sought a suspension of the license for Unit 1. <sup>1/</sup>

The motion was dismissed by the Appeal Board on the basis that:

(1) it was filed more than two months late, with no explanation for the delay; and

(2) to the extent it requested suspension of License No. NPF-27, it was improperly before the Appeal Board, since "requests for license suspension are more properly addressed to the Director of NRR via a petition under 10 C.F.R. § 2.206, or to the Commission itself."

Memorandum and Order, dated November 23, 1984 at 1, 3.

The Appeal Board noted that even if the motion were timely, it did not raise any matters warranting a stay of LBP-84-31. Memorandum and Order at 3.

## II. ARGUMENT

### A. Timeliness

Under 10 C.F.R. § 2.788, a motion for a stay of LBP-84-31 should have been filed by September 13, 1984. The initial motion for a stay was not, however, filed until November 16, 1984 (with the Appeal Board). LEA did not provide to the Appeal Board, and does not now provide in its present motion to the Commission, an explanation of its delay of over two months in seeking a stay of LBP-84-31. The Appeal Board considered the

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<sup>1/</sup> The Appeal Board treated LEA's pleading as a motion for a stay of LBP-84-31, although it was styled a motion for suspension of the license.

motion deniable on this ground alone and there is no basis for the Commission to hold otherwise. <sup>2/</sup>

B. Request for Stay of LBP-84-31

The four factors to be considered in determining whether to grant an application for a stay 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 C.F.R. § 2.788(e).

LEA has addressed these factors, but has failed to carry its burden of persuasion as a movant for a stay. <sup>3/</sup> Alabama Power Co. (Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

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<sup>2/</sup> LEA does not specifically invoke 10 C.F.R. § 2.788, but its motion is in the nature of an application for a stay of the LBP-84-31 See Motion at 7:

"Limerick Ecology Action, Inc. respectfully requests the Commission to either stay LBP-84-31, suspend the low-power license granted to the Applicant, or otherwise prohibit low-power testing of the facility pending adjudication of LEA's appeal on the merits."

<sup>3/</sup> LEA's motion also requests suspension of License No. NPF-27; however, for the reasons set forth in response to the present stay request, this suspension request is also fatally flawed and likewise must be denied.

1. Likelihood of Prevailing On the Merits.

In seeking to satisfy this criterion, LEA provides nothing more than its assertion that

Based upon the arguments set forth in its Brief [on appeal], LEA believes that it has made a "strong showing" that it is likely to prevail on the merits of its position.

Motion at 2.

This ipse dixit statement is not entitled to any weight since it does not satisfy the burden required by this criterion in that LEA must show more than a possibility of legal error by the Licensing Board. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1 and 2), ALAB-385, 5 NRC 621 (1977); Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-158, 8 AEC 95 (1974). LEA's appeal is pending before the Appeal Board, with the responses of the Applicant and the Staff still to be filed. <sup>4/</sup> LEA's bare reference to its appeal brief does not satisfy its burden of persuasion on this criterion.

2. Irreparable Injury

In its effort to demonstrate the irreparable injury which it will incur if a stay is not granted, LEA asserts that "the environmental review for Limerick [failed] to consider design alterantives to mitigate the risk of severe accidents." Motion at 3. In addition, LEA argues that:

the cost-effectiveness of such measures, the practicability of backfitting such measures into the Limerick design and the radiation exposure of workers involved in the implementation of such measures will all be adversely affected by low power operation of the facility which will contaminate plant systems. Id.

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<sup>4/</sup> Staff's brief in response is to be filed by January 7, 1985.

Finally, LEA states that "low-power operation may forever make unavailable design alternatives which could substantially reduce the public risk to LEA's membership." Id. We cannot agree.

In the present motion, LEA has provided no specific basis for this assertion of insufficiency nor has it demonstrated the validity of its argument for specific mitigation measures. Although LEA repeats the assertion from its appeal brief that the Staff's environmental review for Limerick failed to consider design alternatives to mitigate the risk of severe accidents (Motion at 3), LEA has not shown in its present motion that it is likely to prevail on its position that these design alternatives had to be considered in the Limerick review.

LEA also asserts that its interest in "lawful decision-making for the Limerick facility" will be irreparably injured if a stay of LBP-84-31 is not granted. This generalized interest would be insufficient to establish standing in this proceeding (Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)) and a fortiori does not provide a basis for the requested stay. Furthermore, even if the interest were cognizable by the NRC, the Staff fails to see how this interest asserted by LEA requires the issuance of a stay; i.e., it would appear that LEA's appeal provides the means by which this interest can be protected.



Accordingly, LEA has not demonstrated that its members will suffer any irreparable injury from continued operation of Limerick, Unit 1 under NPF-27. <sup>5/</sup>

3. Harm to Other Parties.

LEA's argument concerning the harm to other parties is premised on its position that the Applicant has no interest cognizable by the NRC that would be harmed by license suspension. However, this argument ignores the fact that the Applicant is now the holder of a Commission license, and as such is entitled to undertake the activities authorized by the License unless the public health, interest or safety requires that these activities be suspended. Consumers Power Company (Midland Plant, 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973). These rights and privileges cannot be dismissed merely by characterizing the Applicant's interest in the preservation of its license as "economic" in nature. Motion at 5. Thus, LEA has failed to demonstrate that other parties to this proceeding (specifically, the Applicant) will not be harmed by the grant of a stay.

LEA also argues that any harm to the Applicant is speculative because it cannot be presumed that a license authorizing full power operation will ever be issued. Motion at 5-6. LEA bases this argument on the pendency of hearings as to the adequacy of offsite emergency plan-

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<sup>5/</sup> While a determination on whether to grant a stay turns on a balancing of the four factors, the "irreparable injury" factor is the weightiest of the factors under § 2.788(e). Westinghouse Electric Corp. (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 662 (1980).



ning. While it is true that the outcome of future proceedings are not and cannot be presumed, LEA's argument nonetheless fails to recognize the existence of the Commission's regulations which expressly permit authorization of low-power operation without NRC or Federal Emergency Management Agency (FEMA) findings as to the state of offsite emergency preparedness or the adequacy and capability to implement State and local emergency plans. 10 C.F.R. § 50.47(d). <sup>6/</sup> The fact that issuance of a full power license cannot be presumed from issuance of a low power license does not demonstrate that the Applicant would not be harmed by a stay of LBP-84-31.

4. The Public Interest

With respect to this criterion, LEA basically summarizes its argument on the other criteria. The Staff relies on its responses with respect to those criteria, with the following additional comments. LEA characterizes the risks of operation of Limerick as "undue", but, as noted above, has failed to demonstrate irreparable harm from Limerick's operation under NPF-27. LEA asserts that a stay would avoid "'irreversible and irretrievable' commitment to resources in the face of violations of National Environmental Policy Act safeguards," (Motion at 6), but, as noted above, has failed to demonstrate a strong likelihood of prevailing on appeal on the merits of its NEPA arguments regarding

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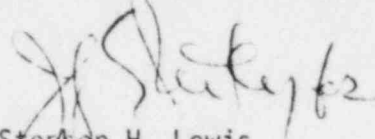
<sup>6/</sup> 10 C.F.R. § 50.47(d) provides that a license authorizing operation up to five percent of rated power may be issued after a finding by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

consideration of severe accidents. In sum, LEA has failed to demonstrate that the public interest warrants a stay of LBP-84-31.

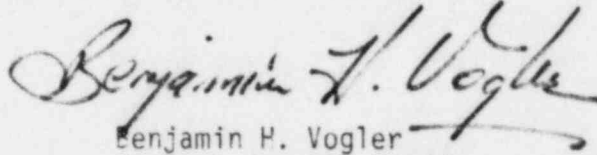
III. CONCLUSION

For the reasons set forth in the brief, LEA's motion should be denied.

Respectfully submitted,



Stephen H. Lewis  
Counsel for NRC Staff



Benjamin H. Vogler  
Counsel for NRC Staff

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LEA MOTION FOR STAY OF LBP-84-31 AND OTHER RELIEF" 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 December, 1984:

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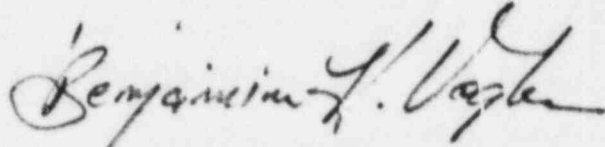
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A handwritten signature in cursive script, reading "Benjamin H. Vogler". The signature is written in dark ink and is positioned above a horizontal line.

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