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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

June 11, 1985
(ALAB-808)

In the Matter of	
PHILADELPHIA ELECTRIC COMPANY	Docket Nos. 50-352 OL 50-353 OL
(Limerick Generating Station, Units 1 and 2)	

Phyllis Zitzer, Pottstown, Pennsylvania, for intervenor Limerick Ecology Action.

Troy B. Conner, Jr., Robert M. Rader, and Nils N. Nichols, Washington, D.C., for applicant Philadelphia Electric Company.

Donald F. Hassell and Joseph Rutberg for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Intervenor Limerick Ecology Action (LEA) has moved for a stay of the Licensing Board's third partial initial decision (PID) in this proceeding, LBP-85-14, 21 NRC __ (May 2, 1985).[1] In that decision, the Licensing Board resolved all remaining offsite emergency planning issues (except for those raised by another intervenor, the inmates of the State

[1] LEA filed its motion for stay on May 16, 1985, and supplemented it with a filing on May 20. In an unpublished order issued on May 22, we accepted the supplement as timely.

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Correctional Institution at Graterford) in favor of applicant Philadelphia Electric Company (PECo) and imposed two license conditions.[2] PECo and the NRC staff oppose the motion for stay.[3] For the reasons explained below, we decline to stay LBP-85-14.

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[2] Because of the outstanding issues concerning the inmates, the Board's decision did not contain an authorization for the Director of Nuclear Reactor Regulation (NRR) to issue an operating license to PECo. The NRC staff argues that, in the absence of such an authorization, there is no Board "action" that LEA can seek to stay; it thus urges us to deny the motion on that ground. Obviously, if no immediate action will come to pass as a result of a decision, it will be quite difficult for a movant to show the irreparable harm that is required for a stay. See p. 3, infra. But under the Commission's Rules of Practice, a party may seek a stay of "a decision or action." 10 C.F.R. § 2.788(a). See 42 Fed. Reg. 22,128, 22,129 (1977). Thus, outright denial or dismissal of a stay motion on the ground that the decision is merely "passive" would not appear to be justified.

Be that as it may, events subsequent to the filing of the stay motion (but preceding the staff's stay opposition) have put more teeth into LBP-85-14. In an unpublished order issued May 24, 1985, the Licensing Board granted PECo's request for an exemption from the requirements of 10 C.F.R. § 50.47 insofar as the issues raised by the inmates are concerned. The Board thereby authorized the Director of NRR to issue an operating license to PECo, notwithstanding the continued litigation of the inmates' proposed offsite emergency planning contentions. Appeals from and motions to stay the May 24 order have been filed and will be addressed in due course. The decision here is limited solely to the issues raised in LEA's May 16 and 20 stay papers.

[3] PECo and the staff filed their responses to the motion on May 28 and June 4, 1985, respectively.

PECo argues that under several NRC cases, LEA should have initially sought a stay from the Licensing Board. The

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A.

Stay motions are decided by weighing the following four factors set forth in 10 C.F.R. § 2.788(e):

> (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.

Further, as we noted just last fall in addressing several earlier stay motions filed in this proceeding, the second factor, irreparable harm, is often the most important in deciding whether a stay is warranted. ALAB-789, 20 NRC 1443, 1446 (1984), and cases cited. We now consider each factor in turn.

B.

1. Presumably in an effort to make a strong showing that it is likely to prevail on the merits, LEA raises several substantive arguments in connection with LBP-85-14.[4]

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cases PECo cites, however, were superseded eight years ago when the Commission promulgated 10 C.F.R. § 2.788(f). That provision explicitly authorizes the filing of a request to stay a licensing board decision before either that licensing board or an appeal board, but not both at the same time. See also 10 C.F.R. § 2.721(d); 42 Fed. Reg. at 22,129.

[4] Many of LEA's arguments are not presented clearly enough for us to address meaningfully. The problem is worsened by LEA's failure, in all but a few instances, to cite to the portions of the Licensing Board's 306-page
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LEA assigns the following errors to the Licensing Board's decision. First, the Board improperly delegated to the staff the responsibility of verifying compliance with the two license conditions imposed by the Board concerning (a) traffic control in the King of Prussia area, and (b) municipal staffing needs during a radiological emergency. On the latter point, LEA claims that the Board ignored concerns expressed by the Federal Emergency Management Agency's (FEMA) witness. Second, the Board's predictive finding of reasonable assurance -- that local governments (particularly Montgomery County) and school districts will, in good faith and in accordance with state law, adopt and implement final, adequate radiological emergency response plans (RERPs) -- is not justified. To support its claim, LEA refers to several recent FEMA memoranda identifying inadequacies in the plans. Third, LEA asserts that the record greatly understates the number of "transport-dependent" persons. Fourth, LEA incorporates by general reference the entire brief in support of its pending appeal from the Licensing Board's second partial initial decision, LBP-84-31, 20 NRC 446 (1984). Finally, in connection with the third PID, LEA complains about several

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decision to which it objects. We therefore discuss the points we find most discernible.

of the Licensing Board's procedural rulings as well -- to wit: the consolidation of LEA and another intervenor on one contention; the imposition of time limits on cross-examination; and the exclusion of certain evidence concerning traffic control.

LEA has not made the required "strong" showing on any of its arguments. First, the delegation to the staff of post-hearing verification of certain emergency planning measures can be proper, depending on exactly what is left for verification. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-07 (1983). Here, the Board conditioned the issuance of the operating license on verification of sufficient traffic control in the King of Prussia area, and FEMA's satisfaction with municipal emergency staffing. According to the record -- which LEA does not seriously challenge -- the former can be accomplished without problem by the establishment of a comparatively few additional traffic control points beyond the boundary of the emergency planning zone (EPZ). See LBP-85-14, 21 NRC at __ (slip opinion at 49-50). According to a recent FEMA memorandum (more recent than those on which LEA relies), determination of these points is now under way. Memorandum to E. L. Jordan from R. W. Krimm (May 21, 1985) at 2-3 (attached to letter to Licensing Board from D. F. Hassell (May 22, 1985)) [hereafter, "FEMA Memorandum"]. As for the municipal

staffing needs, subsequent to the Board's decision, FEMA determined that "adequate staffing now exists in all risk municipalities to respond to a radiological emergency over an extended period of time." Id. at 3. Thus, any concerns in this regard expressed by the FEMA witness at the hearing appear to be resolved. See LBP-85-14, 21 NRC at __ (slip opinion at 236).

LEA's arguments about the adoptability and implementation of the municipal RERPs are likewise unconvincing. As LEA seems to acknowledge, the predictive nature of findings is the essence of litigation in the emergency planning area. The plan need not be final, just sufficiently developed to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. See Waterford, 17 NRC at 1103-04. Although only a few of the local jurisdictions involved here have actually adopted "final" versions of their plans so far, draft plans exist for all entities (including Montgomery County) and were introduced into evidence at the hearing. They have been reviewed by FEMA, the Commonwealth of Pennsylvania, and other officials.[5] There is no credible reason to believe that the RERPs will not be adopted formally in the future,

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[5] Planning and preparedness deficiencies earlier identified by FEMA have now been corrected to FEMA's satisfaction. See FEMA Memorandum at 1-2.

although it is expected that they will undergo further revision, given the very nature of emergency planning. See LBP-85-14, 21 NRC at __ (slip opinion at 241-95). LEA has given us no cause, in its stay motion, to doubt the Licensing Board's reasonable assurance finding. Cf. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1067 (1983). LEA's objection to the survey method used to determine transport-dependent individuals is also unavailing. The Board has adequately explained the discrepancies between the survey and census data. See LBP-85-14, 21 NRC at __ (slip opinion at 33-37).

Insofar as LEA refers us generally to its fully briefed arguments on appeal from the Licensing Board's second PID, it fails to make a strong showing that it is likely to prevail.[6] We are not yet prepared to rule on the merits of LEA's appeal from the second PID. Our study of the matter

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[6] LEA can properly raise arguments concerning the Board's second PID here, in the context of its request to stay the Board's third PID. LEA's two earlier requests to stay, in effect, the second PID were denied by both the Commission and us. See Commission Order of February 19, 1985 (unpublished); Appeal Board Memorandum and Order of November 23, 1984 (unpublished). But those motions were filed in an attempt to enjoin the low-power operation authorized by the second PID. Different and more serious considerations pertain to full-power authorization. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 959-60 (1984). LEA may thus renew its earlier concerns insofar as they pertain to the Board's third PID, the penultimate decision before full-power authorization.

thus far, however, reveals no error that would warrant a stay here, in connection with possible full-power operation.

With respect to LEA's procedural objections, we see no obvious error in the Board's rulings. By Commission rule and policy, consolidation of intervenors with the same interest is acceptable and encouraged, providing, of course, that no undue prejudice results. 10 C.F.R. § 2.715a; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). Limitations on cross-examination are also appropriate in certain circumstances and, even where improper, actual prejudice must be shown to establish reversible error. Waterford, 17 NRC at 1096. LEA has not shown how the various procedural restrictions imposed by the Licensing Board -- as explained in its decision, LBP-85-14, 21 NRC at __ (slip opinion at 15-19) -- have resulted in actual prejudice to its case. As for LEA's evidence on traffic control, the Board's decision to exclude it for lack of sponsoring testimony is consistent with NRC precedent. Id. at __ (slip opinion at 27). See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982).

2. LEA's arguments of irreparable harm are rather generalized and unpersuasive. For example, LEA contends that its interest in lawful decisionmaking has been irreparably injured by violations of the National Environmental Policy Act, the Administrative Procedure Act,

and unspecified regulations. Our response is equally general: if such violations have occurred, they can be corrected in due course through the appeal process and do not, without a specific showing, cause irreparable harm so as to warrant a stay pendente lite.

LEA also asserts that the risk to the public from an accident at Limerick is greater than at any other plant in the United States, except for one (Indian Point). Further, LEA asserts that full-power operation may forever render mitigating design alternatives neither cost-effective nor feasible (largely due to worker radiation exposure). But the premise of LEA's concern -- the high risk to the public from operation of Limerick -- is based on an erroneous understanding of the probabilistic risk assessment (PRA) for Limerick. One of the few plant-specific PRAs, it shows that Limerick's range of risk is about the same as that of other plants, especially those located in high-population density areas, and is not undue. See NUREG-0974, Final Environmental Statement (April 1984) at 5-115 to 5-126. See also NUREG-1068, Review Insights on the Probabilistic Risk Assessment for the Limerick Generating Station (August 1984), attached to Board Notification No. 84-147 (September 17, 1984). Moreover, although full-power operation unquestionably entails greater risks than low-power operation or testing (see note 6, supra), LEA fails to identify a specific risk not already considered and a

corresponding, real (rather than theoretical) design alternative to mitigate it.

3. LEA asserts, without offering any supporting affidavits or documentation, that a stay would cause no adverse economic impact because there is sufficient electricity available to PECo elsewhere at a cheaper cost. It also argues that, in any event, PECo's economic interests cannot properly be considered in light of our holding in ALAB-789, 20 NRC at 1447, that such matters "are not within the proper scope of issues litigated in NRC proceedings." If economic interests were cognizable, however, in LEA's view they would be outweighed as a general principle by public health and safety concerns.

LEA has misconstrued our statement of long standing Commission precedent in ALAB-789. Rate issues and the like are not cognizable under the Atomic Energy Act, which is concerned with protection of the public health and safety from radiological hazards. State utility commissions, and in some instances the Federal Energy Regulatory Commission, exercise economic regulatory jurisdiction. For stay purposes, however, it is often necessary and appropriate to take into account various matters not actually litigated in the proceeding -- providing proper documentation is supplied. See 10 C.F.R. § 2.788(b)(4). Thus, under the third stay criterion, the Commission has in the past taken into account the economic harm that an applicant might

suffer if a stay of its license is granted. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977). Furthermore, refusal to consider economic harm would effectively eliminate the third stay criterion insofar as an applicant's interest is concerned, because the harm most likely to be incurred by a utility (paying financing costs on a completely constructed, but not yet operating, plant) is monetary. That is not to say, however, that this is or should be the principal basis on which stay decisions are based. Indeed, it is but one of the criteria that must be weighed under 10 C.F.R. § 2.788(e). Accordingly, PECo has called to our attention, and we give it due weight, the March 14, 1985, affidavit of V. S. Boyer, PECo's Senior Vice President, stating that delays in full-power operation will cost $49 million per month, including $15 million in fuel costs passed on to customers.[7]

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[7] This affidavit was previously filed as an attachment to a letter to the Licensing Board from M. J. Wetterhahn (March 18, 1985), amending an earlier motion filed with that Board.

LEA argues that any economic harm to PECo is speculative, inasmuch as full-power testing and operation of Limerick will not be possible in the coming months due to

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4. Under the fourth stay criterion, LEA simply summarizes its other arguments, in an effort to show that a stay is in the public interest. Given that it has failed to make a strong showing of likely success on the merits, to establish irreparable harm, and to counter PECo's averment of economic harm if a stay is granted, LEA's final argument necessarily fails as well.

LEA's motion for a stay of the Licensing Board's third partial initial decision, LBP-85-14, is denied.[8]

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insufficient water for cooling purposes. The current status of the water supply PECo needs to operate at full power, however, is uncertain. All that we are aware of is that the Delaware River Basin Commission recently approved, in part, PECo's request for certain relief that would temporarily enhance the amount of water available for operation of Limerick this summer. See letter to S. Chilk from T. B. Conner, Jr. (June 10, 1985), Enclosure. But it is worth noting that, if LEA is correct in its claims, the lack of water and consequent inability to operate the plant in the immediate future necessarily undercut LEA's claims, under the second stay criterion, of irreparable harm to its own interest.

[8] We stress, however, that the denial of this stay motion is without prejudice to the merits of the pending appeals from both the second and third PIDs, as well as the pending appeals and stay requests in connection with the Licensing Board's May 24 exemption order (see note 2, supra). Like all stay decisions, our judgment here is necessarily circumscribed by the filings, time, and application of the stay criteria.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

Mr. Edles did not participate in this memorandum and order.