

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

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

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Docket Nos. 50-352 OL
50-353 OL

NRC STAFF ANSWER IN OPPOSITION TO APPLICANT'S REQUEST
FOR EXPEDITED REVIEW OF ALAB-809 AND OTHER EMERGENCY RELIEF

Stephen H. Lewis
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Hearing Counsel

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INTRODUCTION AND BACKGROUND

ALAB-809 arose out of a motion filed by the Applicant on February 7, 1985 for an exemption under 10 C.F.R. § 50.12(a) from the requirements of

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-809, 21 NRC ____, slip op. (June 17, 1985).

10 C.F.R. § 50.47(a) and (b) to permit operation of Limerick Generating Station at power levels greater than 5% of rated power "prior to the completion by the Board of its consideration of any contentions which it may admit related to the evacuation provisions of the radiological emergency plan for the State Correctional Institution of (sic) Graterford" ^{2/} The background to ALAB-809 is set out in that decision and in the pleadings of the parties who have participated on the issue of whether the exemption should be granted and will not be repeated here.

The Appeal Board in ALAB-809 held that the Licensing Board in its May 9 and May 24, 1985 orders ^{3/} had failed to apply the proper standards for granting an exemption and had failed to state a reasoned basis for its action. ALAB-809, slip op. at 3. The Appeal Board, therefore, vacated the May 9 and May 24 orders and remanded the matter to the Licensing Board for further action in accordance with its opinion. Id.

The Appeal Board held the Licensing Board's grant of the exemption to have been improper on two grounds. First, the Licensing Board had erred in basing its grant of the exemption solely on the provisions of

^{2/} "Applicant's Motion For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) And (b) As They Relate To The Necessity Of Atomic Safety And Licensing Board Consideration Of Evacuation Provisions Of The Emergency Plan For The State Correctional Institution Of Graterford," (hereinafter, "exemption motion").

^{3/} "Order Granting Applicant's Motion For Exemption From Requirement Of 10 C.F.R. § 50.47(a) and (b) For A Period Of Time Any Potential Contentions Of Remaining Party Are Considered By The Board," (May 9, 1985); "Board's Order Implementing Its Grant Of Applicant's Motion For Exemption From Requirement Of 10 C.F.R. § 50.47(a) And (b) For A Period Of Time Contentions Of Graterford Inmates Are Considered By The Board -- Authorization For Director Of Nuclear Reactor Regulation To Issue Full Power License" (May 24, 1985).

10 C.F.R. § 50.47(c)(1) and not having also measured it against the standards of 10 C.F.R. § 50.12(a). Id., slip op. at 9-10. Second, the Licensing Board had acted prematurely in granting the exemption before it had ruled on the admissibility of the proposed contentions of the inmates of the State Correctional Institution at Graterford. ^{4/} Id., slip op. at 13-14.

In its petition for review, the Applicant asserts that the Appeal Board committed "fundamental legal error" in four respects. Petition for review at 5. Briefly stated, the four assertions are: (1) the Appeal Board's ruling violated § 50.47(c)(1) by imposing the additional requirements of § 50.12(a) and was directly contrary to Commission policy and precedent affording temporary relief under § 50.47(c)(1) from Commission emergency planning requirements (Id., at 5-6); (2) the Appeal Board erred in holding that the grant of the exemption was premature because the Licensing Board had not yet determined whether an admissible contention had been proffered by the inmates (Id., at 6); (3) the Appeal Board erred in not itself deciding whether the Applicant had demonstrated compliance with the criteria of § 50.12(a) (Id.); and (4) the Appeal Board denied Applicant due process by vacating the Licensing Board's orders on the basis that the criteria of both §§ 50.12(a) and 50.47(c)(1) must be satisfied, a basis that had not previously been raised (Id., at 6-7).

^{4/} The Graterford Inmates will hereafter be referred to as "inmates" and the State Correctional Institution at Graterford will hereafter be referred to as "SCIG".

For the reasons developed below, the Staff submits that the petition for review does not raise "an important question of fact, law or policy" meriting Commission review. 10 C.F.R. § 2.786(b)(1).

DISCUSSION

I

Although the Commission has the discretion to review any decision of its subordinate boards, a petition for Commission review "will not ordinarily be granted" unless important environmental, safety, procedural, common defense, antitrust, or public policy issues are involved. 10 C.F.R. § 2.786(b)(4). The Staff submits that ALAB-809 did not resolve any issue, based on the circumstances of this case, in a manner which merits Commission review. The Staff considers each of the asserted errors in turn.

A. The Appeal Board did not commit error by requiring that the Licensing Board review the exemption motion under § 50.12(a) as well as § 50.47(c)(1), in the circumstances of this case. Applicant notes correctly that § 50.47(c)(1) has been relied upon in a line of Commission cases to authorize the grant of operating licenses even though the emergency plans associated with those plants may not have fully met the standards set forth in 10 C.F.R. § 50.47(b). ^{5/} The issue in such cases, however, was whether a factual record which had been compiled with regard to emergency planning was sufficient to support a finding under § 50.47(c)(1) or what factual record would be required to support a § 50.47(c)(1) finding in

^{5/} See, petition for review, at 8-9 ns. 18, 19.

light of asserted emergency planning deficiencies. ^{6/} While an extensive evidentiary record has been compiled in the Limerick proceeding on offsite emergency planning ^{7/} the specific contentions asserting deficiencies in the emergency plan for the SCIG have not yet been the subject of an adjudicatory hearing. The grant of the Applicant's exemption motion must, of necessity, address the alleged deficiencies in the SCIG plan in order to make the required showing under § 50.47(c)(1). The Staff believes that these circumstances distinguish Limerick from the § 50.47(c)(1) cases relied upon by the Applicant. While not explicitly stated by the Appeal Board in its discussion of the requirement that the exemption motion be reviewed against § 50.12(a) ^{8/}, the Appeal Board's decision appears to be driven by the fact that a factual record had not yet been fully developed with respect to the deficiencies alleged by the inmates. ^{9/}

^{6/} See, for example: Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 369 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 743 (1983); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 NRC 1211, 1459 (1981).

^{7/} See generally, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-85-14, 21 NRC ____ (May 2, 1985), (Third Partial Initial Decision On Offsite Emergency Planning).

^{8/} ALAB-809, slip op. at 6-13.

^{9/} Id. slip op. at 10-11 n. 9 (distinguishing San Onofre on the basis that in that case no outstanding contentions remained to be considered); slip op. at 15-16 and n. 14 (leaving to the Licensing Board to consider the exemption request in the context of the two admitted contentions).

The Applicant also asserts that ALAB-809 is "directly contrary to Commission policy . . . in affording temporary relief from emergency planning requirements under [10 C.F.R. § 50.47(c)(1)]." Petition for review, at 5-6. The Staff recognizes that the Commission intended § 50.47(c)(1) to provide for ". . . certain equitable exceptions, of a limited duration, from the requirements of § 50.47(b)" See, Emergency Planning: Statement of Policy, 50 Fed. Reg. 20892, at 20893 (May 21, 1985). Nothing in that policy statement, however, or in Commission statements of consideration regarding § 50.47 ^{10/} indicate that an exemption under § 50.12(a) would not also be required where § 50.47(c)(1) is invoked in advance of the full development of a factual record on the emergency planning deficiencies alleged to exist.

The Staff can, thus, perceive no error in requiring the more general standards for an exemption contained in § 50.12(a) to be addressed by the Licensing Board in addition to the more specific standards contained in § 50.47(c)(1) under the circumstances of this case.

B. The Appeal Board did not err in ruling that the Licensing Board's grant of the exemption was premature. The Appeal Board reasoned that only after one or more contentions had been admitted could the specific asserted deficiencies be known and, hence, be addressed by the Applicant and the other parties. ALAB-809, slip op. at 14. The Staff had consistently taken the position that the exemption motion was premature until the Licensing Board had ruled upon the admissibility of the inmates' proposed

^{10/} See, 45 Fed. Reg. 55402 (August 19, 1980); 47 Fed. Reg. 30232 (July 13, 1982).

contentions. ^{11/} The real point here is that the alleged deficiencies have to be sufficiently well defined that they may be adequately addressed by a factual record. This is consistent with the Commission cases, cited above in n. 6, applying § 50.47(c)(1).

C. The Appeal Board did not err in declining to make a determination itself on whether the standards of § 50.12(a) were met based upon a review of the exemption motion and the briefs of the parties. The Appeal Board considered it more appropriate for matters related to the significance of the asserted deficiencies to be determined in the first instance by the Licensing Board on the basis of a factual record developed before it. ^{12/}

D. The Applicant's assertion that it was denied due process because the Appeal Board in ALAB-809 relied on a legal basis -- the requirements to consider the exemption against § 50.12(a) as well as § 50.47(c)(1) -- that had not been previously raised is not well-founded. The Applicant was put on notice as to the existence of this issue by the Appeal Board's statement in its May 21, 1985 Memorandum and Order that:

we do not understand how the Board could properly weigh the exemption criteria of both 10 C.F.R. §§ 50.12(a) and 50.47(c)(1) (as well as pertinent case law) before it has determined whether any exemption will even be necessary --

^{11/} "NRC Staff Response To Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) And (b)," (March 18, 1985), at 6-9; "NRC Staff Additional Views On Applicant's Motion Dated February 7, 1985 For Exemption From The Requirements Of 10 C.F.R. § 50.47(a) And (b)," (April 1, 1985), at 3-4.

^{12/} See ALAB-809, slip op. at 16 ns. 14, 15.

i.e., whether the inmates have proffered an admissible contentions. [footnote omitted] ^{13/}

When, despite the Appeal Board's statement, the Licensing Board reiterated in its May 24 order that its grant of the exemption motion was based on § 50.47(c)(1) alone, the Applicant could have anticipated that this issue would be addressed when the Appeal Board ruled on the appeals from the May 24 order. Nevertheless, the Applicant did not address this issue in its response brief. ^{14/} Thus, Applicant's assertion now that it was denied due process is without merit.

II

As set forth above, the Commission should not take review of ALAB-809. Since the Commission should let ALAB-809 stand, the Commission should also decline to grant the emergency relief requested by the Applicant. ^{15/} The Licensing Board has already taken steps to hold an expeditious hearing on

^{13/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum and Order, May 21, 1985, at 2.

^{14/} "Applicant's Brief In Opposition To Appeals By Graterford Prisoners, Friends Of The Earth And Air And Water Pollution Patrol Regarding The Grant Of An Exemption As To Graterford Contentions," (June 13, 1985). See, p. 15 n. 31.

^{15/} The Applicant requested: reinstatement of the Licensing Board's grant of the exemption and its authorization of issuance of a full-power operating license, conferring of immediate effectiveness on the Licensing Board's orders authorizing license issuance, and the Commission's grant of the exemption requested by the Applicant.

the admitted contentions of the inmates. ^{16/} Pursuant to the opportunity afforded in ALAB-809, the Applicant has also filed a renewed motion for an exemption, which is presently pending before the Licensing Board. ^{17/} The Commission has previously indicated that it would again consider the issuance of a full-power operating license for Limerick, Unit 1 once either the Appeal Board had found the grant of exemption proper or the Licensing Board had issued a decision on the contentions. ^{18/} Since procedures are in place to bring this proceeding to an expeditious conclusion, the Commission should not exercise its discretion to grant Applicant's requested emergency relief. ^{19/}

^{16/} The hearing is scheduled to commence on July 15, 1985 and the Licensing Board has taken the additional step of modifying the normal procedures for filing of proposed findings and has advised the parties that within 24 hours following the close of receipt of evidence it will hear oral argument on the parties' positions and that any party wishing to do so may simultaneously file a written outline of its proposed findings of fact and conclusions of law." Memorandum and Order: Graterford Contentions and Hearing Schedule" (June 18, 1985).

^{17/} "Applicant's Renewed Motion For An Exemption From The Requirements Of 10 C.F.R. § 50.47(a) and (b) As They Relate To The Two Contentions Admitted On Behalf Of The Graterford Prisoners During The Period Necessary For Litigation," (June 20, 1985).

^{18/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), CLI-85-11, 21 NRC ___, June 11, 1985, slip op. at 2.

^{19/} The Applicant also requested that in the event the Commission did not grant its other requested relief, it grant an application that the Applicant would shortly be filing for an exemption from the requirement of 10 C.F.R. Part 50, Appendix E, Section IV.F.1 that a full participation emergency planning exercise be conducted within one year before the issuance of a full-power license. Petition for review, at 2-3. Such a motion was filed with the Commission on June 24, 1985 and the Staff is currently preparing a response to the motion.

CONCLUSION

For the reasons set forth in this answer, the Staff believes that the Commission should decline to take review of ALAB-809 or to take the other actions requested in the petition for review.

Respectfully submitted,

Stephen H. Lewis

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Dated at Bethesda, Maryland
this 2nd day of July, 1985

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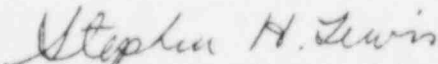
Atomic Safety and Licensing
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