

209.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED  
USNRC

Administrative Judges:

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

'85 AUG 13 P3:48  
August 13, 1985  
(ALAB-814)  
OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

SERVED AUG 14 1985

Docket Nos. 50-352 OL  
50-353 OL

Robert L. Anthony, Moylan, Pennsylvania, intervenor  
pro se and for intervenor Friends of the Earth.

Frank R. Romano, Ambler, Pennsylvania, for intervenor  
Air and Water Pollution Patrol.

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

Benjamin H. Vogler for the Nuclear Regulatory  
Commission staff.

MEMORANDUM AND ORDER

By petition filed August 1, 1985, intervenors Robert L. Anthony/Friends of the Earth (Anthony/FOE) seek a stay of the Licensing Board's fourth partial initial decision (PID), LBP-85-25, 22 NRC \_\_\_ (July 22, 1985). That decision, which addresses the last two contested issues in this proceeding (relating to the emergency plan for the State Correctional Institution at Graterford, Pennsylvania), authorizes the Director of Nuclear Reactor Regulation (NRR) to issue a full-power operating license for the Limerick facility to applicant Philadelphia Electric Company (PECo). Intervenor

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Air and Water Pollution Patrol supports the stay request, while PECO and the NRC staff oppose it. As explained below, we deny the stay.<sup>1</sup>

A.

The first criterion for a stay is a strong showing that the moving party is likely to prevail on the merits. 10 C.F.R. § 2.788(e)(1). In an attempt to show this, Anthony/FOE claim that the Licensing Board could not properly authorize the Director of NRR to issue an operating license for Limerick because several matters that require Board findings prior to license issuance remain outstanding. In this regard, intervenors identify four matters.

First, they argue that both the fourth (LBP-85-25) and third (LBP-85-14, 21 NRC 1219 (1985)) PIDs are legally flawed because they do not consider 44 C.F.R. § 350.7(b). The pertinent portion of this regulation, promulgated by the Federal Emergency Management Agency (FEMA), requires the exact size and configuration of the emergency planning zone

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<sup>1</sup> The Graterford inmates, also intervenors in this proceeding, previously sought a stay of the Board's fourth PID. Because they failed to address the stay criteria set forth in the Commission's Rules of Practice, 10 C.F.R. § 2.788(e), we summarily denied that motion in an unpublished order issued August 1, 1985. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270-71 (1978).

(EPZ) around a nuclear power plant to be determined by state and local governments in consultation with FEMA and the NRC. Second, Anthony/FOE direct our attention to an appeal they now have pending before FEMA. They express confidence that FEMA will agree with their arguments and withdraw its previous approval of the entire emergency plan for Limerick, including the portion involving the Graterford facility. They contend that the withdrawal of FEMA's approval would significantly undercut the Licensing Board's fourth PID. Third, Anthony/FOE believe that they will also succeed on another appeal pending before us -- that involving the Licensing Board's June 4, 1985, denial of Anthony/FOE's motion to reopen the record on a recent PECO effluent release report. Fourth, intervenors refer to three appeals they assertedly have pending before the Commission concerning a variety of topics. Again, they are confident about their likelihood of prevailing on these matters and contend that no license can issue until they are resolved.

A stay motion must also address three other factors: whether the movant will be irreparably harmed in the absence of a stay; whether the grant of a stay would harm any other party; and where the public interest lies. 10 C.F.R. § 2.788(e)(2), (3), (4). Anthony/FOE argue generally that they will be harmed by the danger of accidents, routine releases, radioactive waste, and economic losses if Limerick is licensed. They also claim that PECO's stockholders would

be harmed in the short run by a stay, but would benefit eventually. Lastly, they assert that a stay would serve the public interest by avoiding rate increases that allegedly would result from the licensing of the facility.

B.

1. As a threshold argument, PECO contends that we do not have the authority even to consider Anthony/FOE's petition for stay, in light of the Commission's recent decision to make effective immediately the fourth PID and to issue the full-power license for Limerick Unit 1. Licensee's Opposition to Petition by Friends of the Earth (August 9, 1985) at 2, 5. See CLI-85-15, 22 NRC \_\_ (August 8, 1985). PECO's argument is without merit. The Commission's action in CLI-85-15 was explicitly pursuant to its so-called "immediate effectiveness" rule, 10 C.F.R. § 2.764(f)(2). See CLI-85-15, 22 NRC at \_\_ (slip opinion at 2). Under this regulation,

[u]nless the Commission otherwise explicitly so directs in its immediate effectiveness determination, no comment made in the course of the opinion or statement reflecting that determination is to be given any weight by the . . . Appeal Board in its consideration of either a stay motion pursuant to § 2.788(e) or an appeal on the merits pursuant to §§ 2.762 and 2.785, or in any subsequent formal adjudication. The Commission's effectiveness determination is entirely without prejudice to such consideration in subsequent proceedings.

10 C.F.R. § 2.764(g). The Commission reiterates this mandate in CLI-85-15 itself, 22 NRC at \_\_\_ (slip opinion at 8).

The particular cases upon which PECO relies to support its view are inapposite. Indeed, several months ago in one of the proceedings cited (Shoreham), the Commission authorized a Licensing Board decision to become immediately effective, but nine days later the Appeal Board -- reviewing an appeal from the same Licensing Board decision on the merits -- reversed and vacated that decision in part, as well as the corresponding license authorization. See Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC 275 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-800, 21 NRC 386, 392-98 (1985). Thus, there is no impediment to our consideration of Anthony/FOE's petition for stay.

2. None of the reasons Anthony/FOE advance in support of their stay request has merit. In the first place, arguments concerning the Licensing Board's third PID (for example, those relating to FEMA's compliance with 44 C.F.R. § 350.7(b)<sup>2</sup>) and June 4 denial of reopening on the effluent

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<sup>2</sup> As explained at p. 7, *infra*, the fourth PID concerns only limited emergency planning issues involving the Graterford facility. Thus, Anthony/FOE's argument about FEMA regulation section 350.7(b) can logically be raised  
(Footnote Continued)

release report are far too late. Under 10 C.F.R. § 2.788(a), an application for a stay must be filed within 10 days of service of the decision for which a stay is requested. Anthony/FOE have provided no good cause for their tardiness and no compelling reason for our scrutiny of either decision in connection with this request to stay the Board's fourth PID.<sup>3</sup>

As for the three matters Anthony/FOE claim to have pending before the Commission and on which they expect to prevail, none concerns any matter now before us on appeal. We are only generally aware of their content and cannot properly speculate as to how they might ultimately be decided.<sup>4</sup> Anthony/FOE's argument that an operating license for Limerick cannot be issued until these matters are

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(Footnote Continued)

only in conjunction with the Licensing Board's more comprehensive offsite emergency planning decision, its third PID. And indeed, Anthony/FOE's brief on appeal from the third PID is devoted principally to this issue. See Anthony/FOE Brief (June 6, 1985), passim.

<sup>3</sup> Another party, Limerick Ecology Action, did timely seek a stay of the Board's third PID, which was issued May 2, 1985. We denied this motion in ALAB-808, 21 NRC 1595 (1985).

<sup>4</sup> The Commission has referred two of these matters (concerning PECO's request for various exemptions) to NRR for initial disposition. See Order of July 24, 1985 (unpublished); Order of August 8, 1985 (unpublished). The third item, relating to Anthony/FOE's request for revocation of PECO's low-power operating license, was recently denied in a lengthy decision by the Director of NRR and is pending Commission review. See DD-85-11, 22 NRC \_\_\_ (July 29, 1985).

disposed of is thus more properly directed to either the Commission itself or the Director of NRR.

Anthony/FOE's remaining argument is only peripherally related to the discrete emergency planning issues addressed in the Licensing Board's fourth PID (i.e., the training for Graterford's civilian emergency evacuation personnel and the evacuation time estimate for the Graterford facility).<sup>5</sup> This claim -- that FEMA will withdraw its approval of the entire Limerick offsite emergency plan -- is highly speculative and thus cannot serve as a basis for a stay. If FEMA were to take such action, however, this would be a significant new development that would likely warrant further action by the appropriate NRC officials at that time.

Anthony/FOE have therefore failed to make the required strong showing that they are likely to prevail on the merits of their appeal. See also note 5, supra. It is not enough simply to state confidence or an expectation of success before this or any other forum. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20

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<sup>5</sup> It does not appear that Anthony/FOE were participants in this part of the proceeding. Thus, there is a question as to Anthony/FOE's right to appeal and to seek a stay of the fourth PID. We need not decide that issue now, however, but we expect all the parties concerned to address this matter in their briefs on the merits.

NRC 801, 804-05 (1984). Intervenors' arguments on the other three stay factors are similarly generalized and unconvincing. Especially insofar as irreparable harm -- often the factor accorded the greatest weight -- is concerned, a party must reasonably demonstrate, not merely allege, such harm. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984). Anthony/FOE have failed to meet their burden of proving that a stay of the Board's fourth PID is warranted.

Anthony/FOE's motion for a stay of LBP-85-25 is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Board