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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
Docket Nos. 50-352
50-353 *loc*

NRC STAFF'S ANSWER TO R. L. ANTHONY/FOE'S PETITION FOR
A STAY OF THE LICENSING BOARD'S ORDER OF JULY 22, 1985
AUTHORIZING THE ISSUANCE OF A FULL POWER LICENSE FOR LIMERICK

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August 12, 1985

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I. INTRODUCTION

On August 1, 1985 R. L. Anthony/FOE petitioned the Appeal Board for an immediate stay of the Licensing Board's Fourth Partial Initial Decision, which authorized the issuance of a full power license for Limerick Units 1 and 2. On August 6, 1985 the Appeal Board directed that all replies to the Anthony/FOE motion should be received no later than the close of business (5:00 p.m.) August 12, 1985. ^{1/} For the reasons set forth below, the NRC staff (Staff) opposes the Anthony/FOE (FOE) petition for a stay.

II. BACKGROUND

On July 22, 1985 the Atomic Safety and Licensing Board issued its Fourth Partial Initial Decision in this proceeding. This Partial Initial

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished), (August 6, 1985).

Decision (PID) relates to the offsite emergency planning contentions of the inmates of the State Correctional Institution at Graterford. All of the other emergency planning contentions raised in this proceeding were considered and disposed of in the Licensing Board's Third Partial Initial Decision. LBP-85-14, 21 NRC ____ (May 2, 1985). Appeals from the Licensing Board's Third PID are now pending. In its Fourth PID, the Licensing Board resolved in favor of the Applicant the two admitted contentions raised by the inmates at Graterford. The decision also authorized the Director of Nuclear Reactor Regulation "to issue a full power operating license for the Limerick Generating Station, Units 1 and 2, consistent with the Board's decisions in this case and upon making requisite findings with respect to matters not embraced in the Third Partial Initial Decision on Offsite Emergency Planning or in this decision." PID at 25. ^{2/}

III. DISCUSSION

The requirements for determining whether to grant or deny a stay are contained in 10 C.F.R. § 2.788(e). ^{3/} In deciding whether a petitioner

^{2/} After being briefed on the uncontested issues, the Commission in a Memorandum and Order, dated August 8, 1985, determined, pursuant to 10 C.F.R. § 2.764, that a stay of the effectiveness of the Fourth PID was not warranted. CLI-85-15, 22 NRC ____ (August 8, 1985).

^{3/} 10 C.F.R. § 2.788(e) states:

(e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Li-

(FOOTNOTE CONTINUED ON NEXT PAGE)

has satisfied the criteria of 10 C.F.R. § 2.788(e), it must be recognized that:

The burden of persuasion on these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.

Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981) (footnotes omitted); see also, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

censing Appeal Board, or presiding officer will consider:

- (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.

1443, 1446 (1984). The Staff will address each of the four factors found in 10 C.F.R. § 2.788(e) in turn. ^{4/}

1. Likelihood of Prevailing on the Merits

In its first paragraph, captioned "Strong Showing On the Merits", FOE asserts -- without any citations to the record -- that the Fourth PID is "legally flawed" in that it did not consider the requirements of 44 C.F.R. § 350.7(b) which provide that:

The exact size and configuration of the EPZs surrounding a particular nuclear power plant facility shall be determined by State and local governments in consultation with FEMA

. . . .

Specifically, FOE asserts that "FEMA disclaimed any connection with setting up the EPZ [and that] [t]he wording above 'shall be determined' does not allow any exception to this by FEMA or NRC." Petition at 1. FOE further asserts that [the above regulation] is a requirement in offsite planning [and] [i]n neither the 4th or the 3rd PID did [the Licensing Board] consider this, making both decisions flawed." Id. We cannot agree.

Unlike the regulation of the Federal Emergency Management Agency cited above by FOE, the regulations of the NRC regarding the establishment of the Emergency Planning Zone (EPZ) do not contain the express requirement for "consultation with FEMA". See e.g., 10 C.F.R. §§ 50.33(g), 50.47(c)(2), Part 50, Appendix E. However, under the Com-

^{4/} In addressing FOE's request for a stay of the Fourth PID on the merits, the Staff does not suggest that FOE has standing to appeal the findings and conclusions of the Fourth PID with respect to the Graterford Imates. FOE's standing in this regard will be addressed by the Staff in its response to the appeals from the Fourth PID.

mission's regulations (10 C.F.R. § 50.33(g)) the Applicant for a nuclear power reactor must "submit radiological emergency response plans of State and local governmental entities . . . that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ)" The regulation further states that "[g]enerally, the plume exposure pathway EPZ for nuclear power reactors shall consist of an area about 10 miles (16 km) in radius [but that] [t]he exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to the local emergency response needs and capabilities" Id. Upon receipt of the offsite emergency plans, the Memorandum of Understanding entered into between the NRC and FEMA provides that the plans will then be reviewed by FEMA for their adequacy. 50 Fed. Reg. 15485 (1985).

In the present proceeding, FEMA has testified that as part of this review, FEMA's Regional Assistance Committee has reviewed the EPZ developed for the Limerick facility and has no reason to believe that it is not appropriately drawn. See, Tr. 20,233-234; 20,242-243; 20,246; 20,287; 20,293-294. Thus, the cooperative effort sought by FOE has in fact occurred, and FOE's concern that FEMA has not fully performed its responsibilities regarding the establishment of the EPZ is without merit. ^{5/}

^{5/} FOE also asserts that "[w]e are certain that we will prevail on our appeal to the Director, FEMA, of 6/25/85 and that the Director will withdraw FEMA approval of emergency plans for the whole EPZ and Graterford." Petition at 1. While we, of course, do not know how the Director of FEMA will respond to FOE's appeal, FOE's unsupported anticipation, standing alone, does not provide a sufficient basis for a stay of the Licensing Board's decision.

Similarly, FOE's unsupported belief that it will prevail on its pending appeal of the Licensing Board's denial of its petition to reopen the record in this proceeding provides no basis upon which to grant this present Petition. In its June 4, 1985 decision, the Licensing Board rejected FOE's motion to reopen the record based on Applicant's Semi-Annual Effluent Release Report and concluded that FOE had "(1) failed to make the showing required of a party seeking to reopen the record; and (2) failed to satisfy the five factors for admission of a late-filed contention and the basis and specificity requirements for admission of a contention." Memorandum and Order at 13. FOE's present argument here, stating only that "[w]e believe that the Board will reverse [the Licensing Board's] decision and order the record reopened, making the issuance of a license impossible before the results of a hearing on the matter are issued" (Petition at 1) is neither helpful nor persuasive and provides little to support its "Strong Showing on the Merits."

Finally, FOE asserts that it believes that it will prevail on three other "appeals" which are pending with the NRC, and thus suggests that such "appeals" provide a basis for granting its present petition. The three matters relied upon by FOE are: (i) a 10 C.F.R. § 2.206 Petition seeking revocation of the low power operating license issued to the Limerick facility on October 26, 1984; (ii) an opposition to Applicant's request for an exemption from the requirements of 10 C.F.R. § 50, App. E, IV,F,1; and (iii) an "appeal" to the Commission from the granting of eight exemptions to the Applicant from certain requirements of 10 C.F.R. Part 50.

Contrary to FOE's assertion, none of the above "appeals" provides a basis for the granting of the present Petition. As to the first "appeal", relied upon by FOE, the Director of Nuclear Reactor Regulation issued a decision on July 29, 1985 denying FOE's 2.206 Petition. DD-85-11, 22 NRC ____ (July 29, 1985). And under the provisions of 10 C.F.R. § 2.206(c), that Decision will become final action of the Commission in 25 days of its issuance unless the Commission determines to review the Decision within that time. Similarly, as to FOE's opposition to Applicant's request for an exemption from the requirements of 10 C.F.R. § 50, App. E, IV,F,1, on August 8, 1985 the Commission authorized the issuance of a full power operating license for the Limerick facility (CLI-85-15, 22 NRC ____ (August 8, 1985)) which license granted the requested exemption. Finally, with regard to FOE's third "appeal" regarding the issuance of eight exemptions to the Applicant from certain regulations, the Commission issued an Order on August 8, 1985 referring FOE's pleading to the Director of Nuclear Reactor Regulation "for appropriate action." Order at 1.

Thus, while not all of the "appeals" relied upon by FOE have been finally resolved, none of the matters can be viewed as providing any support for the present Petition.

2. Irreparable Harm

This factor is often the most important in determining the need for a stay. ^{6/} FOE argues -- again without any support -- that if

^{6/} Philadelphia Electric Company, (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443 (1984).

Limerick is licensed it will be irreparably injured because of the danger of accidents, routine releases and financial injury due to losses to the economy. With regard to FOE's allegations concerning the danger from accidents, the Commission recently denied a stay request in Diablo Canyon, stating that "mere exposure to risk, --- does not constitute irreparable injury if the risk --- is so low as to be remote and speculative." ^{7/} In addition, FOE's reasons are so general in nature as to provide no support for its request. Accordingly, FOE has not established that it will suffer irreparable injury if its request for a stay is denied.

3. Harm to other Parties

With respect to the question of harm to other parties, FOE alleges "...PECo stockholders will probably be harmed in the short run, but in the longer run will benefit." Thus, FOE acknowledges that the Applicant's interests will be affected by the grant of a stay even though in the long run it somehow will benefit. As with FOE's treatment of the other factors necessary for a stay, there is no support for its bare assertions of a long run benefit to the Applicant. Moreover, the Licensing Board has authorized the Director of Nuclear Reactor Regulation to issue a full power operation license for Limerick and the Commission has voted to make the Licensing Board's decision immediately effective. CLI-85-15, 22 NRC ____ (August 8, 1985). A stay at this time, would ad-

^{7/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, August 1, 1985, slip op. at 5.

versely impact the Applicant's schedule thereby delaying operation of the Limerick facility.

4. The Public Interest

FOE makes no persuasive showing on the public interest factor and simply asserts that the public interest lies in avoiding economic setbacks from rate hikes and "PECo instability" if Limerick is licensed. This is not the first time FOE has put forth this argument in connection with a stay request and the Appeal Board has on previous occasions rejected it.

In ALAB-789 ^{8/} the Appeal Board stated:

...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 1), CII-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 view of FOE's failure to make a persuasive showing on this factor as well as the other requisite factors (discussed above) necessary for the issuance of a stay, it is Staff's opinion that FOE has not successfully established that the public interest supports its efforts to

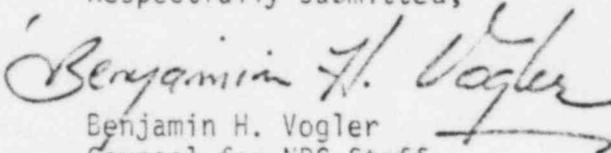
^{8/} Philadelphia Electric Company, (Limerick Generating Station, Units 1 and 2) ALAB-789 20 NRC 1443, 1447, (1984)

disturb the effectiveness of the decisions below. ^{9/} Consideration of all the criteria set forth in 10 C.F.R. § 2.788(e) clearly weigh against granting the relief requested by FOE.

IV. CONCLUSION

Based on the foregoing, FOE has failed to satisfy the requirements for the issuance of a stay under 10 C.F.R. § 2.788 and its request should be denied.

Respectfully submitted,


Benjamin H. Vogler
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of August, 1985

^{9/} See, Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188-1189 (1977).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO R. L. ANTHONY/FOE'S PETITION FOR A STAY OF THE LICENSING BOARD'S ORDER OF JULY 22, 1985 AUTHORIZING THE ISSUANCE OF A FULL POWER LICENSE FOR LIMERICK" 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, or as indicated by a double asterisk by hand-delivery, this 12th day of August, 1985:

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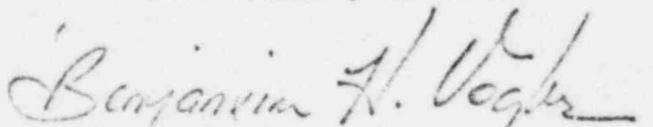
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