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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

OFFICE OF SECRETARY
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In the Matter of)	
)	
Philadelphia Electric Company)	Docket No. 50-352-OLA
)	
(Limerick Generating Station,)	
Unit 1))	

LICENSEE'S ANSWER IN OPPOSITION TO REQUEST
BY ROBERT L. ANTHONY FOR A STAY

Preliminary Statement

This matter concerns a late-filed petition by Robert L. Anthony for leave to intervene and for a hearing with respect to the proposed issuance of an amendment to the operating license of Limerick Generating Station, Unit 1 ("Limerick"). After public notice in the Federal Register on December 26, 1985, the NRC Staff prepared a written safety evaluation and otherwise fulfilled the requirements of 10 C.F.R. §§50.91 and 51.92 prior to granting the requested amendment "effective immediately" on February 6, 1986.

On January 30, 1986, Mr. Anthony filed his petition seeking intervention and requesting a hearing, which the Secretary rejected for noncompliance with the rules. Mr. Anthony filed an amended petition dated February 5, 1986, which the Secretary referred to the Atomic Safety and Licensing Board Panel. An Order was entered on February 12, 1986 establishing an Atomic Safety and Licensing Board ("Licensing Board") to rule upon petitions for leave to intervene and/or requests

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for hearing and to preside over the proceeding in the event that a hearing is ordered.

In furtherance of his petition, Mr. Anthony filed another paper dated February 12, 1986, which asked the Commission "to suspend the effectiveness of the amendment until a hearing and a decision based on the hearing." Licensee Philadelphia Electric Company ("Licensee") opposes the application by Mr. Anthony for a stay.^{1/}

Preliminarily, Licensee believes that only the Commission possesses authority to overturn the immediate effectiveness of the amendment at issue. The Commission's regulations governing license amendments do not provide for the grant of a stay by the licensing board subsequently designated to rule upon hearing requests after the Commission, by its Staff, has determined that the proposed amendment involves "no significant hazards consideration." Therefore, the matter of the stay request, as distinct from the substantive challenge to the amendment, is properly before the Commission and is not within the delegation of authority noted in the Order establishing the Licensing Board to preside over the instant amendment proceeding.

On the merits of the stay request, Mr. Anthony has wholly failed to satisfy applicable stay criteria. His petition should therefore be summarily denied.

^{1/} In its Answer filed February 19, 1986, Licensee opposed Mr. Anthony's petition for leave to intervene and for a hearing.

Argument

I. Mr. Anthony's Request for a Stay of the Effectiveness of the Amendment Should Have Been Sought Before the Commission During the Thirty-Day Comment Period.

Petitioner's request for a stay of the license amendment granted by the Commission to be "effective immediately" appears to raise a novel issue. Licensee is unaware of any other instance in which such an amendment has been granted and a petitioner has sought a stay from the Commission or the licensing board designated to rule upon intervention petitions and to preside over any subsequent hearing in the proceeding. Accordingly, it is necessary at the outset to examine whether the Commission has delegated stay authority to licensing boards in license amendment proceedings.

The grant of a stay would overturn the decision of the NRC Staff, acting as the delegate of the Commission under 10 C.F.R. §50.91, in determining that the license amendment involves no significant hazards consideration and should be made effective immediately. If such authority has not been delegated to adjudicatory boards, the Commission must decide Mr. Anthony's stay request because the licensing board appointed to rule on the petition by Mr. Anthony to intervene lacks jurisdiction to do so.^{2/}

^{2/} The Appeal Board recently summarized this fundamental principle in the Catawba proceeding as follows:

Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings. Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act

(Footnote Continued)

Under its regulations, the Commission has taken a fundamentally different approach with regard to a stay of a board's adjudicatory decision and a stay of an operating license amendment issued by the Staff as its delegate. Under 10 C.F.R. §2.788, a party to a proceeding may obtain a stay of a decision or action by the presiding officer or the Atomic Safety and Licensing Appeal Board by meeting the four stated criteria. For operating license amendments, however, a different procedure has been established for determining whether or not licensing action will be immediately effective.

Whenever a license amendment is requested, the NRC is required by its regulations to publish in the Federal Register a notice of the proposed license amendment, including the Staff's proposed determination as to whether the request involves "no significant hazards consideration." The notice must provide a 30-day comment period.^{3/} Following the 30-day comment period, the Staff makes its final determination as to "no significant hazards consideration" if a hearing is requested.^{4/}

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and use licensing boards "to conduct such hearings as the Commission may direct." The boards, therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them. The various hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings.

Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985) (footnotes omitted).

3/ See 10 C.F.R. §50.91(a)(2).

4/ 10 C.F.R. §§50.91(a)(3) and 50.92(c).

Once the Staff finds that it involves no significant hazards consideration, the Staff may issue the amendment, effective immediately, even if a hearing is requested. The regulations state:

Where the Commission makes a final determination that no significant hazards consideration is involved and that the amendment should be issued, the amendment will be effective upon issuance, even if adverse public comments have been received and even if an interested person meeting the provisions for intervention called for in §2.714 has filed a request for a hearing. The Commission need hold any required hearing only after it issues an amendment, unless it determines that a significant hazards consideration is involved.^{5/}

Accordingly, the Commission has fashioned its license amendment rule such that any requests to delay effectiveness of a requested amendment are to be directed to the Commission (i.e., the Staff as its delegate) during the 30-day comment period. The Statements of Consideration underlying the rule make this clear. As the Commission explained in rulemaking, "new §50.91 would permit the Commission to make an amendment immediately effective in advance of the holding and completion of any required hearing where it has determined that no significant hazards consideration is involved."^{6/}

Thus, the rulemaking history amplifies the rule's explicit statement that it is the Commission, rather than any subsequently appointed board, which decides whether the requested amendment should be made

^{5/} 10 C.F.R. §50.91(a)(4). The Commission's new procedures were authorized by Congress in Section 12 of Pub. L. 97-415, 96 Stat. 2073 (1983), which amended Section 189a of the Atomic Energy Act, 42 U.S.C. §2239(a).

^{6/} 48 Fed. Reg. 14873, 14876 (April 6, 1983) (emphasis added).

immediately effective. That decision is to be made on the basis of public comments, the licensee's analysis and the Staff's safety evaluation. The Commission emphasized this critical aspect of procedure in adopting the rule:

If it receives a hearing request during the comment period and the Commission has decided that no significant hazards consideration is involved, it would prepare a "final determination" on that issue, make the requisite safety and public health findings, and proceed to issue the amendment. The hearing request would be treated the same way as in previous Commission practice, that is, by providing any requisite hearing after the amendment has been issued. As explained before, the legislation [Pub. L. 97-414 (1982)] permits the Commission to make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person (even one that meets the provisions for intervention in §2.714), in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved. The Commission wishes to state in this regard that any question about its staff's determinations on the issue of significant versus no significant hazards consideration that may be raised in any hearing on the amendment will not stay the effective date of the amendment.^{7/}

Therefore, whatever authority licensing boards may exercise pursuant to 10 C.F.R. §2.788 in other proceedings, the Commission has determined that the decision of the Staff in license amendment actions as to immediate effectiveness shall not be subject to challenge in proceedings initiated by a petitioner's request for a hearing.^{8/}

^{7/} Id. (emphasis added).

^{8/} If a licensing board should determine sua sponte or on the basis of
(Footnote Continued)

II. Mr. Anthony Has Waived His Right to Comment on the Immediate Effectiveness of the Amendment.

Once it is clear that the procedures defined under 10 C.F.R. §50.91 provide the exclusive means for an interested person to seek a delay in the "immediate effectiveness" of a license amendment, it follows that any such request by Mr. Anthony in this instance should have been made to the Commission within the 30-day comment period afforded the public prior to issuance of the amendment. Obviously, the Commission has discretion to change the "immediate effectiveness" of a license amendment if there were some identifiable threat to the public health or safety.^{9/} Absent a compelling demonstration of potential harm to the public, however, the Commission should not entertain requests for deferred effectiveness once the public comment period provided by regulation has expired.^{10/} In short, Mr. Anthony has waived his right to seek a stay of the immediate effectiveness of the license amendment issued for Limerick within the prescribed 30-day comment period. The Commission should not expand the privilege afforded Mr. Anthony and other members of the public under its regulations by considering late requests to defer the amendment's effectiveness.

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a petitioner's proof that the amendment poses a threat to the public health and safety, it would, of course, promptly notify the Commission either informally or by way of existing certification or referral procedures.

9/ Cf. 10 C.F.R. §2.202(f); Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

10/ By analogy, the Commission considers comments from the parties
(Footnote Continued)

II. Mr. Anthony Has Not Satisfied Applicable Stay Criteria.

Should the Commission review the request on the merits, Mr. Anthony has not satisfied the traditional criteria for obtaining a stay. Preliminarily, Mr. Anthony has not even addressed applicable stay criteria in any meaningful way.^{11/} As the Appeal Board held in the operating license proceeding for Limerick, a party's request for a stay should be summarily denied where the movant has not even addressed the stay criteria.^{12/}

Certainly, Mr. Anthony's perfunctory statements in his most recent submittal, dated February 15, 1986, do not address the stay criteria in any meaningful way. He claims that he is likely to prevail on the merits because the 18-month surveillance testing requirement for excess flow check valves was written into the Technical Specifications and any amendment of that schedule necessarily "gambles" with safety. This is

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prior to determining whether the decision of a licensing board authorizing issuance of an operating license should be made immediately effective. 10 C.F.R. §2.764(f)(2)(ii).

^{11/} For the reasons discussed above, a request to stay the immediate effectiveness of a license amendment is not covered by the provisions of 10 C.F.R. §2.788 governing requests to stay actions by presiding officers and the Appeal Board. It is irrelevant, however, whether the Commission applies the criteria under 10 C.F.R. §2.788(e) by analogy or the traditional criteria used by the federal courts, for example, in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). The two sets of criteria are basically the same. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 631-32 (1977).

^{12/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB Order (August 1, 1985).

an obvious example of circular logic. On that basis, no license amendment could ever be granted by the NRC.

Mr. Anthony's claim of irreparable injury, which he cites as "a possible breakdown" of some unidentified component or system "because of the neglect of these tests," is wholly conclusionary and without factual basis.^{13/} As to the harm to Licensee in granting a stay, Mr. Anthony erroneously asserts that Licensee was unable to complete the surveillance testing as scheduled because of neglect. This ignores the facts stated in the application for the amendment and as found by the NRC Staff in its written safety evaluation.^{14/} Mr. Anthony's claims as to the "public interest" merely recite his unsupported allegations.

13/ Anthony Request for a Hearing and Petition for Leave to Intervene and Petition for Stay of Operation at 3 (February 15, 1986).

14/ In the application, Licensee explained the situation as follows:

The long time associated with obtaining the full power license led to the need for this extension. A normal schedule for low power testing, startup testing and 100-hour full power warranty run would not have resulted in a requirement to extend the testing interval. All low power (less than 5% thermal power) testing was completed prior to late April, 1985. Circumstances beyond Licensee's control delayed the issuance of the full power license until August, 1985. During this period of time, the unit was maintained in a 48-hour standby condition to demonstrate its availability for operation. This action precluded testing the excess flow check valves.

Application for Amendment of Facility Operating License NPF-39 at 2 (December 18, 1985). The Staff agreed with this analysis, noting: "Since the Limerick Unit 1 plant has been through an extended startup program schedule, which included relatively little startup testing program activity from about April to early August 1985, the

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Thus, Mr. Anthony's stay request and petition for intervention incorporated by reference do not demonstrate entitlement to a stay under the four stay criteria. The Appeal Board's reasons for denial of a stay requested by Mr. Anthony in the operating license proceeding are equally applicable here. It stated:

Anthony/FOE have therefore failed to make the required strong showing that they are likely to prevail on the merits of their appeal. . . . It is not enough simply to state confidence or an expectation of success before this or any other forum. . . . 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 concern, a party must reasonably demonstrate, not merely allege, such
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Similarly, the Commission denied Mr. Anthony's request for a stay of the low-power license for Limerick, holding:

The request falls far short of the criteria set forth within 10 CFR §2.788(e) for granting a stay. FOE's bases amount to no more than conclusory assertions which do not equate to a strong showing that it is likely to prevail on the merits, do not establish that it will suffer irreparable harm if no stay is granted, and do not elucidate where the public interest lies.16/

(Footnote Continued)

scheduled surveillance tests fall in a period of what would otherwise be a continuation of first fuel cycle power operations." Safety Evaluation by the Office of Nuclear Reactor Regulation, Support Amendment No. 1 to Facility Operating License No. NPF-39 at 1 (February 6, 1986).

15/ Limerick, supra, ALAB-814, 22 NRC 191, 196 (1985).

16/ Limerick, supra, Commission Order (December 20, 1984) (slip op. at 2), aff'd, ALAB-789, 20 NRC 1443 (1984).

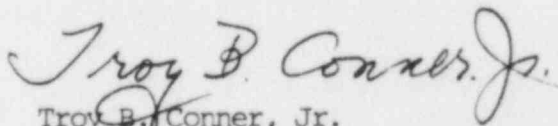
Mr. Anthony's showing in the instant case is extremely weak. He has demonstrated no defect in the NRC's determination that the requested amendment involves "no significant hazards consideration," as defined in the regulations and analyzed in the Staff's safety evaluation and the Licensee's application for the amendment. For the same reason, Mr. Anthony has demonstrated no threat of harm to him personally, much less any irreparable threat of harm. He has totally ignored the fact that any interim shutdown of Limerick to perform the tests which are the subject of the license amendment would necessarily inflict substantial economic harm upon Licensee and its customers and would therefore be contrary to the public interest.

Conclusion

For the reasons discussed above, Mr. Anthony's request for a stay should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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Counsel for the Licensee

February 25, 1986