



ADJUDICATORY ISSUE
(Affirmation)

January 22, 1985

SECY-85-18

For:

From:

Subject:

Facility:

Purpose:

The Commissioners

James A. Fitzgerald.
Assistant General Counsel

MOTION FOR STAY OF LOW-POWER
AUTHORIZATION AND SUSPENSION OF
LOW-POWER LICENSE

Limerick Generating Station,
UNITS 1 AND 2

Discussion:

On December 10, 1984, LEA moved the Commission for a stay of LBP-84-31, the Licensing Board's authorization for a low-power license for the Limerick facility, and a suspension of the low-power license. The NRC staff and the Applicant, Philadelphia Electric Company, oppose this motion.

Analysis:

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Larry Ralph, OGC
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RYAN85-409

Recommendation:


James A. Fitzgerald
Assistant General Counsel

Attachments:

1. Draft Order
2. Motion for Stay
3. Appeal Board Decision
4. Staff Response
5. Applicant's Opposition

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, February 6, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, January 30, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of February 11, 1985. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION:

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ATTACHMENT 1

ATTACHMENT 2

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

BEFORE THE COMMISSION

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

MOTION FOR STAY OF LBP-84-31, SUSPENSION
OF LOW-POWER FACILITY OPERATING LICENSE NPF-27,
AND/OR PROHIBITION OF LOW-POWER TESTING

Limerick Ecology Action, Inc. (LEA), intervenor in the above captioned licensing proceeding, moves the Commission for an Order staying LBP-84-31, suspending the low-power operating license NPF-27 for the above facility, or otherwise prohibiting low-power testing, and sets forth the following in support thereof:

On or about September 3, 1984, LEA filed a timely appeal to the ASLAB Board from the Partial Initial Decision (PID), of the Atomic Safety and Licensing Board (ASLB), which, inter alia, authorized the Director of the Office of Nuclear Reactor Regulation to issue the operating license.

On or about October 3, 1984 LEA filed a brief in support of its appeal, setting forth in detail various errors in law, and violations of the National Environmental Policy Act, the Administrative Procedure Act and Commission regulations by the ASLB.

LEA's arguments therein are hereby incorporated in their entirety by reference thereto.

Based upon the arguments set forth in its Brief, LEA believes that it has made a "strong showing" that it is likely to prevail on the merits of its position.

On or about November 15, 1984, in connection with its Appeal, LEA filed a Motion For Suspension of Low-Power Facility Operating License NPF-27 with the Atomic Safety and Licensing Appeal Board (ASLAB).

In a Memorandum and Order dated November 23, 1984, the ASLAB dismissed LEA's Motion as an untimely "stay" request and stated inter alia:

...our power to treat a post-license-issuance stay request as a motion to suspend, or to entertain a motion for license suspension, extends only to limited circumstances -- for example, where the license has already been issued but a party nevertheless has a colorable right to such a stay within the time limit of 10 C.F.R. § 2.788 (a). Otherwise, requests for license suspension are more properly addressed to the Director of NRR via a petition under 10 C.F.R. § 2.206 or to the Commission itself.

(Memorandum and Order, slip. op., p. 3).

LEA therefore requests the Commission, for the reasons set forth in its Brief on appeal and those set forth below, to either stay the authorization for the license granted by LBP-84-31, to suspend the license, or otherwise to prohibit low-power testing of the facility. The Commission's failure to take such action will prejudice LEA's interests pending appellate review, and will irretrievably commit resources in the face of violations of the National Environmental Policy Act.

Irreparable Injury to LEA

LEA will be irreparably injured unless the suspension or prohibition is granted. Among the bases which LEA set forth for reversal of the ASLB partial initial decision below is the failure of the environmental review for Limerick to consider design alternatives to mitigate the risk of severe accidents. LEA's membership is among the population exposed to this risk, and would be among the beneficiaries of a reduction of this risk.

Hidden from NEPA review and excluded from licensing consideration are Staff-contractor analyses of a range of potential risk reduction measures which may be available for implementation at Limerick. ^{1/} However, the cost-effectiveness of such measures, the practicability of backfitting such measures into the Limerick design and the radiation exposure of workers involved in the implementation of such measures will all be adversely affected by low-power operation of the facility which will contaminate plant systems.

Thus, low-power operation may forever make unavailable design alternatives which could substantially reduce the public risk to LEA's membership. As the ASLB stated below:

It is commonly recognized that as construction continues, the costly corrective action to minimize environmental harm may increase, even to the point where such action is not reasonably possible.

^{1/} See, e.g. the material noted in LEA's pleadings and brief below.

Philadelphia Electric Co. (Limerick Generating Station) LBP-82-92A, 16 NRC 1387 (1982). Plant operation may well cause an "irretrievable and irreversible commitment" to a particular, and needlessly risky, plant design.

The public accident risk from operation of Limerick exceeds that of any facility in the United States with the sole exception of Indian Point in New York. See NUREG-0974, Final Environmental Statement related to the operation of the Limerick Generating Station, pp. 5-116 - 5-124. Remedial risk reduction measures unavailable at Indian Point due to its history of plant operation may still be available for Limerick.

In addition, the NEPA, APA, and regulatory violations set forth in LEA's Brief, unless corrected prior to plant operation, will irreparably harm LEA's interest in lawful decision-making for the Limerick facility.

Harm to Other Parties

The granting of suspension will not harm the cognizable interests of other parties. The only party whose interests may reasonably be said to be adversely affected by such a suspension

would be the Applicant. Yet the only such interests so affected are solely economic in nature - concerns which, as this Appeal Board has expressly noted, are "not within the proper scope of issues litigated in NRC proceedings".^{1/} Philadelphia Electric Co. (Limerick Generating Station) ASLB-789, ___ NRC ___ (November 5, 1984), slip. op. p. 5 (rejecting such concerns in the context of a stay of a license).

To the extent that such solely economic interests are deemed cognizable, LEA submits that the interest in the health and safety of the public must necessarily outweigh the monetary and private interests of the utility. Further, such economic impacts to the utility are speculative at best, because the ultimate full-power and commercial operation of Limerick cannot now be presumed, in the face of extant challenges to the adequacy of off-site emergency planning which remain to be litigated as

^{1/} Indeed, it would be arbitrary and capricious for the Commission to consider claims of economic harm to the utility caused by a licensing delay, yet exclude claims of economic harm to the rate-payers and the public occasioned by the licensing of a nuclear facility, which like Limerick, the need for which is dubious at best. If the Appeal Board intends to consider such claims of economic harm to the utility, LEA respectfully requests an opportunity to set forth the economic harm to its membership and the public resulting from facility licensing and operation.

a condition to full-power operation and whose outcome cannot permissibly be prejudged. Indeed, the Appeal Board has precisely rejected a claim that even the grant of a low-power license begins the "inexorable" process to full-power licensure. Philadelphia Electric Co., supra, slip. op., p. 5.

The Public Interest

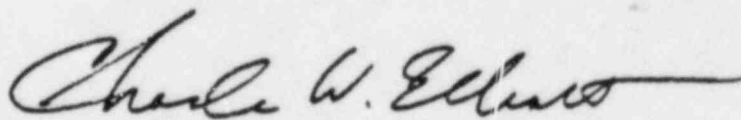
The requested suspension would serve the public interest, because it (1) protects the public interest in avoiding undue risk in nuclear power plant operation; (2) permits time to fairly and comprehensively consider risk mitigation alternatives; (3) avoids an "irreversible and irretrievable commitment" to resources in the face of violations of National Environmental Policy Act safeguards; (4) protects the public interest in principled and lawful decision making.

We anticipate the Applicant's arguments that the public interest would be disserved by any asserted increased costs due to delay in testing and commercial operation. Therefore, we reiterate the Appeal Board's rejection of the cognizability of "a nuclear plant's possible effect on rates." Id., slip. op. p. 5. And, in any event, whether the Commission will authorize full power operation by such time so as to make the suspension LEA requests a material factor in any delay of commercial operation impacting rates is utterly speculative; even more speculative is

what actual significant impact, if any, such a delay might actually have upon rates.

What is not speculative is the fact that contamination of plant systems by low-power testing will make design change backfitting more dangerous, more difficult, and more expensive, and may thus irrevocably shift a close cost-benefit ratio against risk reduction.

For all these reasons, Limerick Ecology Action, Inc. respectfully requests the Commission to either stay LBP-84-31, suspend the low-power license granted to the Applicant, or otherwise prohibit low-power testing of the facility pending adjudication of LEA's appeal on the merits.



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Dated: December 10, 1984

ATTACHMENT 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD ⁸⁴ NOV 23 P3:29

Administrative Judges:

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

November 23, 1984

SECRET NOV 23 1984

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

Docket Nos. 50-352
50-353

MEMORANDUM AND ORDER

In a motion served November 16, 1984, intervenor Limerick Ecology Action, Inc. (LEA), seeks a suspension of the low-power license recently issued to Philadelphia Electric Company (PECo). For the reasons set forth below, we dismiss the motion.

Although the pleading is styled a motion for suspension of the low-power license, it is, in fact, a motion for stay of the Licensing Board's August 23, 1984, partial initial decision, authorizing the issuance of the license. See LBP-84-31, 20 NRC ___. Under the Commission's Rules of Practice, 10 C.F.R. § 2.788(a), LEA should have filed its stay motion within 10 days of service of LBP-84-31. See ALAB-789, 20 NRC ___, ___ (Nov. 5, 1984) (slip opinion at 6). LEA's stay request is thus more than two months late. Further, LEA fails to acknowledge the delay and makes no attempt whatsoever to explain the reason for it.

In an apparent attempt to circumvent the usual time limit for stay motions, LEA has seized upon our treatment of two earlier stay motions as requests for suspension of the low-power license. This strategy, however, must fail. Last month, two other intervenors, Friends of the Earth (FOE) and Del-Aware Unlimited, Inc., filed motions that sought, in effect, a stay of the issuance of the low-power license. Unbeknown to us and before we had received either stay request, the Director of Nuclear Reactor Regulation (NRR) issued the license. In this circumstance, we treated each stay request as a motion for suspension of the license, applied the stay criteria of 10 C.F.R. § 2.788(e), and ultimately denied both motions. ALAB-789, supra, 20 NRC ___. We did not suggest that it would be proper for a party to allow the time for seeking a stay to lapse, to wait for the license to be issued, and then to seek suspension rather than a stay of the license.¹ Our treatment of the two earlier stay requests as motions to suspend arose solely from the peculiar procedural circumstances applicable to FOE

¹ Indeed, in ALAB-789, we found FOE's request to be untimely under 10 C.F.R. § 2.788(a). 20 NRC at ___ (slip opinion at 6).

and Del-Aware.² Those circumstances do not exist as to LEA, which timely filed a straightforward appeal of LBP-84-31.

Simply stated, our power to treat a post-license-issuance stay request as a motion to suspend, or to entertain a motion for license suspension, extends only to limited circumstances -- for example, where the license has already been issued but a party nevertheless has a colorable right to seek a stay within the time limit of 10 C.F.R. § 2.780(a). Otherwise, requests for license suspension are more properly addressed to the Director of NRR via a petition under 10 C.F.R. § 2.206, or to the Commission itself.

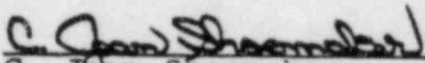
Finally, we gave full consideration in ALAB-789 to the merits of the two earlier stay requests. Even if LEA's motion were timely, it raises nothing that would warrant a change in our previous decision denying FOE's and Del-Aware's stay motions.

LEA's motion to suspend PECO's low-power license is dismissed.

² FOE apparently and mistakenly believed that it need not have sought a stay until the Licensing Board resolved a pending FOE motion to reopen. Del-Aware actually sought a stay of an October 15, 1984, order of the Licensing Board, and thus its stay motion was timely under the rules. Id. at __, __ (slip opinion at 6, 2).

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

ATTACHMENT 4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
Units 1 and 2)

}
}
}
}
} Docket Nos. 50-352
50-353

NRC STAFF RESPONSE TO LEA MOTION
FOR STAY OF LRP-24-31 AND OTHER RELIEF

Stephen H. Lewis
Counsel for NPC Staff

Benjamin H. Vogler
Counsel for NPC Staff

December 26, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
Units 1 and 2)

}
}
} Docket Nos. 50-352
50-353
}

NRC STAFF RESPONSE TO LEA MOTION
FOR STAY OF LBP-84-31 AND OTHER RELIEF

I. INTRODUCTION

On December 10, 1984, Limerick Ecology Action (LEA), an Intervenor in this proceeding, filed a "Motion for Stay of LBP-84-31, Suspension of Low-Power Facility Operating License NPF-27, and/or Prohibition of Low-Power Testing." LBP-84-31, which was issued on August 29, 1984, constituted the Atomic Safety and Licensing Board's Second Partial Initial Decision in this proceeding and authorized the issuance of low power (up to five percent of rated power) licenses for the Limerick units. On October 26, 1984, the Director of Nuclear Reactor Regulation issued a facility operating license (NPF-27) for Unit 1 which permitted operation limited to five percent of rated power.

By motion filed with the Atomic Safety and Licensing Appeal Board on November 16, 1984, LEA sought a suspension of the license for Unit 1. ^{1/} The motion was dismissed by the Appeal Board on the basis that:

- (1) it was filed more than two months late, with no explanation for the delay; and
- (2) to the extent it requested suspension of License No. NPF-27, it was improperly before the Appeal Board, since "requests for license suspension are more properly addressed to the Director of NRP via a petition under 10 C.F.R. § 2.206, or to the Commission itself."

Memorandum and Order, dated November 23, 1984 at 1, 3.

The Appeal Board noted that even if the motion were timely, it did not raise any matters warranting a stay of LBP-84-31. Memorandum and Order at 3.

II. ARGUMENT

A. Timeliness

Under 10 C.F.R. § 2.788, a motion for a stay of LBP-84-31 should have been filed by September 13, 1984. The initial motion for a stay was not, however, filed until November 16, 1984 (with the Appeal Board). LEA did not provide to the Appeal Board, and does not now provide in its present motion to the Commission, an explanation of its delay of over two months in seeking a stay of LBP-84-31. The Appeal Board considered the

^{1/} The Appeal Board treated LEA's pleading as a motion for a stay of LBP-84-31, although it was styled a motion for suspension of the license.

motion deniable on this ground alone and there is no basis for the Commission to hold otherwise. ^{2/}

B. Request for Stay of LBP-84-31

The four factors to be considered in determining whether to grant an application for a stay are:

1. Whether the movant 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 will harm the other parties; and
4. Where the public interest lies.

10 C.F.R. § 2.788(e).

LEA has addressed these factors, but has failed to carry its burden of persuasion as a movant for a stay. ^{3/} Alabama Power Co. (Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

^{2/} LEA does not specifically invoke 10 C.F.R. § 2.788, but its motion is in the nature of an application for a stay of the LBP-84-31 See Motion at 7:

"Limerick Ecology Action, Inc. respectfully requests the Commission to either stay LBP-84-31, suspend the low-power license granted to the Applicant, or otherwise prohibit low-power testing of the facility pending adjudication of LEA's appeal on the merits."

^{3/} LEA's motion also requests suspension of License No. NPF-27; however, for the reasons set forth in response to the present stay request, this suspension request is also fatally flawed and likewise must be denied.

1. Likelihood of Prevailing On the Merits.

In seeking to satisfy this criterion, LEA provides nothing more than its assertion that

Based upon the arguments set forth in its Brief [on appeal], LEA believes that it has made a "strong showing" that it is likely to prevail on the merits of its position.

Motion at 2.

This ipse dixit statement is not entitled to any weight since it does not satisfy the burden required by this criterion in that LEA must show more than a possibility of legal error by the Licensing Board. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1 and 2), ALAB-385, 5 NRC 621 (1977); Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-158, 8 AEC 95 (1974). LEA's appeal is pending before the Appeal Board, with the responses of the Applicant and the Staff still to be filed. ^{4/} LEA's bare reference to its appeal brief does not satisfy its burden of persuasion on this criterion.

2. Irreparable Injury

In its effort to demonstrate the irreparable injury which it will incur if a stay is not granted, LEA asserts that "the environmental review for Limerick [failed] to consider design alternatives to mitigate the risk of severe accidents." Motion at 3. In addition, LEA argues that:

the cost-effectiveness of such measures, the practicability of backfitting such measures into the Limerick design and the radiation exposure of workers involved in the implementation of such measures will all be adversely affected by low power operation of the facility which will contaminate plant systems. Id.

^{4/} Staff's brief in response is to be filed by January 7, 1985.

Finally, LEA states that "low-power operation may forever make unavailable design alternatives which could substantially reduce the public risk to LEA's membership." Id. We cannot agree.

In the present motion, LEA has provided no specific basis for this assertion of insufficiency nor has it demonstrated the validity of its argument for specific mitigation measures. Although LEA repeats the assertion from its appeal brief that the Staff's environmental review for Limerick failed to consider design alternatives to mitigate the risk of severe accidents (Motion at 3), LEA has not shown in its present motion that it is likely to prevail on its position that these design alternatives had to be considered in the Limerick review.

LEA also asserts that its interest in "lawful decision-making for the Limerick facility" will be irreparably injured if a stay of LBP-84-31 is not granted. This generalized interest would be insufficient to establish standing in this proceeding (Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)) and a fortiori does not provide a basis for the requested stay. Furthermore, even if the interest were cognizable by the NRC, the Staff fails to see how this interest asserted by LEA requires the issuance of a stay; i.e., it would appear that LEA's appeal provides the means by which this interest can be protected.

Accordingly, LEA has not demonstrated that its members will suffer any irreparable injury from continued operation of Limerick, Unit 1 under NPF-27. ^{5/}

3. Harm to Other Parties.

LEA's argument concerning the harm to other parties is premised on its position that the Applicant has no interest cognizable by the NRC that would be harmed by license suspension. However, this argument ignores the fact that the Applicant is now the holder of a Commission license, and as such is entitled to undertake the activities authorized by the License unless the public health, interest or safety requires that these activities be suspended. Consumers Power Company (Midland Plant, 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973). These rights and privileges cannot be dismissed merely by characterizing the Applicant's interest in the preservation of its license as "economic" in nature. Motion at 5. Thus, LEA has failed to demonstrate that other parties to this proceeding (specifically, the Applicant) will not be harmed by the grant of a stay.

LEA also argues that any harm to the Applicant is speculative because it cannot be presumed that a license authorizing full power operation will ever be issued. Motion at 5-6. LEA bases this argument on the pendency of hearings as to the adequacy of offsite emergency plan-

^{5/} While a determination on whether to grant a stay turns on a balancing of the four factors, the "irreparable injury" factor is the weightiest of the factors under § 2.788(e). Westinghouse Electric Corp. (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 662 (1980).

ning. While it is true that the outcome of future proceedings are not and cannot be presumed, LEA's argument nonetheless fails to recognize the existence of the Commission's regulations which expressly permit authorization of low-power operation without NRC or Federal Emergency Management Agency (FEMA) findings as to the state of offsite emergency preparedness or the adequacy and capability to implement State and local emergency plans. 10 C.F.R. § 50.47(d). ^{6/} The fact that issuance of a full power license cannot be presumed from issuance of a low power license does not demonstrate that the Applicant would not be harmed by a stay of LBP-84-31.

4. The Public Interest

With respect to this criterion, LEA basically summarizes its argument on the other criteria. The Staff relies on its responses with respect to those criteria, with the following additional comments. LEA characterizes the risks of operation of Limerick as "undue", but, as noted above, has failed to demonstrate irreparable harm from Limerick's operation under NPF-27. LEA asserts that a stay would avoid "'irreversible and irretrievable' commitment to resources in the face of violations of National Environmental Policy Act safeguards," (Motion at 6), but, as noted above, has failed to demonstrate a strong likelihood of prevailing on appeal on the merits of its NEPA arguments regarding

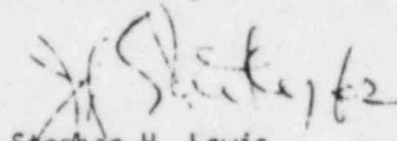
^{6/} 10 C.F.R. § 50.47(d) provides that a license authorizing operation up to five percent of rated power may be issued after a finding by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

consideration of severe accidents. In sum, LEA has failed to demonstrate that the public interest warrants a stay of LBP-84-31.

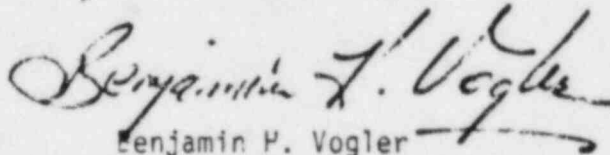
III. CONCLUSION

For the reasons set forth in the brief, LEA's motion should be denied.

Respectfully submitted,



Stephen H. Lewis
Counsel for NRC Staff



Benjamin P. Vogler
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of December, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

PHILADELPHIA ELECTRIC COMPANY)

(Limerick Generating Station,)
Units 1 and 2))

Docket Nos. 50-352
50-353

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LEA MOTION FOR STAY OF LBP-84-31 AND OTHER RELIEF" 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, this 26th day of December, 1984:

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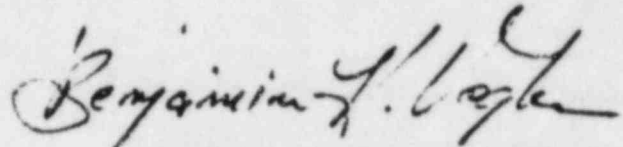
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ATTACHMENT 5

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352
) 50-353
(Limerick Generating Station,)
Units 1 and 2))

APPLICANT'S OPPOSITION TO LIMERICK ECOLOGY ACTION'S
MOTION FOR STAY OF LBP-84-31 SUSPENSION OF LOW
POWER FACILITY OPERATING LICENSE NPF-27,
AND/OR PROHIBITION OF LOW-POWER TESTING

Preliminary Statement

On December 10, 1984, Limerick Ecology Action ("LEA") moved the Commission for an order "staying LBP-84-31, suspending the low-power operating license . . . [for Limerick Generating Station, Unit 1 ("Limerick")], or otherwise prohibiting low-power testing."^{1/} The sole ground for the relief sought is alleged error by the Atomic Safety and Licensing Board ("Licensing Board") in rejecting a contention related to the Commission's obligation under the National Environmental Policy Act of 1969 ("NEPA") to require the installation of safety systems not otherwise required by its safety regulations.

^{1/} Motion for Stay of LBP-84-31, Suspension of Low-Power Facility Operating License NPF-27, and/or Prohibition of Low-Power Testing. In Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), "Order," slip op. at 2 n.1 (October 29, 1984) (unpublished), the Appeal Board held that the criteria for a stay contained in 10 C.F.R. §2.788(e) apply to a motion to suspend an operating license.

In a motion which was served on November 16, 1984, LEA sought essentially the identical relief before the Atomic Safety and Licensing Appeal Board ("Appeal Board"). On November 23, 1984, the Appeal Board dismissed the motion stating that LEA's stay request was more than two months late and even if the motion were timely "it raises nothing that would warrant a change in our previous decision denying [other parties'] stay motions."^{2/} The instant request to the Commission was filed some 17 days after the date of the Appeal Board's denial of LEA's motion for a stay.

Applicant, Philadelphia Electric Company, opposes the relief sought as untimely and without merit.

Argument

I. LEA's Motion For Suspension of the Operating License is Late-Filed.

The Licensing Board's Second Partial Initial Decision dated August 29, 1984 authorized the Director of Nuclear Reactor Regulation to issue a license permitting fuel load and low-power testing up to 5% of rated power for the Limerick Generating Station.^{3/} LEA recognized that this decision by the Licensing Board triggered its right to appeal the denial of the subject contention by filing a Notice of Appeal and subsequent brief.^{4/} As recognized by the Appeal Board, pursuant to 10 C.F.R.

^{2/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Memorandum and Order (November 23, 1984) (unpublished) (slip op. at 1, 3).

^{3/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 599 (1984).

^{4/} See for example, LEA "Notice of Appeal" (September 3, 1984).

§2.788(a), a request for a stay must be filed within 10 days after service of a decision or action.^{5/} The Appeal Board found that the motion for suspension of low-power license was more than two months late. It further noted that LEA failed to acknowledge the delay, and it made "no attempt whatsoever to explain the reason for it."^{6/} In the instant motion, even after being admonished by the Appeal Board for its extreme lateness, as compounded by the additional 17-day delay in seeking a stay before the Commission on essentially the same grounds, LEA does not even attempt to address the reasons for its lateness let alone show good cause. LEA's motion should be denied as late.

II. LEA Fails to Meet its Burden of Persuasion for a Stay Pursuant to the Requirements of 10 C.F.R. §2.788.

Aside from being late-filed, LEA's motion fails to meet the Commission's criteria necessary to support the issuance of a stay. In determining whether to grant or deny an application for a stay, the Commission is required, pursuant to 10 C.F.R. §2.788(e), to 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

^{5/} Limerick, supra, Memorandum and Order, slip op. at 1 (November 23, 1984).

^{6/} Id.

(4) where the public interest lies.^{7/}

As the moving party, LEA bears the burden of persuading the Commission that it is entitled to the relief which it seeks.^{8/} This burden is even greater where the Appeal Board summarily denied the motion on essentially the same grounds advanced before the Commission. As discussed below, it has failed to demonstrate it is entitled to the relief it seeks.

The first criterion regarding grant of a stay is whether the moving party has made a strong showing that it is likely to prevail on the merits. Where, as here, there is no showing of irreparable injury absent a stay and the other criteria do not support its issuance, an overwhelming showing of likelihood of success on the merits is required.^{9/} LEA has failed to meet its burden. In an attempt to satisfy this requirement, LEA merely incorporates its appellate brief and in conclusory manner states it has "made a 'strong showing' that it is likely to prevail on the merits of its position."^{10/} LEA fails to even

^{7/} See generally Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 796-97 (1981); Environmental Radiation Protection Standards for Nuclear Power Operations, CLI-81-4, 13 NRC 298, 301 (1981); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1982).

^{8/} Farley, supra, CLI-81-27, 14 NRC at 797; Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

^{9/} Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1189 (1977).

^{10/} LEA Brief at 2. This broad brush approach has been held to be unfair to a party attempting to respond to a stay request. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-356, 4 NRC 525, 540-41 (1976).

note that its appeal relates to the alleged improper exclusion of a contention. Therefore, even if the contention were to be ultimately admitted, LEA has failed to make any showing whatsoever that it would prevail on the merits of the contention if litigated.^{11/} The mere establishment of possible grounds for appeal is not in and of itself sufficient to justify a stay.^{12/}

The second factor regarding the grant or denial of a stay is whether the party will be irreparably injured unless a stay is granted. The irreparable injury asserted is indeed an unusual one. LEA asserts that the failure of the environmental review for Limerick to consider design alternatives to mitigate the risk of severe accidents would result in some hypothetical increase in risk to LEA's membership. The alleged irreparable injury is clearly remote and speculative. The

^{11/} To the contrary, the Commission rejected a similar contention in the Hope Creek proceeding, where the intervenors claimed that NEPA required the Staff to amend the FES to discuss alternative methods of protecting the facility from liquified natural gas accidents that might occur near the site. Finding that the probability that such an accident could affect the plant was highly remote, the Appeal Board dismissed the argument as unfounded stating:

The Supreme Court has embraced the doctrine, first enunciated in Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972), that environmental impact statements need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978).

Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979).

^{12/} Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 634 (1977).

presiding Atomic Safety and Licensing Board has found the risk of environmental, including health, effects resulting from low probability, high consequence accidents to be "clearly small" compared to the risks to which the environment and the population are otherwise exposed.^{13/} LEA has not challenged this finding by the Board on appeal. LEA does not allege noncompliance with any of the Commission's safety regulations which the Commission has found to be adequate to protect the health and safety of the public.^{14/}

LEA alleges that "the practicability of backfitting such measures into the Limerick design and the radiation exposure of workers involved in the implementation of such measures will all be adversely affected by low-power operation of the facility which will contaminate plant systems."^{15/} However, LEA does not define what backfitting measures it is contemplating nor provide any basis for its assertion that low power operation of the type permitted by the present 5% license "will contaminate plant systems"^{16/} necessary to install the undefined additional systems. LEA had the opportunity to submit affidavits in support of its motion, as permitted by 10 C.F.R. §2.788(b)(4), but did not do so.

LEA argues that low power operation may forever make unavailable design alternatives which could substantially reduce the public risk.

^{13/} Limerick, supra, LBP-84-31, 20 NRC at 573.

^{14/} See, for example, Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 443-44 (1974)..

^{15/} LEA Brief at 3 (emphasis in original).

^{16/} Id.

Inasmuch as the Licensing Board has found such risk to be already small, LEA has failed to show a basis for the assertion.^{17/} LEA has failed to show how the grant of a low-power license will cause even the potential for a severe accident. Thus, an essential element in a requirement for a stay is missing.^{18/} LEA has failed to show that it will be irreparably injured.^{19/}

As to the third factor, whether the granting of a stay would harm other parties, LEA alleges that the harm to the Philadelphia Electric Company would be economic and thus should be excluded from consideration. The cited case, Limerick, supra, ALAB-789, 20 NRC ____, (slip op. at 5) (November 5, 1984), does not support this proposition. There, the Appeal Board was discussing the fact that economic concerns regarding rates are not within the proper scope of issues to be litigated in NRC proceedings. It does not follow that under the Commission's stay criteria such matters are not properly included in the considerations

^{17/} It is important to note that LEA's other appealed matters relate to the manner of disclosure of environmental impacts, rather than to an assertion that the risk of plant operation was incorrectly stated.

^{18/} Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978).

^{19/} LEA's argument that the risk of operation from Limerick exceeds that of any facility with the sole exception of Indian Point does not support its request. Initially, Limerick meets all Commission safety requirements regarding operation. The Board has found the risk to be "clearly small." Limerick, supra, LBP-84-31, 20 NRC at 513. In addition, as may be seen by examination of the Final Environmental Impact Statement, the comparison of PRA results from Limerick with those of other plants is not supportive of LEA's motion because the scope, methodology and assumptions of each PRA are so different and because the resulting associated uncertainties are so high.

when such extraordinary relief is sought by a party. While LEA claims it would be arbitrary and capricious for the Commission to consider claims of economic harm to the utility caused by a licensing delay, it fails to provide any legal citation for this proposition.^{20/} To the contrary, this is a relevant factor inasmuch as the Applicant has shown itself entitled to the license which it now possesses. In other Commission proceedings this economic impact to a utility has been recognized as a factor in deciding whether a stay should be issued.^{21/}

The actual economic harm which would result if the license were suspended, which is not denied by LEA to be real, must be compared to some speculative reduced outcome of some already low probability accident whose risk has been judged to be clearly small, which may occur in the future. In fact, LEA admits that the issuance of an ultimate full-power and commercial license cannot be presumed.^{22/} This substantially weakens LEA's already weak argument for the requested relief.

With regard to the fourth factor, whether the requested stay would serve the public interest, LEA argues that the public interest is in avoiding undue risk and in permitting time to comprehensively consider risk mitigation alternatives.^{23/} Applicant submits that the public

^{20/} LEA Motion, n.1 at 5.

^{21/} St. Lucie, supra, ALAB-404, 5 NRC at 1188; see also Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 170-71 (1978).

^{22/} LEA Brief at 5-6.

^{23/} Id. at 6.

interest is in allowing continuation of the operating license which was granted after a finding of compliance with all NRC regulations because of the adverse economic consequences should the license be stayed or suspended. As with the third factor, LEA fails to show that effects on costs are not properly cognizable under this factor. Again, LEA asserts as not speculative that "contamination of plant systems by low power testing will make design change backfitting more dangerous, more difficult, and more expensive, and may thus irrevocably shift a close cost/benefit ratio against risk reduction."^{24/} This assertion is without foundation in the record. LEA has failed to make a showing under the fourth factor that the public interest lies in the grant of the requested relief.

III. LEA Has Failed to Show That a License Suspension is Warranted.

If considered as a request for a license suspension or suspension of low-power testing, LEA's request lacks merit. Initially, LEA does not allege that there are any activities which are being improperly conducted under the license nor does it allege changed circumstances since its issuance which warrant any review of the license. To permit LEA to have this matter considered as a request for a license suspension would be contrary to the Commission policy of not using such procedures as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be

^{24/} Id. at 7.

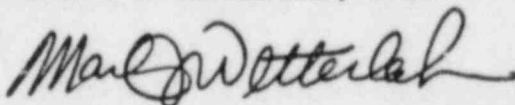
presented.^{25/} For these reasons, LEA's request for license suspension should be rejected.

Conclusion

For the foregoing reasons, LEA's request for a stay and suspension of low-power license and prohibition of low power testing should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Mark J. Wetterhahn
Counsel for the Applicant

December 24, 1984

^{25/} Consolidated Edison Company of New York (Indian Point, Units 1, 2 and 3), CLI-10-8, 2 NRC 173, 177 (1975); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Opposition to Limerick Ecology Action's Motion for Stay of LBP-84-31 Suspension of Low Power Facility Operating License NPF-27, and/or Prohibition of Low-Power Testing" dated December 24, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 24th day of December, 1984:

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