

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission '89 JUN 16 P12:06

OPPOSITION OF LIMERICK ECOLOGY ACTION, INC. TO
"APPLICANT'S MOTION FOR CLARIFICATION OF THE COMMISSION'S
DELEGATION OF AUTHORITY AND FOR ISSUANCE OF AN OPERATING
LICENSE, OR ALTERNATIVELY, FOR AN EXEMPTION FROM ANY PROCEDURAL
REQUIREMENT THAT A LICENSE FOR LIMERICK UNIT 2 CANNOT ISSUE
UNTIL THE CONTENTION REMANDED BY THE THIRD CIRCUIT IS RESOLVED

INTRODUCTION

In the appeal of Limerick Ecology Action, Inc. ("LEA") from the Commission's final order authorizing the issuance of operating licenses for Limerick Units 1 and 2^{1/}, the Third Circuit Court of Appeals agreed with LEA that severe accident mitigation design alternatives ("SAMDAs") must be considered by the NRC under the National Environmental Policy Act, 42 U.S.C. Section 4321 et seq. ("NEPA") and remanded the matter to the NRC for consideration of severe accident mitigation alternatives in accordance with NEPA. The Court concluded that the Commission had not "succeeded, or attempted to succeed, in convincing this Court that the procedural requirements of NEPA have been met".

¹ At the time of LEA's petition for review, and at the time of the decision of the Third Circuit, no request to "enjoin, set aside, or suspend" the "grant of an operating license" for Unit 2 could possibly have been made because no such operating license had been granted. This is true notwithstanding the Court's somewhat misleading reference in footnote 27 of the opinion of the Court to "the grant of an operating license to Limerick Units 1 and 2". Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission, 869 F.2d 719, 741 n.27. For reasons we more fully discuss *infra*, the applicant Philadelphia Electric Co. ("PECO") completely mischaracterizes the import of this footnote.

Limerick Ecology Action, Inc. et al. v. United States Nuclear Regulatory Commission, 869 F.2d 719,731 (3d Cir. 1989). The Court also concluded that because a failure to consider severe accident mitigation alternatives "could affect the final decision", the Commission's conduct in precluding consideration of severe accident mitigation alternatives was "an abuse of discretion". 869 F.2d at 738.

The Court also agreed with LEA that the Atomic Energy Act ("AEA")^{2/} does not preclude application of, and compliance with, the procedural requirements of NEPA and that there "is no language in NEPA itself that would permit its procedural requirements to be limited by the AEA". 869 F.2d at 729. Thus, it is clear that the Commission may not avoid NEPA's procedural requirements -- including the requirement to consider severe accident design mitigation alternatives -- in its decision to issue any operating license in this proceeding.^{3/}

Thus, the Commission's regulations at 10 CFR Part 51, which implement NEPA, apply to the Commission's consideration of severe accident mitigation alternatives and to any decision to actually

²Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, et. seq.

³ The Court emphasized the overriding nature of the statutory mandate to obey NEPA: "Section 102 of NEPA requires agencies to comply with NEPA 'to the fullest extent possible', 42 U.S.C. Section 4332...and the legislative history of the phrase 'to the fullest extent possible' indicates that Congress intended that NEPA not be limited by other statutes by implication". 869 F.2d at 729.

issue an operating license for Unit 2.^{4/}

10 CFR 51.12(a) states: "Except as otherwise provided in this section, the regulations in this subpart shall apply to the fullest extent practicable to NRC's ongoing environmental work". Thus, the Part 51 regulations are fully applicable to the Commission's consideration of the severe accident mitigation alternatives as remanded by the Third Circuit and to any issuance of an operating license for Unit 2.

For the reasons we detail more fully below, the Atomic Safety and Licensing Board ("ASLB") constituted by Commission Orders of May 5, 1989 and May 12, 1989 has jurisdiction over licensing matters which is conferred by regulation; Commission regulations require consideration of the severe accident mitigation alternatives under NEPA prior to the issuance of any license or authorization to load fuel or test at low power; and the decision and remand of the Third Circuit Court of Appeals requires full consideration of severe accident mitigation alternatives in compliance with NEPA prior to any license issuance.

⁴ Those regulations provide that the "regulations in Subpart A of this part implement section 102(2) of the National Environmental Policy Act of 1969 as amended". 10 CFR 51.2.

II. ARGUMENT

A. The Licensing Board Constituted For These Proceedings Has Licensing Authority, and Any Authorization for Fuel Loading Or Operation Must Issue From the Presiding Officer, Upon Motion of the Applicant

In its order dated May 5, 1989, the Commission directed the Chairman of the Atomic Safety and Licensing Board Panel "to convene a Licensing Board to conduct such additional proceedings relating to this contention as are necessary to comply with the [Third Circuit's] decision [of February 28, 1989]".^{5/} Therefore, the ASLB, in accordance with the Third Circuit's decision, must comply with the "procedural requirements of NEPA" to "the fullest extent possible"^{6/} and thus with the procedural requirements of the Commission's regulations implementing NEPA.^{7/}

This proceeding, required by the remand of the Third Circuit, is clearly "in the course of a hearing on an application for issuance of an operating license for a nuclear power reactor"^{8/}

⁵ Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), Commission Order at 1-2 (May 5, 1989) (unpublished) (emphasis supplied).

⁶ The language "fullest extent possible" means that each agency shall comply "unless the existing law applicable to such agency's operations expressly prohibit or makes full compliance with one of the directives impossible". Limerick Ecology Action, Inc., supra, 869 F.2d at 729. The Third Circuit concluded that nothing in the Atomic Energy Act supported the view that the Commission was precluded from fully complying with NEPA. Id.

⁷ The Applicant urges that it is entitled to an "exemption" under 51 CFR 51.6. For the reasons set forth supra, no such "exemption" is authorized by law, or is otherwise available in this proceeding.

⁸ 10 CFR Section 51.106 (b).

in contrast with a "proceeding for the issuance of a construction permit for a nuclear power reactor".^{9/} Indeed, consideration of severe accident mitigation alternatives as required by NEPA would have occurred long ago in the course of the earlier hearings on the operating license authorizations for Limerick but for the Commission's and Applicant's unlawful refusal to comply with NEPA at that time. Thus, this proceeding is simply that phase of the Limerick operating license NEPA proceedings which should have occurred years ago, but which was delayed through no fault of intervenor.^{10/}

Because this is a hearing "on an application for issuance of an operating license for a nuclear power reactor", the procedural requirements and safeguards of 10 CFR 51.106 (and, by reference

⁹ 10 CFR Section 51.105.

¹⁰ Indeed, intervenor LEA insisted as early as 1981 in this proceeding that the applicant and Commission was required to consider severe accident mitigation design alternatives. See, e.g., Supplemental Petition of Coordinated Intervenors, November 24, 1981. LEA continued its efforts to obtain consideration of such mitigation alternatives throughout the licensing process. See also, e.g., Special Prehearing Conference Order, June 1, 1982, slip op. at 131-133; Conditionally Admitted Contentions, April 1983; Limerick Ecology Action Response to Licensing Board's Order of May 1, 1983; LEA's SARA/EROL Section 7 Contentions, August 31, 1983; LEA's Reply to Applicant and Staff Response to Severe Accident Risk Assessment Contentions, October 12, 1983; LEA Contentions on the Environmental Assessment of Severe Accidents As Discussed in the NRC Staff Draft Environmental Statement, Supplement No. 1, February 13, 1984; LEA Statement of Significance of NRC Severe Accident Mitigation Systems Contract Documents to LEA Contention DES-5, April 3, 1984. Thus, any delay in considering these matters and any effect it may have on Unit 2 licensing can scarcely be laid at the feet of LEA. Instead, it should be placed squarely on the parties who unlawfully opposed and resisted such consideration: the Commission staff and Philadelphia Electric Co.

thereto, 10 CFR 50.57(c), 51.104 and 51.105) apply to the applicant's request to load fuel into and test Limerick Unit 2.

The applicant argues that the language of the Commission's May 5, 1989 directing the establishment of the licensing board to conduct proceedings in connection with the remanded contention confers no power of "control of license issuance". Applicant Motion, p.6. We believe that the May 5 order suggests no such limitation on the authority of the ASLB, which is otherwise provided by regulation. The absence of express language in the order conferring "control of license issuance" is scarcely dispositive. One need only look to the original September 9, 1981 Order establishing an ASLB to preside in this proceeding; that order did not, by its terms, confer "control of license issuance".¹¹ No such language was necessary; the regulations and the statute confer such authority. See, e.g., 10 CFR Sections 1.15, 2.104(c), 50.57(c), 51.106(b) and section 191 of the Atomic Energy Act.

Indeed, any Commission usurpation of the ASLB authority conferred by regulation would be unlawful without the express grant of the exemption also sought (in the alternative) by the applicant. The Commission cannot simply ignore its own regulations. In this case, the regulations provide for an

¹¹Does the applicant suggest that the original orders of the ASLB authorizing fuel loading and low power testing of Limerick Unit 1 were void and invalid as having been issued by an ASLB without any express authority to do so?

exemption under certain limited circumstances.^{12/} The Applicant and Commission cannot render meaningless comprehensive regulatory procedural safeguards and requirements by relying on the failure of an order to expressly grant licensing authority to an ASLB where the authority is conferred upon it anyway by applicable regulations. Instead, if the applicant claims entitlement to relief from the regulations, it must proceed as required by law: obtain an exemption if the Commission is empowered to grant it.

B. Part 51 of the Commission's Regulations Provide that
During the Course of a Hearing, Only the Presiding
Officer, Not the Director of Nuclear Reactor Regulation,
May Authorize the Loading of Nuclear Fuel in the Reactor
Core and Limited Operation

Section 51.106 of the Commission's regulations provides as follows:

51.106 Public hearings in proceedings for
issuance of operating licenses

- (a) Consistent with the requirements of this section and as appropriate, the presiding officer in an operating license hearing shall comply with any applicable requirements of 51.104 and 51.105.^{13/}

¹² As we note *infra*, the exemption is available only where the Commission determines that it is "authorized by law" and is "otherwise in the public interest". 10 CFR 51.6. For the reasons set forth below, such an exemption cannot be granted under the circumstances present here.

¹³ The "applicable" requirements of 51.105 include the requirement that the presiding officer "determine whether the requirements of section 102(2) (A)(C) of NEPA and the regulations

- (b) During the course of a hearing on an application for issuance of an operating license for a nuclear power reactor, ... the presiding officer may authorize, pursuant to 50.57(c) of this chapter, the loading of nuclear fuel in the reactor core and limited operation within the scope of 50.57(c) of this chapter, upon compliance with the procedures described therein.^{14/} In any such hearing, where

in this subpart have been met". They have not: 102(2)(C) is the requirement for a detailed statement of alternatives to the proposed action, which the Third Circuit found was not met. The section also requires the presiding officer to "independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken". Because no record has been established with respect to any of the matters relating to SAMDAs, the presiding officer cannot "independently consider" any such factors. It also requires the presiding officer to "determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, and considering reasonable alternatives, whether [the license] should be issued". Because no record concerning consideration of SAMDAs has been made, which the Third Circuit expressly found could affect the final action, no such weighing of these factors could possibly be made on a reasoned basis on the record.

¹⁴ Under 50.57(c), "an applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, pursuant to this paragraph (c) for an operating license authorizing low power testing (operation at not more than 1 percent of full power for the purpose of testing the facility) and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision". The required findings include: (1) construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act and the rules and regulations of the Commission, (2) the facility will operate in conformity with the application as amended, the provisions of the Act and the rules and regulations of the Commission, (3) there is

any party opposes such authorization on the basis of the matters covered by Subpart A of this part [51.10 to 51.125], the provisions of 51.104 and 51.105 will apply as appropriate.

Thus, the presiding officer must authorize the "loading of nuclear fuel in the reactor core" and "limited operation within the scope of 50.57(c)", and may do so only "upon compliance with the procedures described [in 50.57(c)]. 50.57(c) provides, inter alia, that the authorization must be on motion, with action on the motion "by the presiding officer" to be taken with due regard of the rights of the parties", including the "right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized".

Because LEA opposes such authorization at this time on the basis that the requirements of NEPA and Part 51 of the Commission's regulations implementing NEPA, and applicable Council On Environmental Quality ("CEQ") regulations have not been satisfied, LEA contends that the presiding officer cannot make the findings necessary to issue a license, nor issue the license, until NEPA and the procedures set forth in these

reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public and (ii) that such activities will be conducted in compliance with the regulations in this chapter, ... (5) that the [financial protection and indemnity requirements] of Part 140 of this chapter have been satisfied; and (6) the issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

provisions are complied with. In addition to the express requirements of the regulations, prevailing Commission case law requires that prior to issuing any license, the Director of NRR "must find that the Commission regulations, including those implementing NEPA, have been satisfied." Pennsylvania Power and Light Co. (Susquehanna), ALAB-693, 16 NRC 952,956 n.7 (1982), citing 10 CFR 50.40(d) and 10 CFR 50.57. Further, 10 CFR 50.40(d) provides that in issuing a license, the Commission is to consider whether "any applicable requirements of Subpart A of Part 51 have been satisfied". Thus, it is clear that the Commission must comply with Part 51 prior to the issuance of any license for Limerick Unit 2.

- C. The Requirements of Part 51, NEPA, and CEQ Regulations Include the Requirement to Prepare Draft and Final Environmental Impact Statements Fully Considering Severe Accident Mitigation Alternatives Prior to Issuing Any Authorization to Operate Limerick Unit 2.

We believe that the procedural requirements of Part 51, the regulations of the Council on Environmental Quality, and NEPA fully apply to this proceeding.

Supplement to draft environmental impact statement

51.71(a) requires the NRC staff to prepare a supplement to the draft EIS if: ..."(2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." In addition, 51.72(b) provides that the "NRC staff may prepare a supplement to a draft EIS when, in its opinion, preparation of a supplement will

further the purposes of NEPA". Thus, because the Third Circuit Court of Appeals concluded that the Commission's exclusion of consideration of SAMDAs violated NEPA, "new circumstances" exist such that there must be, prior to any authorization of a license for Unit 2,

- (1) the preparation of a supplement to the draft EIS for Limerick which sets forth the necessary consideration of SAMDAs;
- (2) a request for comments on the draft EIS pursuant to 51.73 providing the required minimum 45 days for comment following the Federal Register notice by EPA that the draft supplement has been filed with EPA (51.73);
- (3) distribution of the draft supplement pursuant to 51.74 and 51.77.

Final Environmental Statement Supplement

Following the preparation and circulation of the draft EIS considering SAMDAs, a final EIS which considers the comments to the draft EIS and otherwise complies in all respects with NEPA and Part 51 must be prepared:

51.92(a) This section provides that "if the proposed action has not been taken ^{15/} the NRC staff will prepare a supplement to a final environmental impact statement...if (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts". The Third Circuit mandate to consider SAMDAs in

¹⁵The license for Unit 2 of the Limerick Nuclear Generating Station has not yet been issued.

compliance with NEPA is "significant new circumstances or information" under this section. In addition, "significant new information" relating to SAMDAs has been developed since 1984-5 when the contention was rejected by the prior Limerick ASLB.^{16/} Therefore, under 51.92, the NRC staff must prepare a supplement or amendment to the final EIS. This supplement or amendment must fully consider SAMDAs.

51.92(d)(1) Request for Comments. Under 51.92(d)(1), a supplement to a final EIS must be accompanied by or include a request for comments as provided in 51.73 if the conditions in 51.92(a) apply. Those conditions do apply, as set forth above.

51.93 Distribution of Final EIS Supplement. The final EIS supplement must be distributed in accordance with 51.93.

51.94 Requirement to Consider Final EIS "The final EIS, together with any comments and any supplement, will accompany the application...through, and be considered in, the Commission's decisionmaking process. The final environmental impact statement, together with any comments and any supplement, will be made a part of the record of the appropriate adjudicatory...proceeding". Thus, there can be no adjudicatory decision, nor any closure of

¹⁶ See, e.g., NUREG/CR-4244, "Strategies for Implementing A Mitigation Policy for Light Water Reactors" (January, 1988); NUREG/CR-4920, "Assessment of Severe Accident Prevention and Mitigation Features: BWR Mark II Containment Design (July 1988).

the record, until a final EIS considering severe accident mitigation alternatives is prepared and made a part of the record. If made a part of the record, LEA has the right to controvert it, present testimony concerning it, and cross-examine staff witnesses concerning it. Thus, the actual hearings cannot conclude and no license can issue until this process has been completed.

51.100 Timing of Commission Action Under 51.100(a)(1), [with exceptions for emergencies not relevant here] no decision on a proposed action, including the issuance of a ...license, or other form of permission...for which an environmental impact statement is required, will be made and no record of decision will be issued until the later of the following dates: (i) 90 days after publication by the EPA of a Federal Register notice stating that the draft EIS has been filed with EPA; (ii) 30 days after publication by EPA of a Federal Register notice stating that the final EIS has been filed with EPA. Thus, any hearing schedule and issuance of the record of decision must take into account the timing required by 51.100.

51.102 Requirement to Provide Record of Decision

Under 51.102(a), a Commission decision on any action for which a final EIS has been prepared shall be accompanied by or include a concise public record of decision.

Under 51.102(c), the initial decision of the presiding

the record, until a final EIS considering severe accident mitigation alternatives is prepared and made a part of the record. If made a part of the record, LEA has the right to controvert it, present testimony concerning it, and cross-examine staff witnesses concerning it. Thus, the actual hearings cannot conclude and no license can issue until this process has been completed.

51.100 Timing of Commission Action Under 51.100(a)(1), [with exceptions for emergencies not relevant here] no decision on a proposed action, including the issuance of a ...license, or other form of permission...for which an environmental impact statement is required, will be made and no record of decision will be issued until the later of the following dates: (i) 90 days after publication by the EPA of a Federal Register notice stating that the draft EIS has been filed with EPA; (ii) 30 days after publication by EPA of a Federal Register notice stating that the final EIS has been filed with EPA. Thus, any hearing schedule and issuance of the record of decision must take into account the timing required by 51.100.

51.102 Requirement to Provide Record of Decision

Under 51.102(a), a Commission decision on any action for which a final EIS has been prepared shall be accompanied by or include a concise public record of decision.

Under 51.102(c), the initial decision of the presiding

officer or the final decision of the ASLAB or the final decision of the Commission will constitute the record of decision.

Section 51.103 sets forth the required content of the record of decision. The record of decision must:

- ...(2) identify all alternatives considered by the Commission in reaching the decision, state that these alternatives were included in the range of alternatives discussed in the environmental impact statement,¹⁷ and specify the alternative or alternatives which were considered to be environmentally preferable.
- (3) discuss preferences among alternatives based on relevant factors, including economic and technical considerations, the NRC's statutory mission, ...which were balanced by the Commission in making the decision and state how these considerations entered into the decision.

51.104 NRC Proceeding Using public hearings;
Consideration of environmental impact statement

Under 51.104(a)(1), in any proceeding in which

- (i) a hearing is held on the proposed action;
- (ii) a final EIS has been prepared in connection with the proposed action;
- (iii) matters within the scope of NEPA an this subpart are in issue,

the NRC staff may not offer the final EIS in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart until the final EIS is filed with the EPA, furnished to commenting agencies, and made available to the

¹⁷ For this reason as well, it is clear that the staff must prepare a final EIS which considers, discusses, and includes the range of severe accident mitigation alternatives which the Third Circuit's decision required to be considered under NEPA.

public.

Therefore, the staff may not even present evidence on SAMDAs until a final EIS addressing SAMDAs is prepared, filed with EPA and made available to commenting agencies and the public.

D. The Exemption Sought By PECO Is Not "Authorized By Law"

As we noted above, the Third Circuit determined that the Commission's conduct in authorizing the issuance of operating licenses for Limerick failed to comply with the procedural requirements of NEPA by failing to consider severe accident mitigation alternatives. While the Court stated in footnote 27 of its opinion that the Court was not asked to "enjoin, set aside, suspend...or determine the validity" of the license authorization, 869 F.2d at 741,^{18/} the Court concluded that NEPA was violated:

By whatever route the NRC claims to have determined the environmental impact of Limerick, it has not succeeded, or attempted to succeed, in convincing this Court that the procedural requirements of NEPA have been met.

¹⁸ The applicant characterizes this extremely limited observation (which does not even purport to constitute a conclusion on the effect of the NEPA violation on any future action to issue an operating license for Unit 2) as "[t]he Third Circuit explained that its decision should not impede the licensing of Limerick" (Applicant Motion, p.2) and the Court "explicitly stated that no impediment to [Unit 2 license] issuance exists" (Id., p.6) . Such characterizations are not merely incorrect; they are so regrettably baseless as to appear to be intentional distortion.

869 F.2d at 731.

The Commission is not "authorized by law" to issue nuclear power reactor operating licenses without compliance with the procedural requirements of NEPA. Indeed, specifically with respect to consideration of severe accident mitigation alternatives, the Court held that NEPA's procedural requirements mandated such consideration in the licensing of a nuclear power reactor facility. While the ASLB decision in Limerick, LBP-85-25, 22 NRC 101, 116 (1985), aff'd., ALAB-845, 24 NRC 220 (1986) may have authorized the issuance of operating licenses, it did so in reliance on the Commission's erroneous determination that it had complied with Part 51 and NEPA. Under the Third Circuit's decision, that determination was legally incorrect. Thus, no reliance whatsoever may be placed on that erroneous determination.

In any event, the Unit 2 operating license had not issued as of the Court's opinion. If the Commission were to actually issue a Unit 2 license prior to consideration of severe accident mitigation alternatives as NEPA requires, such a federal action would surely be an abuse of discretion and an action "contrary to law", as was the Commission's original failure to consider mitigation alternatives in the licensing process.

The applicant relies on various cases ^{19/} for the proposition that NEPA deficiencies can be "rectified while leaving the underlying action in place". Applicant Motion, pp.11-12. But the

¹⁹Applicant's Motion, p.11, n.17.

cases relied upon simply do not stand for such a proposition. For example, the very first case cited, GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985) did not even involve NEPA. GUARD involved only the interpretation of an NRC emergency planning regulation. Further, GUARD does not address or discuss in any way "leaving the underlying action in place".^{20/} In Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), and Potomac Alliance v. NRC, 682 F.2d 1030 (D.C. Cir. 1982), the "court found that the NRC had approved license amendments for [nuclear power] plants in violation of NEPA and the Atomic Energy Act, but as a matter of equity the court chose not to order the shut-down of the plants pending the Commission's compliance". Potomac Alliance v. U.S. NRC, 682 F.2d 1030 (D.C. Cir. 1982) (Bazelon, J. concurring and writing separately, describing the court's decision in Minnesota). Thus, Minnesota and Potomac Alliance do not support the applicant's position. Those decisions did not involve the original operating license proceedings. The Court did not "leave the underlying [licensing] action in place"; it merely did not order the shut-down of the plants on a license amendment challenge because of generic issues involving post-license storage of spent fuel onsite. Further, in declining to stay or vacate the license amendments, it did so on the basis of an ongoing generic rulemaking to resolve the generic issue. In contrast here, the issue at Limerick involves the original licensing action, is site/reactor-specific, and is not amenable

²⁰ We wonder: did applicant's counsel even read the case?

to generic resolution, as the Third Circuit decision notes. Limerick Ecology Action, supra, 869 F.2d 736-739.^{21/}

Neither does NRDC v. NRC, 606 F.2d 1261 (D.C. Cir. 1979) support the applicant's argument. In that case, the failure to consider various safety features in high level radioactive waste tanks intended to replace existing leaking tanks violated NEPA. Because the tanks were intended to replace existing tanks which were leaking high level radioactive wastes, and NRDC agreed that new tanks must be constructed to hold the wastes currently leaking, the D.C. Circuit did not enter an injunction against further tank construction. Such an emergency safety situation is simply not involved here.

Not only is the applicant's "authority" inapplicable for the reasons stated, but its entire premise is wrong. The Commission is not being asked to "leave the underlying action in place" but instead is being asked to take new action, viz., issue an operating license for Unit 2, in the face of a dispositive judicial determination that a controlling statute -- NEPA -- has been violated. This the Commission cannot do, under the guise of

²¹ The Court's opinion states, inter alia, "it is axiomatic that the generic approach of Baltimore Gas will not suffice where the underlying issues are not generic", "SAMDAs should most appropriately be considered on a case-by-case basis", "it would seem, even on the Commission's own terms, that a failure to consider SAMDAs in the Limerick proceeding could affect the final decision, and ...that preclusion from consideration was an abuse of discretion", "the underlying issue of SAMDAs may not be treated as a generic issue".

an "exemption" or any other device. 22/

E. The Applicant Cannot Meet The Exemption Requirements of 10 CFR 50.12 If Applicable

10 CFR 50.12 is limited to exemptions "from the requirements of the regulations of this part", i.e., Part 50. Thus, because the requirements of Part 51 are at issue here, 10 CFR 50.12 cannot possibly afford a basis for the exemption sought.^{23/} But even more substantially, to obtain such an exemption under 10 CFR 50.12 requires at least two findings: that the exemption is "authorized by law" and "will not present an undue risk to the public health and safety".^{24/} Neither finding can be made here.

First, an exemption from the requirement to consider severe accident mitigation alternatives prior to license issuance is "not authorized by law" for the reasons set forth above.

Second, the failure to consider and implement cost-effective

²² It would also appear that the relief sought by PECO would require an "exemption" from the procedural requirements of the regulations of the Council On Environmental Quality which were adopted by the Commission. See Environmental Protective Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352 (1984). The Commission has no authority under any specific regulation to effectively grant such an "exemption".

²³ We note, however, that 10 CFR 50.40(d) provides that in determining that a license will be issued to an applicant, the Commission will consider whether "any applicable requirements of Subpart A of Part 51 have been satisfied". Thus, to the extent that the requirements of Subpart A of Part 51 have been thus incorporated into Part 50, any exemption from the requirements of Part 50 must also exempt the applicant from the requirements of Subpart A of Part 51.

²⁴ 10 CFR 50.12(a)(1).

severe accident mitigation alternatives as required by law totally precludes any finding that the exemption will not present an "undue" risk to the public health and safety. If the severe accident risk of operation of Limerick -- particularly full-power operation -- can be mitigated with cost-effective alternatives,^{25/} the risk posed by the exempted activity is "undue" without implementation of those alternatives, and thus violates Commission regulations and the Atomic Energy Act.

The applicant also complains about the "inconsistency" of requiring consideration of severe accident mitigation alternatives prior to Unit 2 licensing where no such consideration was required for Unit 1 licensing. PECO deems this the result of the "fortuitous" timing of the Third Circuit decision. The simple answer, of course, is that there is a great deal of difference indeed in ordering the shut-down of an operating reactor licensed years ago in reliance on an error of law, and withholding the decision to issue another license in the face of a statutory violation. While as PECO urges, "the requirements of NEPA apply equally to both units at Limerick,

²⁵ As the Commission itself has noted, the risk of operation of a nuclear power reactor is dominated by the risk of severe accidents. Statement of Interim Policy, "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969", 45 Fed. Reg. 40101,40103; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), CLI-83-32, 18 NRC 1309, 1312 (Separate Views of Commissioners Gilinsky and Asselstine) ("These most serious accidents dominate the risk posed by nuclear power plants, even taking into account their very low probability. Indeed, it is pointless to look at the environmental consequences of reactor accidents unless Class 9 accidents are considered".)

[and] so does the Third Circuit's remand"^{26/} the effect on licensing may properly differ. Indeed, far from complaining of the purported "inconsistent" treatment of the two units, PECO should be thankful that LEA did not press the Court and this Commission for an immediate suspension of the Unit 1 license in the face of the NEPA violation found by the Third Circuit.

The applicant also engages in "historical revisionism" in its claim that it "attempted to assure that all issues were resolved in a timely manner. Any delays in licensing are beyond the control of Applicant". Applicant Motion, p.20. This claim-- particularly as applied to severe accident mitigation -- is patently false. To the contrary, like the NRC staff, the applicant resisted every single one of LEA's numerous efforts to obtain consideration of severe accident mitigation at an early stage in this proceeding.^{27/}

Thus, the applicant cannot now complain of the timing of the required consideration of these issues: it was at fault for resisting the legally required consideration.

Finally, the applicant's Motion amazingly attempts to

²⁶Applicant Motion, p. 16.

²⁷ LEA's efforts, as noted before, date to 1981, nearly eight years ago. See infra, p. 5, n.10. PECO opposed each of LEA's filings and each attempt to convince the Commission to consider these matters at an early stage. PECO also opposed the LEA appeal of these matters to the Third Circuit. If PECO instead had taken a leadership role and considered and implemented the required mitigation measures, the entire issue and the ensuing litigation could have been avoided. Indeed, to this very day, PECO continues to resist the implementation of the required changes or any legally binding commitments to ensure their implementation.

ignore the decision of the Third Circuit and pretend it does not exist. In its Motion, the Applicant baldly claims that

NEPA and the NRC's regulations require only that the environmental impacts of the proposed action be given a hard look by preparation of an FES and that intervenors be given an opportunity to review and challenge those conclusions. This has been done. The fact that a further hearing must be conducted on a single issue does not vitiate the overall cost/benefit findings in the FES [.]

Applicant Motion, p.8.

The Third Circuit's decision was directly contrary:

In sum, by whatever route the NRC claims to have determined the environmental impact of Limerick, it has not succeeded, or attempted to succeed, in convincing this Court that the procedural requirements of NEPA have been met.

869 F.2d at 731.

[E]ven on the Commission's own terms,...a failure to consider SAMDAs in the Limerick proceeding could affect the final decision and, therefore, that preclusion from consideration was an abuse of discretion.

Id. at 738.

We conclude that the FES failed adequately to consider SAMDAs and, therefore, the decisionmaker did not take the requisite "hard look" at SAMDAs. We further conclude that a decision with respect to SAMDAs could affect the final decision[.]

Id., at 739.

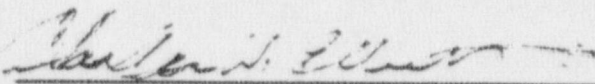
Thus, what NEPA requires has not "been done" and can affect the final decision to issue a license for the facility which is

the subject of PECO's application. 28/

III. CONCLUSION

For all of the foregoing reasons,^{29/} intervenor Limerick Ecology Action, Inc. opposes the Applicant's Motion.

POSWISTILO, ELLIOTT AND ELLIOTT

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²⁸ Should PECO amend its license application to provide for all of the mitigation alternatives at issue in this proceeding, such an amendment and Commission approval of the amended application might alter this conclusion. But as of now, the action sought by the applicant is the grant of an operating license for a facility which fails to include all of the mitigation features which are the subject of the litigation.

²⁹ We also note the applicant's predictably overblown assertions of the value of Unit 2 power generation during the summertime. See Affidavit of Corbin A. McNeill, Jr. paragraph 6. If PECO's experience for Limerick Unit 1 is any indication, it is extremely unlikely that Unit 2 will be able to generate any significant net electrical power contribution to the PJM Interconnection during the period suggested by the McNeill affidavit. Unit 1 first achieved criticality on December 22, 1984 according to the Gray Book. But according to the Limerick Monthly Operating Report dated June 14, 1985 (relevant portion attached as Exhibit B) for the year to date (Jan. 1985 - May 31, 1985) Unit 1 reported a negative net electrical energy generated: -72 MWH.

CERTIFICATE OF SERVICE

'89 JUN 16 P12:07

The undersigned counsel hereby certifies that a true and correct copy of "Opposition Of Limerick Ecology Action, Inc. To "Applicant's Motion For Clarification Of The Commission's Delegation Of Authority And For Issuance Of An Operating License, Or Alternatively, For An Exemption From Any Procedural Requirement That A License For Limerick Unit 2 Cannot Issue Until The Contention Remanded By The Third Circuit Is Resolved" was served upon the following persons by first class mail this 15th day of June, 1989, except where it was served by Federal Express overnight letter, as noted by an asterisk:

Lando W. Zech, Jr.
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Washington, D.C. 20555

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U.S. Nuclear Regulatory
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Washington, D.C. 20555

James R. Curtiss, Commissioner
U.S. Nuclear Regulatory
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Washington, D.C. 20555

Kenneth C. Rogers, Commissioner
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Kenneth M. Carr,
Commissioner
U.S. Nuclear Regulatory
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Washington, D.C. 20555

Samuel J. Chilk, Secretary
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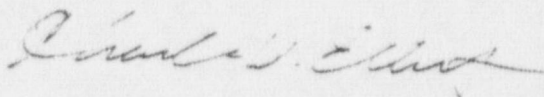
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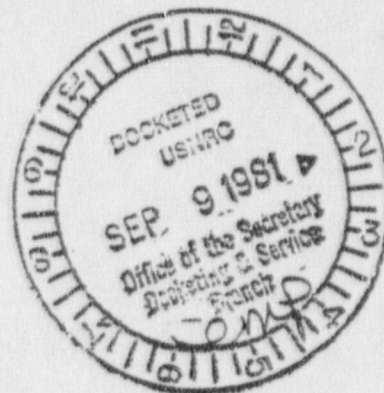


Charles W. Elliott

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PHILADELPHIA ELECTRIC COMPANY

[Docket Nos 50-352 and 50-353]



ESTABLISHMENT OF ATOMIC SAFETY AND LICENSING BOARD
TO PRESIDE IN PROCEEDING

SERVED SEP 9 1981

Pursuant to delegation by the Commission dated December 29, 1972, published in the Federal Register (37 F.R. 28710) and Sections 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717 and 2.721 of the Commission's Regulations, all as amended, an Atomic Safety and Licensing Board is being established in the following proceeding to rule on petitions for leave to intervene and/or requests for hearing and to preside over the proceeding in the event that a hearing is ordered:

PHILADELPHIA ELECTRIC COMPANY

Limerick Generating Station, Units 1 and 2
Construction Permit Nos. CPPR-106 and CPPR-107

This Board is being constituted pursuant to a notice published by the Commission on August 21, 1981, in the Federal Register (46 F.R. 42557-58) entitled, "Receipt of Application for Facility Operating Licenses; Consideration of Issuance of Facility Operating Licenses; Availability of Applicant's Environmental Report; and Opportunity for Hearing."

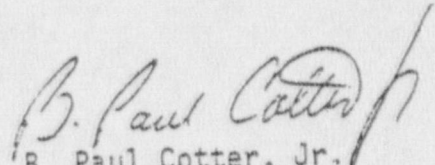
8109140101 JPP
EXHIBIT A

The Board is comprised of the following Administrative Judges:

Lawrence Brenner, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555


B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland
this 8th day of September 1981

877

DATE JUNE 14, 1985

COMPLETED BY PHILADELPHIA ELECTRIC COMPANY

W.M. ALDEN
ENGINEER-IN-CHARGE
NUCLEAR SECTION
GENERATION DIVISION-NUCLEAR
TELEPHONE (215) 841-5022

OPERATING STATUS

- 1. UNIT NAME: LIMERICK UNIT 1
- 2. REPORTING PERIOD: MAY, 1985
- 3. LICENSED THERMAL POWER (MWT): 165
- 4. NAMEPLATE RATING (GROSS MWE): 1092
- 5. DESIGN ELECTRICAL RATING (NET MWE): 1055
- 6. MAXIMUM DEPENDABLE CAPACITY (GROSS MWE): -
- 7. MAXIMUM DEPENDABLE CAPACITY (NET MWE): -

NOTES: UNIT 1 IS IN STARTUP TESTING.
FACILITY OPERATING LICENSE
NPF-27, ISSUED 10/26/84, RE-
STRICTS POWER LEVELS NOT TO
EXCEED 5% OF THE RATED POWER.

- 8. IF CHANGES OCCUR IN CAPACITY RATINGS (ITEMS NUMBER 3 THROUGH 7) SINCE LAST REPORT, GIVE REASONS
- 9. POWER LEVEL TO WHICH RESTRICTED, IF ANY (NET MWE):
- 10. REASONS FOR RESTRICTIONS, IF ANY:

	THIS MONTH	YR-TO-DATE	CUMULATIVE
11. HOURS IN REPORTING PERIOD	0	0	0
12. NUMBER OF HOURS REACTOR WAS CRITICAL	0	1,042.1	1,079.8
13. REACTOR RESERVE SHUTDOWN HOURS	0.0	0.0	0.0
14. HOURS GENERATOR ON-LINE	0.0	0.0	0.0
15. UNIT RESERVE SHUTDOWN HOURS	0.0	0.0	0.0
16. GROSS THERMAL ENERGY GENERATED (MWH)	0	95,668	95,668
17. GROSS ELECTRICAL ENERGY GENERATED (MWH)	0	0	0
18. NET ELECTRICAL ENERGY GENERATED (MWH)	* -72	* -72	* -72
19. UNIT SERVICE FACTOR	0.0	0.0	0.0
20. UNIT AVAILABILITY FACTOR	0.0	0.0	0.0
21. UNIT CAPACITY FACTOR (USING MOC NET)	0.0	0.0	0.0
22. UNIT CAPACITY FACTOR (USING DER NET)	0.0	0.0	0.0
23. UNIT FORCED OUTAGE RATE	0.0	0.0	0.0
24. SHUTDOWNS SCHEDULED OVER NEXT 6 MONTHS (TYPE, DATE, AND DURATION OF EACH):			

25. IF SHUTDOWN AT END OF REPORT PERIOD, ESTIMATED DATE OF STARTUP:

26. UNITS IN TEST STATUS (PRIOR TO COMMERCIAL OPERATION):

INITIAL CRITICALITY
INITIAL ELECTRICITY
COMMERCIAL OPERATION

FORECAST	ACHIEVED
12/19/84	12/22/84
MID APRIL 85	4/13/85
4TH QTR 85	

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PDR ADDCK 05000352

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