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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

'89 AUG 16 P12:29

Kenneth M. Carr, Chairman
Thomas M. Roberts
Kenneth C. Rogers
James R. Curtiss

OFFICE OF THE
DOCKET MANAGER

In the Matter of) SERVED AUG 16 1989
PHILADELPHIA ELECTRIC COMPANY) RE SERVED AUG 18 1989
(Limerick Generating Station,) Docket Nos. 50-352-OL-02
Units 1 and 2)) 50-353-OL-02
) (Severe Accident Mitigation
) Design Alternatives)

CLI-89-15

ORDER RESPONDING TO LIMERICK ECOLOGY
ACTION'S MOTION FOR RECONSIDERATION

Limerick Ecology Action ("LEA") has moved the Commission "to reconsider, stay, suspend, or revoke" our order of July 7, 1989, which concluded that a low power license can be issued for Limerick Generating Station, Unit 2, pending completion of an ongoing adjudicatory proceeding to consider severe accident mitigation design alternatives ("SAMDAs"). This proceeding is being conducted by the Commission in response to a remand by the United States Court of Appeals for the Third Circuit, Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission, 869 F.2d 719 (3d Cir. 1989). For the reasons given in this order, we deny the motion to reconsider or stay our previous order.

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I. Background

In Limerick Ecology Action, supra, the Third Circuit held in the context of a challenge to a full power operating license issued for Limerick Unit 1, that the Commission violated the National Environmental Policy Act ("NEPA") when it excluded from the operating license hearings LEA's contention calling for consideration of SAMDAs. The Court remanded to the Commission to provide this consideration. However, the Court did not revoke the operating license for Unit 1, nor did it modify or vacate the Licensing Board decision authorizing full power operation of both units. LBP-85-25, 22 NRC 101 (1985).

In light of the Court's decision, the license applicant, Philadelphia Electric Company ("PECo"), moved the Commission for clarification of the state of the licensing status of Unit 2, which is ready to begin operation, given that the existing Licensing Board decision authorizing operation of both units had not been vacated. PECo moved that the Commission treat the Licensing Board's authorization to issue a full power license for Unit 2 as effective and to direct the NRC staff to issue the license once the staff has made the findings requisite under 10 C.F.R. § 50.57. LEA and the Commonwealth of Pennsylvania opposed this motion. The NRC staff basically supported the motion, asserting that an operating license could issue prior to completing the consideration of SAMDAs that the Court said was required by NEPA and that any necessary exemptions from NRC regulations implementing NEPA would be authorized by law.

In our order of July 7, 1989, CLI-89-10, which LEA asks us to reconsider, the Commission found it premature to declare that the Licensing Board's authorization of a full power license for Unit 2 was effective, because such determinations are made only after an "immediate effectiveness" review shortly before a plant is ready for full power operation. The Commission did, however, consider whether the Licensing Board's decision should be deemed effective to authorize the staff to issue a license for low power operation. For the reasons given in our order, we found that the Licensing Board's authorization adequately supported issuance of a low power license once necessary NRC staff findings have been made.¹ We also concluded that no supplementation of the existing final environmental impact statement ("FES") for the Limerick facility, NUREG-0974, was necessary prior to low power operation. We made no decision regarding full power operation, indicating that the Commission might need additional information from the parties

¹An immediate effectiveness review and decision by the Commission itself is not required prior to low power operation. See 10 C.F.R. § 2.764(a) and § 2.764(f)(2). Accordingly, the Licensing Board decision resolving all contested issues in favor of Limerick Unit 2, and authorizing the NRC staff to issue a full power license would normally be effective to authorize the issuance of a low power license for Unit 2 without further Commission action, because the issues relevant to a low power license are subsumed within those relevant to full power operation. Our order of July 7, 1989 in effect considered whether this normal application of our rules and procedures should be altered or suspended in the case of Limerick Unit 2, in view of the Third Circuit's decision. We concluded that it should not, in part because the NEPA inadequacies that the Court found in the Licensing Board's decision could reasonably be found not relevant to a decision to operate only at low power.

regarding the issues that bear on the effectiveness of full power authorization.²

II. LEA'S Motion

a. The Request For Reconsideration.

In its motion to reconsider our order of July 7, 1989, LEA objects to the Commission's conclusion that the Licensing Board's 1985 decision, LBP-85-25, is effective to support issuance of a low power license for Limerick Unit 2. Much of LEA's motion, however, simply reiterates and reemphasizes the arguments LEA made in opposition to the applicant's claim that the Licensing Board decision should be deemed effective as an authorization for full power operation. LEA asserts that the Commission showed "no reasoned basis" for distinguishing between full power and low power in considering the validity of the 1985 decision. However, the Commission's order was specifically premised on the distinctions between low power and full power operation. Order at 4.

Even if LEA is correct that action to authorize issuance of a full power license prior to completion of consideration of SAMDAs would be inconsistent with the Third Circuit's opinion (a matter the Commission has yet to determine), it surely does not follow, as LEA would have it, that permitting low power operation likewise

²On July 27, 1989, the Commission issued an order requesting such information from the parties.

would violate the opinion or be contrary to NEPA. As explained in CLI-89-10, low power operation is generally a short-term operation for testing purposes to help assure that the reactor is ready to go to full power later on. Although low power operation does involve criticality and radioactive contamination of the reactor core, the risk level is much lower than that of full power operation, which itself is quite low in a power reactor that meets NRC regulatory requirements. As a consequence of these differences, some issues important to full power operation, such as offsite emergency planning, are not relevant at all to low power operation. For this reason, NRC regulations permit a low power license to be granted before all full power issues are fully resolved. If it is LEA's position that for purposes of applying the Third Circuit's decision no distinction can or should be made between low power and full power operation, then LEA's views do not take reasonable account of the regulatory scheme and the important ways these modes of operation differ.

This is not to say that the Commission believes that a low power license for Limerick Unit 2 could have issued without consideration of how that issuance would bear on the NEPA concerns underlying the Court's remand. In support of our statement that the Limerick FES remains valid for low power authorization, the Commission specifically considered "the degree to which severe accidents, and the SAMDAs that are intended to mitigate such accidents, are implicated in low power operation." Order at 7. The Commission found that the materials in the FES "fully support

low power operation without further supplementation." Id. LEA presents nothing in its motion for reconsideration either by way of data or analysis to cast doubt on that conclusion.

b. The Request For A Stay.

LEA requests in the alternative that the Commission stay or suspend authorization for licensing of Limerick Unit 2 because of the Court's decision. LEA argues that the criteria governing the issuance of a stay on remand are less stringent than those of the test set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). LEA is clearly correct in this assertion. Indeed, if a court decision mandates the issuance of a stay, a stay must issue. However, as indicated supra, the Third Circuit's decision at issue did not speak to the issuance of a stay.

Where, as here, however, the court's decision did not require a stay, two types of inquiry are called for in considering whether a stay will be granted: (1) a traditional balancing of equities and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Public Service Company of New Hampshire (Seabrook Station, Units 1, 2 and 3), CLI-77-8, 5 NRC 503, 521 (1977). LEA's motion omits consideration of the second inquiry.

In considering whether there will be any likely prejudice to decisions called for by the Third Circuit's remand, we emphasize that nothing in the remand calls into question the findings by the

Licensing Board that Limerick as built, i.e., without SAMDAs, meets Atomic Energy Act safety requirements or the conclusion in the FES that the environmental cost/benefit balance for Limerick as built favors operation of the plant. Operation of Limerick Unit 2 is fully supported by the existing safety and NEPA analysis. The eventual operation of Limerick Unit 2 is thus not at issue in the remand. What does remain for consideration is simply the possibility that further cost-effective reductions of environmental impact can be achieved. So long as these reductions are not foreclosed by operating the plant while this consideration is going on, such operation cannot reasonably be found to violate either NEPA or the Third Circuit's decision, particularly where an avoidable delay in operation would itself be costly.³

A major concern addressed in our July 7 order was whether low power testing might substantially increase the environmental cost of installing SAMDAs at a later time or otherwise foreclose the SAMDA alternative. LEA's motion puts forward no reason whatever to doubt the conclusion we reached in our order that low power operation of Unit 2 will not foreclose or unreasonably prejudice a subsequent implementation of SAMDAs, if the Licensing Board hearing indicates that that would be a desirable course of action.

³ These costs are not necessarily confined to financial burdens on the utility and ultimately on its ratepayers. If putting off low power testing leads to delays in full power operation, this delay could in turn cause burdens on the environment from the continued generation of electric power by fossil fuel stations that could otherwise be replaced by Limerick's generating capacity.

With regard to balancing the equities, we would note initially that the Third Circuit's decision, by its own terms, had no impact upon the effectiveness of the Licensing Board's initial decision authorizing the issuance of an operating license for Limerick Unit 2. As we determined in CLI-89-10, nothing in the Third Circuit's decision regarding SAMDA considerations impinges upon the validity of the existing FES as it relates to low power authorization or warrants a delay in the effectiveness of the existing Licensing Board initial decision insofar as that decision authorizes low power operation. In addition, in CLI-89-10 we reexamined the cost/benefit analysis in light of the Third Circuit's decision and concluded that the balance favors the prompt issuance of a low power authorization for Limerick Unit 2. In view of this and of our determination that low power operation will not foreclose or unreasonably prejudice the subsequent implementation of SAMDAs, authorization of low power operation at this time will not harm LEA or the public. As we observed in CLI-89-10, however, a delay in low power authorization could preclude the early detection and correction of facility problems and ultimately delay full power operation. Such delays will result in unnecessary economic costs to the Applicant and ratepayers and avoidable environmental costs (see n.3 supra to the public. In these circumstances, the balancing of the equities favors the prompt issuance of the low power license for Limerick Unit 2. LEA's arguments to the contrary are without merit.

III. Conclusion

In sum, the Commission finds that our order of July 7, 1989 appropriately considered the costs and benefits of allowing low power operation to go forward in comparison with precluding this operation pending completion of Commission action on the Third Circuit's remand. We do not find in LEA's motion to reconsider or stay our earlier order any reason to alter our conclusion that the preferable alternative is to let low power operation proceed when the plant is ready. Accordingly, we deny the motion.

It is so ORDERED.



For the Commission,

A handwritten signature consisting of stylized initials "SJC" followed by a surname.
SAMUEL J. CHILKO
Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of August, 1989.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
Units 1 and 2)

Docket No.(s) 50-352/353-OL-2

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER DTD 8/16/89 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
16 day of August 1989

Helen Boyd

Office of the Secretary of the Commission

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COM ORDER RESPOND G--CL1-89-15

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Dated at Rockville, Md. this
18 day of August 1989

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