

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 BRIEF IN OPPOSITION TO REQUEST BY  
INTERVENOR FRIENDS OF THE EARTH FOR A STAY  
OF ONSITE STORAGE OF UNIRRADIATED FUEL

Introduction

In a pleading dated February 23, 1984, intervenor Friends of the Earth ("FOE")<sup>1/</sup> sought the admission of a new contention related to an application filed by Applicant Philadelphia Electric Company ("Applicant") on June 1, 1983 and an amended application filed January 24, 1984, regarding receipt and onsite storage of unirradiated fuel at Limerick Generating Station, Unit 1 ("Limerick"). Both the NRC Staff and Applicant opposed admission of the new, late proposed contention.

During a prehearing conference in progress on other matters, the presiding Atomic Safety and Licensing Board

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<sup>1/</sup> Robert H. Anthony is the representative of FOE, which is the designated intervenor admitted by the Licensing Board below. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1440 (1982).

("Licensing Board") heard lengthy oral argument from FOE and other parties on the proposed contention. As discussed more fully in the Licensing Board's subsequent written Order confirming denial of the new contention,<sup>2/</sup> FOE failed to advance any basis for its proposed contention and did not even address any of the four criteria applicable to the grant of a stay. The Licensing Board's detailed analysis adequately demonstrates that none of the various arguments raised by FOE provided any basis for the denied contention as required by 10 C.F.R. §2.714(b). The Licensing Board expressly found, as discussed below, that nothing alleged by FOE presented any credible threat to the public health and safety.

On appeal, the presiding Atomic Safety and Licensing Appeal Board ("Appeal Board")<sup>3/</sup> affirmed the Licensing Board's dismissal of FOE's contentions for lack of basis and specificity. In particular, the Appeal Board reviewed each

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<sup>2/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Memorandum and Order on FOE's Contentions and LEA's Petition Based on a Part 70 Application to Store New Fuel" (March 16, 1984).

<sup>3/</sup> In an Order dated March 22, 1984, the Commission delegated to the Appeal Board its authority to exercise the review functions over Part 70 issues raised in this proceeding which otherwise would have been exercised and performed by the Commission.

of the hypothetical events postulated by FOE as a basis for its contention<sup>4/</sup> and concluded:

FOE's purported contentions are unfocused and contain no attempt to identify with reasonable specificity the basis of the perceived risks from the temporary outdoor storage of unirradiated fuel assemblies packed in special shipping containers. The Licensing Board quite properly dismissed them on that ground. But even though FOE's filings were thus deficient, the Board was sensitive to what it believed to be FOE's fundamental misapprehension about the delivery and temporary outdoor storage of the fuel - i.e., that the fuel could somehow go critical with a corresponding risk to the public, or that through some non-criticality mechanism the fuel could release harmful radiation. The Board correctly pointed out that there is simply no conceivable, credible explanation for either to occur.<sup>5/</sup>

Accordingly, the Appeal Board not only denied the stay requested by FOE below,<sup>6/</sup> but also affirmed the Licensing Board's ultimate conclusion in denying FOE's proposed contentions for lack of basis and specificity.<sup>7/</sup> In so affirming, the Appeal Board noted that its conclusions and those of the Licensing Board were buttressed by affidavits

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<sup>4/</sup> See Limerick, supra, ALAB-765, 18 NRC \_\_\_\_ (March 30, 1984) (slip op. at 10).

<sup>5/</sup> Id. at 12-13 (emphasis added).

<sup>6/</sup> Id. at 21 n.22.

<sup>7/</sup> Id. at 2, 17.

provided by the Staff and Applicant,<sup>8/</sup> which had led the Licensing Board to confirm its earlier bench ruling in a subsequent written order, holding:

[N]o credible accident involving unirradiated new fuel rods could cause radiation releases in excess of the limits set by the Commission's regulations. The accidents FOE postulates in its response are highly unlikely, and the chain into which FOE then weaves them is incredible. There is no reason to assume such a chain of events. Moreover, FOE proffers no bases to think that even if the events it postulates were to take place, radiation in excess of limits set by the applicable regulations would be released."<sup>9/</sup>

Accordingly, FOE has failed to carry its burden in requesting a stay. The rejection of its proposed contention by the Licensing Board at the outset, as affirmed by the Appeal Board, demonstrates in and of itself that FOE is extremely unlikely to succeed ultimately on the merits. Given the strongly stated findings by the Licensing and Appeal Boards that no credible risk of injury to the public exists, FOE's stay request is also deficient in demonstrating any possibility of harm, irreparable or otherwise, as a result of receipt and onsite storage of unirradiated fuel at Limerick. Nor has FOE established an absence of harm to

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<sup>8/</sup> Id. at 11, 14-15.

<sup>9/</sup> Limerick, supra, "Memorandum and Order Confirming March 21, 1984 Oral Ruling on Affidavits About Radiation Releases From Unirradiated New Fuel Rods" (March 26, 1984) (slip op. at 2).

Applicant or shown any public interest favoring a stay. Moreover, as discussed below, fuel has been received onsite, thereby mooted the request for a stay. Hence, Applicant opposes FOE's request for stay.

Argument

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

(4) Where the public interest lies.<sup>10/</sup>

As the moving party, FOE bears the burden of persuading the Appeal Board that it is entitled to a stay.<sup>11/</sup> FOE has not met this burden as to any of the four governing criteria and, accordingly, its application for a stay should be denied.

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<sup>10/</sup> See generally Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (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).

<sup>11/</sup> Farley, supra, CLI-81-27, 14 NRC at 797. Public  
(Footnote Continued)

As to the first factor, FOE's showing as to the likelihood of success on its contention is virtually nil inasmuch as the Licensing and Appeal Boards found no basis whatsoever for admitting the proposed contention. To satisfy the first factor for granting a stay, FOE must do more than merely establish possible grounds for appeal of its denied contention.<sup>12/</sup> Yet, FOE has simply advanced the same scenarios rejected by the Licensing and Appeal Boards as wholly incredible under the laws of physics.<sup>13/</sup>

Under the Commission's rules for the granting of contentions, an intervenor need only provide some basis for a proposed contention, the merits of which will be litigated later.<sup>14/</sup> Accordingly, the Licensing and Appeal Boards' rejection of each of the several bases alleged by FOE, mainly because there was no explanation of how unirradiated fuel could cause the public any harm,<sup>15/</sup> clearly establishes that FOE has not mustered the showing necessary to

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(Footnote Continued)

Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

12/ Farley, supra, CLI-81-27, 14 NRC at 797.

13/ See generally, Limerick, supra, ALAB-765 (slip op. at 10-17).

14/ See, e.g., Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

15/ See Limerick, supra, "Memorandum and Order on FOE's Contentions" (March 16, 1984) (slip op. at 16-21).

establish a likelihood of prevailing on the technical merits of its contention. As the Licensing Board aptly found, there is no credible claim under the laws of physics that unirradiated fuel can go critical,<sup>16/</sup> nor is there any credible non-criticality accident involving low-enriched, unirradiated uranium oxide fuel which could threaten the public health and safety.<sup>17/</sup> The Appeal Board agreed,<sup>18/</sup> holding that "[e]ven construing FOE's contentions in a manner most favorable to FOE, we can see no way that these conditions [the factors necessary for criticality to occur] can be achieved in the situations that FOE postulates."<sup>19/</sup> In opposition to the stay, Applicant adopts and incorporates by reference the affidavits filed with the Licensing Board below, which fully support the Board's conclusions.<sup>20/</sup>

As to the second factor, involving possible irreparable injury, FOE has similarly failed to make the necessary showing for the same reasons. The Licensing Board correctly found that none of the accidents postulated by FOE presented

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<sup>16/</sup> Id. at 17-18.

<sup>17/</sup> Id. at 19.

<sup>18/</sup> See note 13, supra.

<sup>19/</sup> Limerick, supra, ALAB-765 (slip op. at 13).

<sup>20/</sup> See Affidavit of Lubomir B. Pyrih Regarding Storage of Unirradiated Fuel at the Limerick Generating Station (March 13, 1984); Affidavit of Paul S. Stansbury (March 12, 1984).

any credible threat to the public health and safety inasmuch as no fission products could result from stored, unirradiated fuel, and because the crushing of uranium oxide pellets by an airplane, tower, or other large object would not result in the dispersion of any material potentially injurious to the public health and safety.<sup>21/</sup> Here again, the Appeal Board agreed.<sup>22/</sup> Accordingly, FOE has made no showing whatsoever as to any possible irreparable harm, perhaps the most critical of the four criteria.<sup>23/</sup>

As to the third factor, the granting of a stay for any extended period could inflict serious harm upon Applicant if it were foreclosed from meeting its scheduled date for fuel loading. As indicated in its letter to the NRC dated March 22, 1984, Applicant has scheduled fuel loading for August 1, 1984. Thus, any lengthy interruption of receipt and storage of fuel onsite creates a potential for delay of fuel loading, low-power testing and, ultimately, commercial operation of the Limerick Generating Station. Furthermore, Applicant is incurring substantial costs for storage of fuel at the fabricator which would not be incurred if fuel were received as scheduled at the site.

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21/ Limerick, supra, "Memorandum and Order on FOE's Contentions" (March 16, 1984) (slip op. at 19).

22/ Limerick, supra, ALAB-765 (slip op. at 12-16).

23/ See Environmental Radiation Protection Standards for  
(Footnote Continued)

As to the last factor for considering a stay, the public interest favors prompt completion of the licensing proceedings for Limerick, the issuance of operating licenses and commencement of commercial operations as soon as possible in order to provide the electrical power which will be generated from Limerick. It is not in the public interest to delay the licensing of Limerick in order to explore what the Licensing Board has determined to be imaginary and incredible risks postulated by FOE in its rejected contention.

Finally, as the Commission is aware, fuel was initially received onsite at Limerick on March 10, 1984.<sup>24/</sup> Because fuel has in fact been received onsite, the request by FOE for a stay of its receipt is now moot. The NRC does not review moot issues.<sup>25/</sup>

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(Footnote Continued)

Nuclear Power Operations, supra, CLI-81-4, 13 NRC at 301; Farley, supra, CLI-81-27, 14 NRC at 797; Clinch River, supra, ALAB-721, 17 NRC at 543.

<sup>24/</sup> Following the Appeal Board's decision in ALAB-765, the NRC issued on April 3, 1984 Materials License No. SNM-1926 (revised) which "authorizes the receipt, possession and storage of uranium enriched in the U-235 isotope contained in fuel assemblies in their shipping containers in the designated outdoor New Fuel Storage Area" at Limerick. Notice of Applicant's receipt of fuel shipment was given by Applicant to Region I as well as to the Office of the General Counsel at that time.

<sup>25/</sup> See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 NRC 72, 74 (1983); United States Department of Energy (Clinch  
(Footnote Continued)

Conclusion

For the reasons discussed more fully above, FOE has failed to carry its burden in establishing its entitlement to a stay. None of the four factors governing issuance of a stay lies in its favor. FOE's application for a stay should therefore be denied.

Respectfully submitted,

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April 12, 1984

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(Footnote Continued)

River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 419 (1982); Consolidated Edison Company of New York, Inc. (Indian Point, Unit No. 2), CLI-81-7, 13 NRC 448, 449 (1981).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Brief in Opposition to Request by Intervenor Friends of the Earth for a Stay of Onsite Storage of Unirradiated Fuel," dated April 12, 1984, in the captioned matter, have been served upon the following by deposit in the United States mail this 12th day of April, 1984:

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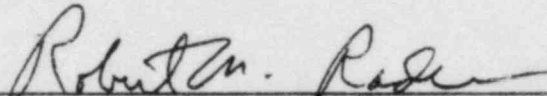
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