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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBefore the Atomic Safety and Licensing Appeal Board

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")^{1/} 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

^{1/} 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).

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("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,^{2/} 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.

Accordingly, FOE has failed to carry its burden in requesting a stay because the rejection of its proposed contention at the outset, in and of itself, demonstrates that FOE is very unlikely to succeed ultimately on the merits. FOE's stay request is also deficient because it has failed to demonstrate any conceivable possibility of harm, irreparable or otherwise, as a result of onsite storage of unirradiated fuel. Nor has FOE established an absence of

^{2/} 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).

harm to Applicant or any public interest favoring a stay. Hence, Applicant opposes FOE's request for a stay.^{3/}

Argument

In determining whether to grant or deny an application for a stay, the Appeal Board 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.^{4/}

^{3/} In an Order dated March 22, 1984, the Commission delegated to the Appeal Board authority to exercise review functions over Part 70 issues raised in this proceeding which otherwise would have been exercised and performed by the Commission. In a subsequent Order dated March 27, 1984, the Appeal Board requested receipt of any opposition to FOE's stay requested by the close of business Thursday, March 29, 1984. The Appeal Board imposed a temporary stay of the Licensing Board's order in the interim.

^{4/} 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).

As the moving party, FOE bears the burden of persuading the Appeal Board that it is entitled to a stay.^{5/} FOE has not met this burden as to any of the four governing criteria and, accordingly, its application for a stay should be denied.

As to the first factor, FOE's showing as to the likelihood of success on its contention was so weak that the Licensing Board found no basis whatsoever for admitting the proposed contention. To meet this standard, FOE must do more than merely establish possible grounds for appeal of its denied contention.^{6/} Yet, FOE has not even attempted to demonstrate that the Licensing Board erred in rejecting its proposed contention, but has simply recapitulated the unadorned arguments it presented to the Licensing Board below.

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.^{7/} Accordingly, the Licensing Board's rejection of

^{5/} 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).

^{6/} Farley, supra, CLI-81-27, 14 NRC at 797.

^{7/} See, e.g., Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

each of the several bases alleged by FOE, largely because there was no explanation of how unirradiated fuel could cause the public any harm,^{8/} clearly establishes that FOE cannot possibly muster the showing necessary to 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,^{9/} nor is there any credible non-criticality accident involving low-enriched, unirradiated uranium oxide fuel which could threaten the public health and safety.^{10/} In opposition to the stay, Applicant adopts and incorporates by reference the affidavits filed with the Licensing Board below.^{11/}

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

^{8/} Limerick, supra, "Memorandum and Order on FOE's Contentions" (March 16, 1984) (slip op. at 16-21).

^{9/} Id. at 17-18.

^{10/} Id. at 19.

^{11/} 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). In a subsequent Memorandum and Order dated March 26, 1984, the Licensing Board held that the affidavits provided by the Staff and Applicant "confirm our judgment, expressed in our March 6 order, that no credible accident involving unirradiated new fuel rods could cause radiation releases in excess of the limits set by the Commission's regulations." (Slip op. at 2).

found that none of the accidents postulated by FOE presented 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 a airplane, tower, or other large object would not result in the dispersion of any material potentially injurious to the public health and safety.^{12/}

While the Licensing Board recognized that it was unessential to its rulings, it requested affidavits from the Applicant and Staff addressing whether any postulated non-criticality accident involving uranium oxide fuel pellets could cause a violation of the Commission's regulations concerning onsite and offsite radiation releases.^{13/} The affidavits provided by the Applicant and Staff irrefutably establish that there exists no potential, credible accident affecting the new fuel assemblies to be stored at Limerick which would pose any potential for radiation releases in violation of the Commission's regulations.^{14/} Accordingly, FOE has made no showing whatsoever

^{12/} Id. at 19.

^{13/} Id.

^{14/} See note 11, supra.

as to any possible irreparable harm, perhaps the most critical of the four criteria.^{15/}

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.

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

^{15/} See Environmental Radiation Protection Standards for 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.

incredible risks postulated by FOE in its rejected contention.

FOE has not addressed the fourth factor and presumably relies upon its generalized assertions of health and safety hazards found wholly wanting by the Licensing Board. Although given an opportunity to respond to the affidavits submitted by the Applicant and Staff,^{16/} FOE did not do so. As the Appeal Board stated in the Clinch River proceeding, such generalizations "are simply conclusory and thus insufficient to justify issuance of the stay."^{17/}

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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March 28, 1984

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

^{17/} Clinch River, supra, ALAB-721, 17 NRC at 544.

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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 March 28, 1984, in the captioned matter, have been served upon the following by deposit in the United States mail this 28th day of March, 1984:

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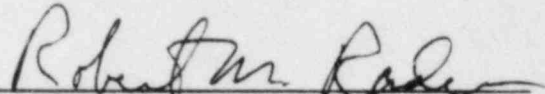
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