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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Philadelphia Electric Company	)	Docket Nos. 50-352 OL
	)	50-353 OL
(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 at 2 n.1 (October 29, 1984) (unpublished), the Appeal Board held that the criteria for a stay contained in 10 C.F.R. §2.788(e) apply to a motion to suspend an operating license.

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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

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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

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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

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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

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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

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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

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24/ Id. at 7.

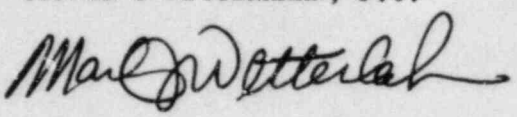
presented.[25/] For these reasons, LEA's request for license suspension should be rejected.

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
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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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