

493

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

SERVED JUN 18 1985
June 17, 1985
(ALAB-809)

'85 JUN 18 A10:28

In the Matter of)

PHILADELPHIA ELECTRIC COMPANY)

(Limerick Generating Station,
Units 1 and 2))

Docket Nos. 50-352 OL
50-353 OL

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Angus R. Love, Norristown, Pennsylvania, for inter-
venors, inmates of the State Correctional Institution
at Graterford, Pennsylvania.

Frank R. Romano, Ambler, Pennsylvania, for intervenor,
Air and Water Pollution Patrol.

Robert L. Anthony, Moylan, Pennsylvania, intervenor
pro se and for intervenor, Friends of the Earth.

Troy B. Conner, Jr., Robert M. Rader, and Nils N.
Nichols, Washington, D.C., for applicant,
Philadelphia Electric Company.

Joseph Rutberg, Donald F. Hassell, and Nathene A.
Wright for the Nuclear Regulatory Commission staff.

DECISION

Three intervenor groups -- the inmates of the State
Correctional Institution at Graterford, Pennsylvania; Air
and Water Pollution Patrol (AWPP); and Robert L. Anthony/
Friends of the Earth (Anthony/FOE) -- have appealed from the
Licensing Board's May 24, 1985, order in this operating
license proceeding. That order implements the Board's May
9, 1985, order, which granted applicant Philadelphia

8506190392 850617
PDR ADOCK 05000352
G PDR

DS02

Electric Company (PECo) an exemption from certain requirements of 10 C.F.R. § 50.47. The Board there concluded that possible continued litigation of issues raised by the inmates in connection with the emergency evacuation plan for the Graterford facility should not bar full-power license authorization for Limerick. Thus, the Licensing Board authorized the Director of Nuclear Reactor Regulation (NRR) to issue a full-power operating license to PECO.¹

Ordinarily, the Commission would now undertake its so-called "immediate effectiveness" review. See 10 C.F.R. § 2.764. But because "important questions regarding the hearing rights of the inmates . . . have not yet been resolved," the Commission has declined to make the Licensing Board's license authorization effective at this time.

¹ Several earlier decisions also supplied the necessary bases for full-power license authorization. In LBP-83-11, 17 NRC 413 (1983), the Licensing Board ruled favorably to PECO on issues relating to the supplementary cooling water system (SCWS) for Limerick. We affirmed most of that decision but remanded in part in ALAB-785, 20 NRC 848 (1984). On remand, the Licensing Board issued its Memorandum and Order of November 8, 1984 (unpublished), which we affirmed in ALAB-804, 21 NRC 587 (1985), finally resolving all contested SCWS issues. In LBP-84-31, 20 NRC 446 (1984), and LBP-85-14, 21 NRC ____ (May 2, 1985), the Licensing Board resolved issues relating to low-power operation and onsite and offsite emergency planning. We denied motions to stay these decisions in ALAB-789, 20 NRC 1443 (1984), and ALAB-808, 21 NRC ____ (June 11, 1985), but appeals from both LBP-84-31 and LBP-85-14 are pending.

CLI-85-11, 21 NRC __, __ (June 11, 1985) (slip opinion at 1-2). In this connection, the Commission directed us to expedite our consideration of the pending appeals from the Licensing Board's exemption order, and we have acted accordingly. See id. at __ (slip opinion at 2).²

As explained below, the Licensing Board failed to apply the proper standards for granting an exemption. Further, the Board's decision lacks a reasoned basis. We therefore vacate the Licensing Board's May 9 and May 24, 1985, orders and remand for further action in accordance with this opinion.

I.

We need not belabor the background of the inmates' efforts to litigate their concerns about the adequacy of the evacuation plan for Graterford, which is located within the emergency planning zone for Limerick. A few details, however, are useful to put the instant dispute in a broader perspective. Although the inmates were admitted as intervenors to this proceeding in 1982, the emergency plan they sought to challenge did not exist and was not made

² Prior to the issuance of CLI-85-11, we had shortened the briefing schedule for these appeals. Appeal Board Orders of June 3 and 5, 1985 (unpublished). In light of the Commission's directive, however, we further abbreviated the time for filing reply briefs. Appeal Board Order of June 12, 1985 (unpublished).

available to them until December 1984 -- shortly before the last of the scheduled hearings on PECO's operating license application was due to be completed. The inmates acted promptly and in accordance with prior Licensing Board orders to "reactivate" and to preserve their interest in the case. As explained in ALAB-806, 21 NRC ____ (May 1, 1985), however, these efforts were initially unsuccessful. But after two appeals, the inmates were reinstated and given the opportunity to file revised contentions. Id. at ____ (slip opinion at 18). The inmates did so on May 13, 1985.

In the meantime (but shortly after the inmates renewed their interest in this proceeding), PECO filed a motion with the Licensing Board, pursuant to 10 C.F.R. § 50.12. The motion sought an exemption from 10 C.F.R. § 50.47 insofar as that regulation would require Board consideration, before a full-power license could be issued, of any contentions raised by the inmates.³ The inmates, the Commonwealth of Pennsylvania, AWPP, and Anthony/FOE opposed the grant of an exemption. See Graterford Inmates' Motion in Opposition (March 13, 1985); Commonwealth of Pennsylvania Response (March 18, 1985); Letter to Licensing Board from F. R.

³ Section 50.47 embodies the NRC's emergency planning requirements. It requires a finding of "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" before issuance of an operating license.

Romano (AWPP) (March 15, 1985); Anthony/FOE Motion in Opposition (March 15, 1985). The NRC staff argued that it was premature for the Board to consider the exemption request until a determination was made that the inmates have at least one admissible contention. See NRC Staff Response (March 18, 1985).

Subsequently -- after ALAB-806 reinstated the inmates as intervenors but before they filed revised contentions -- the Licensing Board addressed PECO's exemption request. The Board first determined that the matter was ripe for disposition because it believed litigation of the inmates' concerns was inevitable and PECO should not have to be penalized by the resultant delay. Licensing Board Order of May 9, 1985 (unpublished) at 2-3, 4. Relying solely on 10 C.F.R. § 50.47(c)(1), the Board also concluded that an exemption was warranted. Id. at 3-8. But while the Board appeared to grant PECO's motion, its May 9 order did not include the customary language that authorizes the Director of NRR to issue a license. Further, the Board called for additional comments. Id. at 8.

Once again, the inmates appealed. We dismissed the appeal without prejudice, finding the Licensing Board's May 9 order to be "merely tentative or proposed." Appeal Board Memorandum and Order of May 21, 1985 (unpublished) at 2. Three days later, the Licensing Board issued another order "implementing its grant of applicant's motion for

exemption." Licensing Board Order of May 24, 1985 (unpublished). That order listed all of the pleadings that had been filed in connection with PECO's exemption request, but contained no significant new discussion. It reiterated, however, the Board's earlier conclusion that the criteria of 10 C.F.R. § 50.47(c)(1) had been met, and it explicitly authorized the Director of NRR to issue a full-power license to operate Limerick. Id. at 5-6. The appeals now before us of the inmates (their fourth in as many months), AWPP, and Anthony/FOE followed.⁴ PECO opposes the appeals and urges affirmance of the Board's May 9 and 24 decisions. The NRC staff argues that the Board's ruling is erroneous in certain respects but it nevertheless opposes the appeals.

II.

A. The principal authority for granting exemptions from any of the 10 C.F.R. Part 50 requirements for an operating license is found in 10 C.F.R. § 50.12(a). It provides, in pertinent part (emphasis added):

The Commission may, upon application by any interested person or upon its own initiative grant

⁴ AWPP and Anthony/FOE both raise several arguments that do not relate to the exemption issue that is before us here on appeal. We need not and do not address such arguments. Further, in view of the decision we reach on the inmates' appeal, we need not decide whether AWPP and Anthony/FOE even have standing to appeal the Board's exemption decision, inasmuch as their expressed interests and past participation in this proceeding have been primarily with regard to other issues.

such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest. * * *

By its very terms, this provision and the criteria specified in it must be addressed before any exemption from Part 50 requirements can be authorized. Even if this were not so clear from the face of the provision, Commission precedent makes that point manifest. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Unit 1), CLI-84-19, 20 NRC 1055, 1059 n.7 (1984).⁵ Indeed, PECO's motion for exemption acknowledges that the requirements of 10 C.F.R. § 50.12(a) must be satisfied in order for an exemption to lie. See Applicant's Motion for Exemption (February 7, 1985) at 1, 5-16.⁶

⁵ A recent Notice of Proposed Rulemaking on Specific Exemptions also makes clear that 10 C.F.R. § 50.12 in its current form embodies the general criteria for an exemption. See 50 Fed. Reg. 16,506 (1985). The purpose of this pending rulemaking is to clarify certain standards now apparently applied as a matter of staff practice, but not expressly reflected in the regulation itself. See note 8, infra. Because the rule proposed in the notice is just that -- proposed -- it, of course, does not apply here. (The Licensing Board's suggestion that the effective date of the proposed rule was May 28, 1985, is incorrect; that was the due date for filing comments on the proposed rule. See Licensing Board Order of May 9 at 3; 50 Fed. Reg. at 16,506.) Nonetheless, the discussion in the notice provides useful insight on the application and purpose of the rule in its existing form. See note 7, infra.

⁶ PECO's brief on appeal, for the most part, curiously
(Footnote Continued)

Despite the clear command of this regulation, the Licensing Board twice explicitly refused to address the requirements of section 50.12(a). Instead, the Board applied only 10 C.F.R. § 50.47(c)(1). That regulation provides:

Failure to meet the applicable [emergency planning] standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

In the Board's view, this was the only standard it need apply because,

when an applicant seeks an exemption of one of the Commission's regulations[,] then the Board should look first to any provisions within the regulation from which the exemption is sought. . . . We need not look elsewhere in the regulations and indeed have not considered the use of 10 CFR § 50.12.

Licensing Board Order of May 9 at 4.

In dismissing the inmates' interlocutory appeal from that order, we referred to "the exemption criteria of both 10 C.F.R. §§ 50.12(a) and 50.47(c)(1) (as well as pertinent case law)." Appeal Board Order of May 21 at 2 (emphasis

(Footnote Continued)
overlooks this fact. To advance one of its arguments, however, PECO cites the recent Notice of Proposed Rulemaking for 10 C.F.R. § 50.12 (see note 5, supra). Applicant's Brief (June 13, 1985) at 29-30.

added). Given the tentative nature of its decision, we thus assumed that the Licensing Board would reconsider the propriety of applying only the criteria of section 50.47(c)(1). Apparently our assumption was not justified. For, in its implementing order, the Board emphatically reiterated its view that it need and did consider only 10 C.F.R. § 50.47(c)(1). Licensing Board Order of May 24 at 1 & n.1.

We agree with the Board that it is proper to apply 10 C.F.R. § 50.47(c)(1) here, where PECo seeks an exemption from other requirements of section 50.47. But there is no basis for not applying the more general exemption standards of 10 C.F.R. § 50.12(a) as well. Nothing in these provisions makes them either mutually exclusive or mutually inclusive.⁷ There may well be some overlap in certain of

⁷ Presumably, if the Commission intended section 50.47(c)(1) to provide the sole standard by which to consider exemptions in the emergency planning area, it would have said so, especially during one of the many recent occasions on which amendment of the emergency planning regulations was under consideration. In this regard, we note that the Commission's recent Policy Statement on 10 C.F.R. § 50.47(b)(12) discusses section 50.47(c)(1), but makes no mention of section 50.12. See 50 Fed. Reg. 20,892, 20,893-94 (1985). But the Commission's silence -- in a Policy Statement addressed to a court remand involving a specific provision of the emergency planning regulations not involved here -- cannot reasonably be construed as an intent to void the requirements of the long standing section 50.12. Compare 50 Fed. Reg. at 16,508, 16,509 (stressing that general criteria of section 50.12 should always be evaluated).

the criteria (e.g., consideration of the "public interest" under section 50.12(a) and of "other compelling reasons to permit plant operation" under section 50.47(c)(1)). But for the most part, the four conjunctive factors of section 50.12(a) -- i.e., authorization under law, no endangerment to life or property, no endangerment to the common defense and security, and the public interest -- are distinct from the three disjunctive factors to be considered under section 50.47(c)(1) -- i.e., the significance of the plan's deficiencies, adequacy and promptness of interim compensating actions, and existence of other compelling reasons for plant operation.⁸ The Licensing Board's failure to apply the requirements of both regulations to PECO's exemption request is reversible error, requiring a remand.⁹

⁸ The factors set out in 10 C.F.R. § 50.47(c)(1) -- e.g., interim compensating actions -- may well be one area where the staff's existing practice vis-a-vis the granting of exemptions is already reflected in the regulations. The Commission's pending rulemaking on exemptions (note 5, supra) is intended to clarify and to codify such practice insofar as exemptions from any regulatory requirement are concerned. See, e.g., 50 Fed. Reg. at 16,508.

⁹ PECO never squarely addresses the real issue before us here -- whether the Licensing Board applied the correct standards in ruling on PECO's exemption request. It cites Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127 (1982), and its progeny, however, implying that that decision holds that only 10 C.F.R. § 50.47(c)(1) need be considered when an exemption for emergency plan deficiencies is under consideration. See Applicant's Brief at 13, 26,

(Footnote Continued)

In addition to the proper standards themselves, the Licensing Board should also take account of the intended purpose of both regulations. For instance, according to the Statement of Consideration accompanying certain amendments of the emergency planning regulations, the types of deficiencies to which 10 C.F.R. § 50.47(c) is addressed are those "that only reflect the actual state of preparedness which may be easily remedied . . . [and] should not delay licensing action." 47 Fed. Reg. 30,232, 30,234 (1982) (emphasis added). With respect to 10 C.F.R. § 50.12, just last year the Commission described that authority as "extraordinary" and "available . . . only in the presence of exceptional circumstances." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984). While observing that such a "discretionary" decision should reflect the equities of the situation, the Commission also stated that "these equities

(Footnote Continued)

42. San Onofre relies on 10 C.F.R. § 50.47(c)(1) but makes no mention of 10 C.F.R. § 50.12. But that fact is neither surprising nor significant. Unlike PECO here, the applicants in San Onofre did not expressly seek an "exemption" from licensing requirements pursuant to section 50.12. Hence, that issue was not before us. Also unlike here, no outstanding contentions remained to be considered. Instead, the issues before us were whether there was support in the record for the Licensing Board's reasonable assurance finding, and whether a license condition requiring applicant to remedy certain deficiencies within six months of full-power operation was permissible.

do not apply to the requisite findings on public health and safety and common defense and security." Ibid.¹⁰

In weighing the factors specified in both 10 C.F.R. §§ 50.12(a) and 50.47(c)(1), the Licensing Board should also be mindful of the special circumstances here involved. This is the only contested licensing proceeding, of which we are aware, in which issues have been raised concerning the adequacy of the evacuation plan for a maximum security prison, with a population of over 2,000, located within a plant's 10-mile emergency planning zone.¹¹ On the other hand, the exemption is not a request for a permanent deviation from the emergency planning requirements; it is intended to apply only during Licensing Board consideration of the inmates' admitted contentions.

¹⁰ In Shoreham, the Commission imposed several specific requirements on applicant that were not explicitly embodied in section 50.12(a). It later clarified that those requirements pertained only to the Shoreham case. See Grand Gulf, 20 NRC at 1059 n.7. There is no reason to assume, however, that the Commission's general comments about section 50.12, noted above, do not pertain here.

¹¹ The adequacy of plans to evacuate prisoners was litigated in the Waterford proceeding. That case, however, involved only two county jails with an average prison population of 55 persons. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1566, 1584 (1982).

We do not decide or suggest that no exemption would be warranted in this case.¹² We simply identify the various factors that the Licensing Board is obliged to consider upon remand. Serious questions have been raised and they deserve serious and full consideration by that Board.¹³

B. The Licensing Board's exemption decision was also premature: the Board put the proverbial cart before the horse. In our Order of May 21 at 2, we stated that "we do not understand how the Board could properly weigh the exemption criteria . . . before it has determined whether any exemption will even be necessary -- i.e., whether the inmates have proffered an admissible contention [footnote omitted]." We still find that to be the case.

¹² Thus, to the extent the inmates and other intervenors argue that the "reasonable assurance" finding required for license issuance can never be lawfully made before consideration of the inmates' contentions is completed, we disagree. In the first place, a grant of an exemption does not deprive the inmates of their right to be heard (at a formal hearing, if necessary, or through written filings) on their admissible contentions. Second, through the exemption regulations -- which no party here challenges per se -- the Commission has recognized that some circumstances might warrant license issuance despite an applicant's inability to satisfy all regulatory requirements. Before such extraordinary relief is authorized, however, an applicant must show that it is justified under the appropriate NRC standards.

¹³ Merely listing the parties' filings and noting the extensive briefing of the matter -- as the Licensing Board did in its May 24 order -- is not a substitute for the reasoned decisionmaking contemplated by the Administrative (Footnote Continued)

Until one or more contentions have been admitted, the specific, potential emergency plan deficiencies that warrant further adjudication are not known. Both 10 C.F.R. §§ 50.12(a) and 50.47(c)(1) presuppose identification of the particular respects in which an applicant is unable to comply with the regulatory requirements from which it seeks an exemption. Indeed, only after the asserted deficiencies in the Graterford evacuation plan are defined, can PECO logically attempt to satisfy the various exemption criteria of the regulations.

The futility of addressing these criteria, before the specific context in which they are to apply is known, is evident from the Licensing Board's decision. For example, in considering the significance of the plan deficiencies and the adequacy of interim compensating actions, the Board could make only generalized statements about the overall adequacy of the plan and the outcome of several remedial emergency response exercises at Graterford. See Licensing Board Order of May 9 at 5-7. But given that the Commission's regulations require intervenors to set forth reasonably specific contentions and bases (see 10 C.F.R. § 2.714(b)), the reasons for granting an exemption despite

(Footnote Continued)
Procedure Act, 5 U.S.C. § 557(c). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983).

the pendency of litigation of those contentions should be equally specific.

We appreciate the Board's desire to handle this matter -- arising so late in the proceeding -- as efficiently and expeditiously as possible. In some instances, procedural shortcuts and innovations can serve a useful purpose without working a hardship on any party. The Licensing Board in this very proceeding did so earlier in connection with the consideration of certain environmental issues, and we affirmed. See ALAB-785, note 1, supra, 20 NRC at 862-66. The shortcuts taken in this instance, however, cannot be justified and, unfortunately, have only led to more, rather than less, legal wrangling and delay.

In an order issued just last week, the Licensing Board ruled on the revised contentions submitted by the inmates. The Board determined that two parts of a proposed contention are admissible -- those concerning the training of civilian personnel involved in the emergency response plan, and the methodology for determining the estimated time of evacuation. Licensing Board Order of June 12, 1985 (unpublished). The Board can now properly consider PECO's

exemption request in the context of the two litigable issues identified in its June 12 order.¹⁴ We think it only fair, however, that the parties be given an opportunity to reassert their positions in light of our holdings here.¹⁵ In order to avoid further delay, we set forth below a schedule for future filings on this matter.

The Licensing Board's orders of May 9 and May 24, 1985, are vacated, and this matter is remanded to the Board for further action consistent with this decision.¹⁶ If PECO intends to renew its request for an exemption, its motion

¹⁴ We make no judgment as to whether these or any of the inmates' proposed contentions are admissible. Moreover, we have made no effort, in light of the Board's June 12 order, to apply the exemption criteria of 10 C.F.R. §§ 50.12(a) and 50.47(c)(1) ourselves. Like the Commission in Shoreham, 19 NRC at 1155 n.2, we are "extremely reluctant to assume the functions of an existing Licensing Board of compiling a factual record, analyzing it and making the initial determination based on the record."

¹⁵ Much of PECO's and the staff's briefs on appeal is devoted to showing why the asserted deficiencies in the emergency plan for Graterford are not significant. This is the type of argument more properly addressed to the Licensing Board on remand.

¹⁶ Because we have thus ruled on the merits of the appeals, vacating the Licensing Board decision that authorized license issuance, we need not address the requests of the inmates and Anthony/FOE for a stay pending appeal.

should be received by the Licensing Board and the parties no later than June 24, 1985. Responses to that motion should be received by the Licensing Board and mailed to the other parties 11 days later. The Licensing Board is directed to consider the matter expeditiously, "consistent with conducting a fair and thorough proceeding." See CLI-85-11, 21 NRC at ___ opinion at 2). Any appeals from (and requests to the Licensing Board's ruling, accompanied by supporting evidence, are to be received by us and the other parties 14 days after the service of the Licensing Board's decision. Appeals are to be received by us and mailed to the parties 10 days thereafter.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
C. Jean Shoemaker
Secretary to the
Appeal Board

Mr. Edles did not participate in this decision.