

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

PHILADELPHIA ELECTRIC COMPANY

(Limerick Generating Station,
Units 1 and 2)

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Docket Nos. 50-352 *DL*
50-353

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NRC STAFF RESPONSE TO
LIMERICK ECOLOGY ACTIONS' MOTION FOR A STAY

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I. INTRODUCTION

On May 2, 1985, the Licensing Board issued its Third Partial Decision ^{1/} for the Limerick Generating Station, Units 1 and 2 on offsite emergency planning. That decision disposed of all issues in favor of the Applicant (Philadelphia Electric Company) except for any issues that might arise from the inmates of the State Correctional Institution at Graterford. In the Matter of Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-85-14, slip op. at 1, (May 2, 1985) ("Decision"). On May 16, 1985, Limerick Ecology Action (LEA) moved for a stay of the Licensing Board's Third Partial Initial Decision. ^{2/} On May 20, 1985, LEA filed a supplement to its motion for a stay. ^{3/} On May 22, 1985, the Appeal Board issued an order noting that

^{1/} The decision was served on May 7, 1985.

^{2/} Motion For A Stay Of The ASLB's Order Authorizing The Issuance Of A Full Power Operating License For The Limerick Generating Station (May 16, 1985) ("Motion For Stay").

^{3/} Supplement To Limerick Ecology Action's Motion For A Stay Of The ASLB's Order Authorizing The Issuance Of A Full Power Operating License For The Limerick Generating Station (May 20, 1985) ("Supplement To Motion").

LEA's supplement to its motion was timely and clarifying the time for filing replies to LEA's motion for a stay. ^{4/} For the reasons set forth below, the NRC staff opposes LEA's motion for a stay of the Licensing Board's Third Partial Initial Decision.

II. DISCUSSION

Before addressing the merits of whether LEA's motion for a stay satisfies the requirements under 10 C.F.R. § 2.788(e) for granting a stay, the Staff submits that LEA's motion should be denied since it is procedurally deficient and does not comply with the Commission's regulations. First, LEA requests the Appeal Board to stay the "Licensing Board's Third Partial Initial Decision on Offsite Emergency Planning which authorizes the issuance of a full power operating license for the Limerick Generating Station." Motion For Stay at 1. However, as the Appeal Board itself has acknowledged, the Licensing Board's Third Partial Initial Decision does not authorize the Director of Nuclear Reactor Regulation to issue a full-power license. See, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), Memorandum and Order, slip op. at 2 (May 21, 1985). Consequently, LEA has sought a stay of a Licensing Board action that does not exist. Second, 10 C.F.R. § 2.788(b) states that "[a]n application for a stay shall be no longer than ten (10) pages, exclusive of affidavits. . . ." LEA's motion for a stay consists of 16 pages with a two page attachment, which is not an affidavit, and its supplement to its motion is six pages in length. Thus, LEA's request for a stay (consisting of 24 pages) is clearly in violation of the Commission's rules governing the application

^{4/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Order (unpublished), (May 22, 1985).

for a stay in the absence of a request for leave to file such a motion in excess of the page limitation. Moreover, LEA has incorporated by reference its entire 48 page "Brief In Support Of Appeal Of Limerick Ecology Action, Inc." that LEA filed on October 4, 1984. Supplement To Motion at 1-2. The acceptance of such a motion would render the Section 2.788(b) prescription meaningless. Accordingly, for these reasons alone, the NRC staff submits that the Appeal Board should reject LEA's motion for a stay.

In addition to the above, LEA has failed, for the reasons stated below, to satisfy its burden of demonstrating that it meets the criteria for granting a stay. The requirements for determining whether to grant or deny a stay are contained in 10 C.F.R. § 2.788(e). In deciding whether the movant has satisfied the criteria of 10 C.F.R. § 2.788(e), it must be recognized that:

The burden of persuasion on these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.

Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981) (footnotes omitted); see also, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984). The Staff will address in turn each of the four factors in 10 C.F.R. § 2.788(e).

1. Likelihood of Prevailing on the Merits

LEA asserts, without any citations to the record, that the Licensing Board did not address LEA's proposed findings of fact. Motion at 2. This

claim by LEA is without merit. The Licensing Board explicitly noted that it considered all of the proposed findings of fact and observed that those proposed findings not incorporated in the Decision were rejected as unsupported by fact or law or unnecessary to rendering the decision. Decision at 14. More importantly, however, the Decision is replete with instances where the Licensing Board specifically addressed certain LEA findings and provided a reasoned resolution of the issues raised by those findings based on citations to the record. See, e.g., Board Findings 7, 11-13, 15, 21, 24, 26-27, 41, 49-50, 56-57, 74, 86, 95, 107, 151, 215, 257, 272, 281, 287.

LEA argues that it will clearly establish that the local radiological emergency response plans (RERP) (the majority of which have not been adopted or accepted by the respective local jurisdictions) do not provide a basis for making a predictive finding of reasonable assurance due to the remaining unresolved deficiencies identified by the Federal Emergency Management Agency (FEMA). Motion at 2. LEA notes that FEMA has not provided the NRC with a determination that the offsite RERP's are adequate and capable of being implemented. Id. at 6. It also argues, without any citation to the record, that the record is insufficient for the Board to ignore FEMA's concern regarding Chester and Montgomery County's unmet needs for buses and ambulances. Id. LEA's argument is not well founded. First, as noted by the Board in the Decision (Decision at 8-10), NRC case law establishes that under the Commission's emergency planning regulations offsite RERP's need not be finally approved or adopted as a prerequisite to finding that there is reasonable assurance that the plans are adequate and capable of being implemented. See, South California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 n.57 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); Detroit

Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066 (1983). Thus, the Licensing Board had ample legal support for this area of its decision. Secondly, FEMA's concern about ambulances is not within the scope of the admitted contentions. Consequently, as the Board correctly observed it was not obligated to address such matters (Decision at 12). This is because it is well established that, apart from matters raised by a board under its sua sponte authority, the Licensing Board's authority is limited to deciding only those issues in controversy (i.e., admitted contentions) in a contested operating license proceeding. See, 10 C.F.R. §§ 2.104(c) and 2.760a; 10 C.F.R. Part 2, Appendix A, Section VIII; Cincinnati Gas & Electric Co. et al. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 768 n.12 (1983). Furthermore, the Licensing Board did not ignore FEMA's concern regarding unmet needs for buses because it extensively considered and addressed this issue in its decision. Decision at 75-107. Finally, on May 21, 1985, FEMA provided the NRC its finding, which states:

offsite radiological emergency planning and preparedness is now adequate to provide reasonable assurance that protective measures can be implemented to protect the public health and safety in the event of a ^{5/}radiological emergency at the Limerick Generating Station. 5/

FEMA also noted that all Category A deficiencies had been corrected. 6/

LEA also claims, without any citation to the record or any authority, that participation in the July and November 1984 exercises is not predictive of jurisdictions achieving reasonable assurance of preparedness for radiological

5/ See Letter to the Licensing Board (May 22, 1985) with FEMA Memorandum from Richard W. Krimm (FEMA) to Edward L. Jordan (NRC) at 2 (May 21, 1985). Although not in the record below, a copy of this letter was provided to the Licensing Board and the parties by the Staff.

6/ Id.

emergencies and that no legal connection can be drawn between drill participation and the endorsement, approval and workability of a proposed RERP in a real emergency. Motion at 6. The Staff submits that this claim is without merit. The Licensing Board reviewed the entire record dealing with the 14 jurisdictions at issue regarding the adoptability of their plans in terms of being predictive of final approval. Decision at 241-303. Participation in those exercises was not principally relied on by the Board in reaching its overall conclusion for any of the jurisdictions involved. Id. The Board referred to participation in the exercises for only 5 of the jurisdictions. Decision at 265-67, 280, 283, 294, 297-98, 302. For those 5 jurisdictions, the Board's reference to participation in the exercises was not the principal basis for its overall finding. Id. Nevertheless, the Staff submits that, to the extent evidence of participation in the exercises was relied on by the Board, the Board's reliance on such evidence was entirely proper since the Commission's emergency planning requirements and guidance require participation in exercises as a basis for making a reasonable assurance finding. See, 10 C.F.R. § 50.47(b)(14); Section F, Appendix E, 10 C.F.R. Part 50; NUREG-0654, II.N. Moreover, LEA's claim that the Board improperly dismissed LEA-1, concerning the adoptability and implementability of the RERPs, by relying on the Emergency Management Services Act of 1978, Act of November 26, 1978, P.L. 1332, No. 323 ("P.L. 1332") (Motion at 11-12) is not well founded. LEA has neither provided authority for such a proposition nor any citations to the record to support such a proposition. The Board also relied upon other probative evidence of record in resolving LEA-1. See, Decision at 241-303. Furthermore, the Board's reliance on P.L. 1332 is entirely consistent with the Commission's case law on predictive findings. See, ALAB-717, supra; ALAB-732, supra; ALAB-730, supra.

LEA's complaints about the significance the Board attached to the issue of unmet staffing needs and the manner in which the Board addressed this issue merely amount to the weight to be given certain evidence. Motion at 10-11. As noted earlier, LEA must do more than merely establish possible grounds for appeal. See, Farley, CLI-81-27, supra; Marble Hill, ALAB-437, supra; Limerick, ALAB-789, supra. Clearly, the Licensing Board treated the issue as significant since it imposed a condition precedent to operation above 5% rated power by requiring FEMA to receive verification of unmet staffing needs. Decision at 305. Since FEMA must receive verification of the satisfaction of unmet needs, FEMA is in a position to assure that its concerns on this matter, including those of Mr. Kinard, are appropriately addressed.

LEA claims that procedural errors by the Board caused the scope of certain traffic problems to be understated in the record. Motion at 7-8. However, LEA fails to provide any cite to the record for the alleged errors. The LEA findings it references likewise contain no such reference or allegation of error. Further, LEA fails to point out that the Board's exclusion of LEA Exhibits E-46 and E-56, which LEA claims is error (Motion at 7-8), was based on the absence of sponsoring testimony to support the relevance of those documents as noted by the Board. Decision at 27. LEA has made no showing which suggests that such an evidentiary ruling was incorrect. Moreover, LEA's claim that the time limits imposed by the Board were inadequate (Motion at 16) is without merit for the reasons set forth by the Board in its decision. See, Decision at 15-19. Indeed, LEA fails to cite any support in the record for how, in a particular instance, the Board's adherence to time limits created prejudicial error.

LEA's claims of Board error in dealing with traffic access and control points (Motion at 5, 8-9) are not well founded and simply amount to a disagreement with the weight the Board attached to the evidence. The Board recognized

the significance of traffic control beyond the EPZ by imposing a condition precedent to operation above 5% to address this concern. Decision at 304-305. Further, the Board fully addressed and considered the evidence of record concerning this issue for the geographical areas that were the subject of the admitted contention. Decision at 20-74. LEA allegation of Board error for Board Finding 70 (Motion at 5) is without merit since the Board did not make the assumption alleged by LEA. See, Decision at 49-50. Contrary to LEA's allegation (Motion at 4-5), as the Applicant notes, the Board did not improperly delegate its responsibility regarding verification of traffic control since it was based on undisputed evidence that there is no problem in establishing such points and is consistent with NRC precedent. Applicant's Brief In Opposition To Request By Limerick Ecology Action For A Stay Of The Licensing Board's Second And Third Partial Initial Decisions (May 25, 1985) at 5-6.

LEA's allegation that the Board erred in its finding regarding the transit dependent population is not well founded. Motion at 13-14. Clearly, the verification of the lists was merely to determine the accuracy of the data on the list. See, Decision at 34. Further, most of LEA's argument (Motion at 13) is not supported with appropriate references to the record as required by 10 C.F.R. § 2.788(b)(4). Finally, Licensing Board did rely upon other evidence of record to explain the discrepancy between the census data and the survey. Decision at 34-37.

Finally, LEA's allegations regarding the workability and adoptability of Montgomery County's RERP (Motion at 15) are without merit since the Board's findings regarding the workability and adoptability of that plan were fully supported by the record. See, Decision at 254-257.

2. Irreparable Harm

This factor is often the most important in determining the need for a stay. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2),

ALAB-789, 20 NRC 1443 (1984). LEA has not presented anything new of any significance. Moreover, LEA's arguments are either so general in nature as to provide no support for its position or have been previously considered by the Appeal Board in connection with an earlier request for a stay in connection with low power that was denied. Id. Accordingly, LEA has not established that it would suffer irreparable injury if its request for a stay is denied.

3. Harm to Other Parties

LEA acknowledges that the Applicant's interest will be adversely affected, but only in an economic sense and that such harm should not be considered by the Appeal Board in determining whether to grant the requested stay. Supplement, at 4. Where the other stay criteria weigh in favor granting the requested relief, economic issues may not tip the balance in favor of denying a stay. However, in this case, LEA has not established that it will prevail on the merits or that it will be irreparably injured. The Commission has made it clear that in appropriate circumstances it will consider the economic harm to the Applicant. In a recent case, the Commission expressly considered economic impact when it addressed the cost of delay to an Applicant in denying an intervenor's request for a stay of the effectiveness of an order. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), CLI-85-3 (1985), slip op. at 8-9. See also, Statement of Policy On Conduct of Licensing Proceedings, CLI-81-3, 13 NRC 452, 453 (1981).

4. The Public Interest

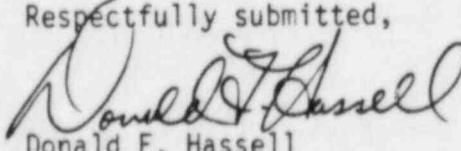
LEA submits that its request for a stay is in the public interest because it will avoid undue risk, permit time to fairly and comprehensively consider risk mitigation alternatives, avoid commitment of resources in the face of NEPA violations, and protect the public interest in principled and lawful decision making. LEA supplement at 5.

In making its public interest argument to grant the requested stay, LEA merely states, without elaboration, the points it relies upon. Id. However, the Staff believes that LEA's failure to satisfy the other stay criteria clearly indicates that it has failed to establish that the public interest warrants the granting of a stay. Furthermore, the Commission has stated that with respect to operating licenses, its adjudicatory boards should make an effort to avoid delays consistent with the Commission's fundamental commitment to a fair and thorough hearing process. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); See also, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1441 (1984); Duke Power Company, (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). In this case, there have been three Partial Initial Decisions, covering a wide range of subjects raised by the intervenors, and there has been a fair and thorough hearing consistent with the Commission's regulations. Under such circumstances, the public interest does not support a grant of LEA's request.

III. CONCLUSION

For the reasons discussed above, the NRC staff submits that LEA's request for a stay should be denied.

Respectfully submitted,


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Counsel for NRC Staff


Joseph Rutberg
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 4th day of June, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LIMERICK ECOLOGY ACTIONS' MOTION FOR A STAY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of June, 1985:

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