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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

DOCKETED
USNRC

In the Matter of
Philadelphia Electric Company
(Limerick Generating Station,
Units 1 and 2)

)
)
) Docket Nos. 50-352
) 50-353
)

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OFFICE OF SECRETARY
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LICENSEE'S OPPOSITION TO PETITION BY FRIENDS OF THE
EARTH FOR A STAY OF THE ATOMIC SAFETY AND LICENSING
BOARD'S AUTHORIZATION FOR ISSUANCE OF A
FULL-POWER OPERATING LICENSE

Preliminary Statement

On July 22, 1985, the presiding Atomic Safety and Licensing Board ("Licensing Board") issued its Fourth Partial Initial Decision, stating that "the Director of Nuclear Reactor Regulation is authorized to issue a full-power operating license for the Limerick Generating Station, Units 1 and 2, consistent with the Board's decisions in this case and upon making requisite findings with respect to matters not embraced in the Third Partial Initial Decision on Offsite Emergency Planning or in this decision."^{1/} On August 1, 1985, intervenor Friends of the Earth

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), "Fourth Partial Initial Decision (On Offsite Emergency Planning Contentions Contention Relating to Graterford)" (July 22, 1985) (slip op. at 25) ("Fourth PID"). The Fourth PID disposed of the only two remaining contested issues in the proceeding, both of which related to emergency planning and preparedness for the State Correctional Institution at Graterford ("Graterford").

("FOE") petitioned for a stay of the authorization for issuance of a full-power operating license.^{2/}

FOE has demonstrated no standing to appeal or request a stay of the Fourth PID. Although FOE purports to base its claims upon aspects of the Fourth PID, its stay request simply reiterates issues it has raised on appeal from the Third Partial Initial Decision^{3/} and otherwise.^{4/} In effect, FOE is attempting to utilize the Fourth PID as an excuse for an untimely request to stay the Third PID. FOE also cites certain matters unrelated to any contentions which it has raised before the Nuclear Regulatory Commission ("NRC" or "Commission"). Yet it offers no explanation as to how the Atomic Safety and Licensing Appeal Board ("Appeal Board") could exercise jurisdiction over uncontested matters which the Commission has delegated to the NRC Staff.

Moreover, possible consideration of a stay by the Appeal Board has been superseded by action of the Commissioners, who met and voted on August 8, 1985 to authorize issuance of the full-power license.^{5/} In any event, FOE has failed to meet its heavy burden for issuance of a

^{2/} By Order dated August 6, 1985, the Appeal Board required all replies to FOE's stay petition to be received by August 12, 1985.

^{3/} Limerick, supra, LBP-85-14, 21 NRC ____ (May 2, 1985) ("Third PID").

^{4/} FOE also bases its stay request upon the Licensing Board's denial of a late-filed contention on effluent releases. See Limerick, supra, "Memorandum and Order Denying Petition by Anthony/FOE to Reopen the Record on the Basis of New Information in Philadelphia Co.'s Semi-Annual Effluent Release Report, Feb. 1985" (June 4, 1985).

^{5/} Limerick, supra, CLI-85-15, 22 NRC ____ (August 8, 1985).

stay under the four criteria of 10 C.F.R. §2.788. Accordingly, Licensee opposes FOE's petition for a stay and requests that it be denied.

Argument

I. FOE Lacks Standing to Appeal the Fourth
PID or Request a Stay of that Decision.

FOE did not participate in the litigation of either contention related to emergency planning and preparedness for Graterford,^{6/} nor has it pleaded any cognizable legal interest in the matter.^{7/} FOE's only admitted contention on emergency planning asserted that the Limerick EPZ should be expanded or that some other form of planning should consider the special needs of certain areas beyond the EPZ.^{8/}

The Commission's rules expressly state that intervenor standing depends upon a showing of a petitioner's particular interest in the proceeding, how that interest may be affected, and the specific

^{6/} On July 25, 1985, FOE filed what purported to be proposed findings on the Graterford contentions, despite the fact that FOE did not appear at the hearing. The proposed findings postdated issuance of the Fourth PID by three days and were filed well after July 16, 1985, the last day of hearings on the Graterford contentions, which had been designated as the deadline for filing written proposed findings. See Limerick, supra, "Memorandum and Order - Graterford Contentions and Hearing Schedule" (June 18, 1985) (slip op. at 3); Tr. 21015-16. None of FOE's proposed findings actually related to emergency planning and preparedness at Graterford, much less the two specific contentions. Rather, FOE summarized its basic opposition to the full-power licensing of Limerick.

^{7/} Noting that FOE appealed the Fourth PID by means of a postcard mailed July 31, 1985, the Appeal Board stated that its acceptance of the notice of appeal "does not reflect any judgment on the standing of Anthony/FOE to appeal the decision in question." Limerick, supra, "Order" (August 5, 1985) (slip op. at 3 n.4).

^{8/} See note 14 and accompanying text, infra. See generally Limerick, supra, LBP-84-18, 19 NRC 1020, 1065-69 (1984).

aspect(s) of the proceeding which the petition wishes to litigate.^{9/} The Commission has held that an assertion of "injury in fact" to the petitioner himself, and not a generalized grievance shared by a large class of the public, is necessary for standing.^{10/}

Contrary to the requirement of the regulations and Commission precedent, FOE has set forth no interest which would permit it to challenge the adequacy of emergency planning and preparedness for the Graterford inmates. Indeed, nothing asserted by FOE in its stay request even peripherally relates to Graterford, demonstrating its total absence of any legal interest in the matter. Rather, FOE's petition simply reflects generalized opposition to the issuance of a full-power operating license for Limerick.

As the Appeal Board stated in Prairie Island, the right of an intervenor "to seek appellate redress of asserted Board error" is limited to issues "within the ambit of his interest as established by his intervention petition"^{11/} Similarly, in Allens Creek, the Appeal

^{9/} 10 C.F.R. §§2.714(a) (2) and (d).

^{10/} In Transnuclear, Inc., CLI-77-24, 6 NRC 525, 530-31 (1977), the Commission adopted the federal standard that "a party seeking relief must 'allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.'" See also Westinghouse Electric Corp. (Exports to South Korea), CLI-80-30, 12 NRC 253, 258 (1980) (an organization's abstract concern does not substitute for the concrete injury required for standing); Nuclear Engineering Company (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 741, 743 (1978) (petitioner failed to identify any specific injury that it or its members would or might sustain).

^{11/} Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863 (1974).

Board denied an interlocutory appeal on the ground that the intervenor "has no standing to press before this Board the grievances of other parties to the proceeding who are not represented by him Nor is he entitled to complain himself of a licensing board ruling unless and until that ruling unless and until that ruling has worked a concrete injury to his personal interests."^{12/} Accordingly, as a threshold matter, the Appeal Board should find that FOE lacks standing to appeal the Fourth PID or request a stay of that decision.

II. The Commission has Already Determined that Issuance of a Full-Power Operating License Should No Longer be Stayed.

A licensing board's order authorizing issuance of a full-power operating license is automatically stayed under 10 C.F.R. §2.764(f)(2) until the Commissioners have completed their "immediate effectiveness" review. In this proceeding, the automatic stay under the regulations had been in effect since issuance of the Fourth PID on July 22, 1985. At its meeting on August 8, 1985, the Commissioners completed their "immediate effectiveness" review by voting to authorize issuance of the full-power operating license for Limerick, Unit 1. Given this decision by the Commissioners, the Appeal Board lacks authority to make any contrary determination.^{13/}

^{12/} Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-631, 13 NRC 87, 89 (1981). See also Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979) (intervenors who do not assert any invasion of their own rights are not clothed with authority to speak for others).

^{13/} Long Island Lighting Company (Shoreham Nuclear Power Station, Unit
(Footnote Continued)

FOE purports to base its stay request upon the Fourth PID, but its petition clearly indicates that FOE's principal claim is alleged error in the Third PID concerning the Commonwealth of Pennsylvania's designation of boundaries for the plume exposure pathway emergency planning zone ("EPZ") around the Limerick facility. There is no merit to FOE's claim. Nor does it raise any potential harm, let alone irreparable harm, to the public health and safety. The EPZ boundaries for Limerick were delineated by the Pennsylvania Emergency Management Agency in consultation with county and municipal planners, as contemplated by the regulations.^{14/}

In conducting its "immediate effectiveness" review, the Commission found nothing in the Third PID which would warrant staying its effectiveness.^{15/} The Commission again denied a stay request of even a very

(Footnote Continued)

1), ALAB-810, 21 NRC _____ (June 19, 1985) (slip op. at 4). See also Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982). Put differently, the decision by the Commission to lift the automatic stay and authorize issuance of the full-power operating license mooted any claim by FOE for a stay. As the Commission held in Indian Point, moot legal issues need not be decided. Consolidated Edison Company of New York, Inc. (Indian Point, Unit No. 2), CLI-81-7, 13 NRC 448, 449 (1981).

^{14/} See 10 C.F.R. §50.47(c)(2); 44 C.F.R. §350.7(b). The Licensing Board considered the joint contention by FOE and Limerick Ecology Action ("LEA") that certain areas outside the Limerick EPZ should be included within the EPZ boundaries, but found "that in the absence of any affirmative showing that the Marsh Creek State Park/Exton area or the Valley Forge/King of Prussia area should be included within the Emergency Planning Zone, there is no reason to so include them." Third PID at 73.

^{15/} Limerick, supra, CLI-85-13, 22 NRC _____ (July 24, 1985). Although afforded the opportunity by the regulations, FOE apparently did not file comments with the Commission. It is not the Appeal Board's
(Footnote Continued)

limited duration at the time it authorized issuance of the full-power operating license on August 8, 1985.^{16/} Moreover, the Appeal Board denied the motion by LEA for a stay of the Third PID.^{17/} Accordingly, both the Commission and the Appeal Board have already determined that there is no basis for staying the effectiveness of the Third PID. Finally, FOE's stay request based on the Third PID is untimely filed.^{18/}

III. FOE has not Satisfied the
Requirements for a Stay.

Even if the Appeal Board should determine that FOE has standing to seek a stay and that the Board has authority to issue a stay, FOE's petition lacks any substance and provides no legal or factual basis for issuing a stay pursuant to the four criteria of 10 C.F.R. §2.788. For the sake of brevity, Licensee incorporates the points and authorities contained in its opposition to the similar request by LEA for a stay of the Second and Third PID's,^{19/} which the Appeal Board denied in

(Footnote Continued)

responsibility to consider arguments FOE elected not to make before the Commission when afforded the opportunity.

^{16/} Limerick, supra, CLI-85-18, 22 NRC ____ (August 8, 1985) (slip op. at 10).

^{17/} Limerick, supra, ALAB-808, 21 NRC ____ (June 11, 1985). The Commission declined review of ALAB-808, which thereby became final agency action on July 25, 1985.

^{18/} The Third PID was served May 7, 1985. Under 10 C.F.R. §2.788(a), any stay request related to that decision should have been filed within ten days after service, i.e., by May 22, 1985.

^{19/} See 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 28, 1985). In denying LEA's request for a stay in ALAB-808, the Appeal Board observed that LEA had "not made the required 'strong' showing on any of its arguments" and that its
(Footnote Continued)

ALAB-808.^{20/} The same legal principles and conclusions require denial of FOE's instant request for a stay.

In essence, FOE has merely enumerated previous filings with the Licensing Board as well as the Director, Office of Nuclear Reactor Regulation, pursuant to 10 C.F.R. §2.206. Even if the Appeal Board were to review the various pleaded allegations of error incorporated by reference, FOE has raised no issue regarding its litigated contention with potential impact upon the public health and safety.^{21/} Further, FOE has demonstrated no basis for the Appeal Board to assume jurisdiction over matters the Commission has expressly delegated to its Staff^{22/}

(Footnote Continued)

arguments of irreparable harm "are rather generalized and unpersuasive." Limerick, supra, ALAB-808, 21 NRC ____ (June 11, 1985) (slip op. at 5, 8). FOE's generalizations are even less persuasive.

^{20/} See note 17, supra.

^{21/} See note 14 and accompanying text, supra. Licensee has addressed FOE's specific concern regarding the plume exposure pathway EPZ boundaries for Limerick in its brief opposing the appeals from the Third PID. See Applicant's Brief in Opposition to Appeals by Limerick Ecology Action, Inc. and Friends of the Earth Relating to the Atomic Safety and Licensing Board's Third Partial Initial Decision at 54-56 (August 6, 1985). Likewise, the points discussed in FOE's appeal of its late-filed contention regarding Limerick effluent releases have been fully addressed by Licensee. See Applicant's Brief in Opposition to Appeal by Anthony/Friends of the Earth from the Memorandum and Order, Dated June 4, 1985, Denying its Motion to Reopen the Record for Admission of a New Effluent Release Contention (July 17, 1985).

^{22/} FOE notes that it opposed Licensee's request for an exemption from the requirement of 10 C.F.R. Part 50, Appendix E, Section IV.F.1, for the conduct of a full participation exercise within one year before issuance of a full-power operating license. The Commission determined that "no adjudicatory hearing is required" on the request and that, therefore, "it is appropriate to refer the initial evaluation and decision on this motion to the Director of

(Footnote Continued)

or other matters decided by the Staff pursuant to requests for relief under 10 C.F.R. §2.206.^{23/} Nor has FOE shown any substantive basis for relief even if jurisdiction existed.

Conclusion

For the reasons discussed above, the Appeal Board is bound by the decisions of the Commission regarding the immediate effectiveness of the Third and Fourth PID's. Further, FOE lacks standing and has raised no matter of substance which shows a strong likelihood of ultimate success

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Nuclear Reactor Regulation," subject to review by the Commission "in the course of its full-power effectiveness review." Limerick, supra, "Order" (July 24, 1985) (slip op. at 1-2).

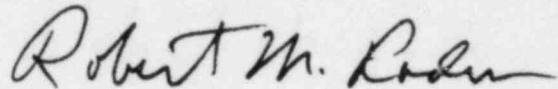
23/ In a petition under 10 C.F.R. §2.206, FOE questioned the grant of exemptions to Licensee by the NRC. Its claims have been found by the Director, Office of Nuclear Reactor Regulation, to lack merit. See Limerick, supra, DD-85-11, 22 NRC ____ (July 29, 1985) (slip op. at 5-13). The notice in the Federal Register cited by FOE merely states the Commission's determination not to prepare an environmental impact statement based upon its conclusion that the requested grant of the exemptions will not have a significant effect on the quality of the human environment. See 50 Fed. Reg. 27388, 27390 (July 2, 1985). On July 26, 1985, FOE filed a purported "appeal" to the Commission regarding the grant of the exemptions. Under 10 C.F.R. §2.206(c)(2), however, the denial of a Section 2.206 petition is not appealable. The Commission reviews such action at its discretion.

FOE's reliance upon its petition dated April 5, 1985 to revoke the low-power operating license for Limerick, Unit 1, is also without merit. That request was treated as a reiteration of FOE's pending request under 10 C.F.R. §2.206 with respect to the institution of show cause proceedings, initially filed by FOE on December 23, 1984. After thorough consideration of all matters alleged by FOE, the Director concluded that nothing raised by FOE warrants the initiation of enforcement proceedings. Limerick, supra, DD-85-11, 22 NRC ____ (July 29, 1985) (slip op. at 38).

on the merits of its appeals or otherwise satisfies the requirements for issuance of a stay.^{24/} Accordingly, its request should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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Counsel for the Licensee

August 9, 1985

^{24/} Given the obvious jurisdictional infirmities in its stay request and the total absence of any showing on the merits by FOE, Licensee believes that the Appeal Board need not reach any finding on the three remaining stay criteria. See Shoreham, supra, ALAB-810, 21 NRC ____ (June 19, 1985) (slip op. at 6-7). Nonetheless, the Appeal Board's findings on those factors in denying LEA's stay request are equally applicable here. See Limerick, supra, ALAB-808, 21 NRC ____ (June 11, 1985) (slip op. at 8-12).

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CERTIFICATE OF SERVICE

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I hereby certify that copies of "Licensee's Opposition to Petition by Friends of the Earth for a Stay of the Atomic Safety and Licensing Board's Authorization for Issuance of a Full-Power Operation License," dated August 9, 1985 in the captioned matter, have been served upon the following by deposit in the United States mail this 9th day of August, 1985:

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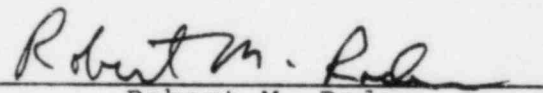
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