UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Philadelphia Electric Company	)	Docket No. 50-352-OL
	)	50-353-OL
(Limerick Generating Station, Units 1 and 2)	)	

BRIEF IN SUPPORT OF MOTION FOR SUSPENSION OF PROCEEDINGS AND CONSOLIDATION OR TO STRIKE STAFF TESTIMONY

I. INTRODUCTION AND SUMMARY

Del-AWARE Unlimited, Inc. urges the Board to suspend the scheduled hearings becuase they have been shown to be premature and unnecessarily hasty, the hearing should be deferred pending the Staff's preparation of an Environmental Impact Statement as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et. seg.. The Board is asked to suspend or stay any construction of the diversion in the interim, or certify this question to The Commission. Alternatively, Del-AWARE Unlimited moves that The Board strike testimony submitted by the Staff to date in these proceedings, which submission has been contrary to the requirements of Commission regulations requiring that a draft Environmental Impact Statement first be prepared by Staff.

NEPA requires that an Environmental Impact Statement be prepared as early as possible in the proceedings in order to

assure the integrated and comprehensive consideration of the environmental impacts of a major federal action, such as the issuance of the applied for Operating License. The preparation of this statement is the responsibility of the federal agency taking action. Within the NRC, The Commission's regulations delegate this responsibility to the Staff. The Staff is required to prepare and EIS an introduce it into evidence for consideration by this Board before issuance of an Initial Decision. From the Staff's proposed testimony submitted on September 20, it is clear that the hearings will violate NEPA.

Issuance of an Initial Decision before the insertion of full NEPA consideration of impacts and alternatives would substantially prejudice the interests of Del-AWARE and the public generally in complete evaluation of the environmental effects of the Point Pleasant diversion. Construction is in fact more likely to be approved because of this procedural failing because The Board will not have before it a complete record on environmental impacts, nor the needed update of facts and plans causing those impacts, nor agency and public comments on those impacts. Similarly, any Staff testimony is based on and constitutes incomplete study, and cannot properly evaluate the impacts which is purports to assess and comment on.

For these reasons, as more fully set forth below, the present hearing schedule should be suspended pending preparation of the EIS. The preparation by the parties to

date will of course still be part of the hearing process prior to Initial Decision. However, as NEPA requires that an EIS precede the Initial Decision, and that the preparation of the EIS be a meaningful part of the development of the record, it appears necessary to suspend the proceedings at this point so that the parties will have the opportunity to comment on and participate in the EIS preparation, and so that The Board and the parties will have the benefit of the information generated therein. The alternative of sandwiching the EIS preparation between the hearings and Initial Decision would prevent the proper utilization, and confound the purposes, of NEPA review. Moreover, the hearings will be provided from providing an opportunity to develop the information base contained in the environmental statement, including for example cross-examination of witnesses in light of the statement.

Alternatively, should The Board determine that its reference to NEPA procedure in its July 14, 1982 Order constitutes its final opinion on the issues raised herein, even in light of the present suits, Del-AWARE submits The Board certify to the Appeal Board the following question:

> Should hearings before an Initial Decision or Partial Initial Decision on supplementary cooling water environmental issues be suspended pending preparation of Environmental Impact Statement (EIS) when no such statement has been prepared and the Staff has shown that, under the present timetable, it is unable to prepare and submit a EIS before the Initial Decision is rendered, and no need for present construction exists?

Del-AWARE submits that the board should exercise its discretion to refer this question, pursuant to 10 CRF §

2.718 (i), because of the public interest stake in the NEPA process and because of the delay and expense that would result should the issue be resolved through alternative procedures, such as direct appeal to the District Court, or should the issue remain unresolved through the time of the Initial Decision, and the hearing process be substantially duplicated thereafter following preparation of the EIS.

II. AN OPERATING LICENSE CANNOT BE ISSUED BEFORE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT

A. NRC Regulations Require that an EIS be part of the Hearing Process and Precede the Initial Decision

An EIS is made a prerequisite to issuance of an operating License by Commission regulations, 10 CFR § 51.5 provides:

> "(a) An environmental impact statement will be prepared and circulated prior to taking any of the following types of actions:
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> ***
>
> (b) Issuance of a full power or design capacity license to operate a nuclear power reactor pursuant to Part 50 of this chapter;"

In addition, the above mandatory language, an action under subsection (a) requires an EIS because of Section (b) lists actions which may need an EIS and subsection (d) lists insignificant actions not requiring an EIS. By inference, the present action, being neither a (b) or (d) action, is an (a) action.

The Environmental Report - Operating License Stage required to be prepared by the applicant pursuant to § 51.21 is not an EIS, clearly under NEPA, as it is prepared by the applicant and also under NRC regulations. NRC regulations require that an EIS be prepared by the Director of Nuclear Reactor Regulation as soon as practicable after receipt of the EROC (10 C.F.R. § 51.22). Here the EROL is still being assembled, and the pell-mell process of the last sixty days has not settled any questions.

The EIS must be complete at least in draft form before any hearing can commence and must be complete and put in evidence by NRC Staff during the proceedings. 10 CFR 51.52 provides:

> (a) In any proceeding in which a draft environmental impact statement is prepared pursuant to this part, the draft environmental impact statement will be made available to the public at least fifteen (15) days prior to the time of any relevant hearing. At any such hearing, the position of the Commission's staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the Environmental Protection Agency and commenting agencies and made available to the public. Any other party to the proceeding may present its case on NEPA matters as well as on radiological health and safety matters prior to the end of the fifteen (15) days period.

Additionally, it is the responsibility of the presiding officer at the hearing to decide NEPA issues, as provided in 10 CFR 51.51 (b)(2):

> (2) In such a proceeding the presiding officer will decide those matters in controversy among the parties within the scope of NEPA and this part.

Clearly this responsibility cannot be meaningfully fulfilled if not based on the full NEPA record, as reflected in the EIS. See discussion in Section II, C, infra.

From the above, it is clear that The Commission regulations require that an EIS be part of the operating license proceedings, and that it exist in final form to provide a basis for The Board's Initial Decision.

The Staff has not have the benefit of coordination with the agencies of expertise, such as EPA and Fish & Wildlife, with whom it must consult prior to the DEIS preparation is made (CEQ Regulations, 40 C.F.R. § 1500.1 et. seq.). Also, to ensure that preliminary judgements do not disrupt the unprejudiced review of environmental inputs required by NEPA, and that the Staff review is comprehensive, the regulations prohibit the Staff from presenting evidence on any matter until the Staff has completed the DEIS and thereby apprised itself of the full impacts of the proposed licensing and has made that full understanding the basis of its judgement. Accordingly, consistent with the regulations and the view of the Staff expressed in requesting reconsideration of The Board's June 1, 1982 Special Prehearing Conference Order, in light of the present record, the testimony submitted by the Staff to date must be striken, and resubmitted as appropriately amended and accompanied by the DEIS.

Additionally, the procedure described in the regulations discussed above has been recognized by the

practice of the Commission, and is a minimum required by NEPA itself, as reflected in various cases discussed below.

B. The Commission has required preparation of an EIS in Conjunction with the Hearing Process; It is the Responsibility of The Board to Incorporate this Statement

Cases before the Licensing Board or Appeal Board of The Commission reflect unanimous conformity with the requirements of the regulations that an EIS be prepared before an Initial Decision is made. Presumably because the procedure has been so uniformly followed, and is so essential to compliance with NEPA, the issues raised by deviating from it do not yet appear to have been raised. However, in cases discussing the extent of flexibility in setting hearing procedure and the scope of discretion afforded The Board, the requirement that an EIS precede the Initial Decision shows itself as unvoidable.

For example, in confirming its separation of health and safety issues (under the Atomic Energy Act) from environmental issues (under NEPA) in the receipt of evidence, The Board has noted "we have flexibility in our allocation of various issues to particular hearing sessions, and could hear an issue at any time after publication of the Staff's document treating that issue..." In re Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), 11 NRC 906, 908 (1980) (emphasis supplied).

Similarly, it has been pointed out that the environmental reports are subject to review by The Board in an adjudicatory setting "in which all parties with a demonstrated interest may participate in evidentiary hearings. "In re New England Power Co.", 7 NRC 271 (1978). In other words, not only is it important that The Board have the benefit of Staff reports, but also that the public not be required to develop its own record from scratch.

Where early hearings have been held, they have been "appreciably in advance of the target date for the start of construction activities", have "not amount(ed) to a final disposition of any environmental question", and have been gauged to develop "evidence (that) might suggest that more data should be obtained on the diversions of certain threatened environmental harm; e.g., that additional investigation is called for to ascertain more precisely the effect of the facility's proposed cooling system upon the marine environment. And even in Douglas Point, the hearings were held only after a draft EIS has been prepared and circulated by the Staff. "In re Potomac Electric Power Co.", (Douglas Point N.G.S., Units 1 & 2), 1NRC 539, 547, and 549.

Not only would proceeding with the present hearing prevent the Staff from performing its mandatory duties and prevent the Decision of this Board from resting on an adequately developed record; also, the attempt to develop a

full evidentiary record in the hearings alone would usurp the powers and functions of the Staff.

The decision in In re New England Power Co., 7 NRC 271 (1978) illustrates this point. The opinion notes that the Commission has been empowered by statute to appoint Licensing Boards to conduct adjudicatory hearings and that these Boards have limited power. The Staff had independent responsibility for evaluating data and preparing draft and final impact statements. The Board has no role or authority in their preparation.

This same division of roles between the Board and Staff was described in Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1077 (D.C. Cir. 1974). As stated by the Court, Licensing Board's "mandate is to review the sufficiency of the record and the adequacy of the analysis to support the necessary findings."

This discussion is consistent with the regulations regarding the Board's powers and duties, which also contemplate a division between the Staff's investigative duties and the Board's adjudicating role. See, e.g., 10 CFR §2.719(a).

From the regulations and cases, a clear picture of the applicable NEPA procedural guidelines arises. Before hearings commence, in connection with the definition of issue through review of contentions and otherwise, the Staff is to investigate environmental impacts and prepare a draft statement before the beginning of the hearings. This

statement forms a base of information, especially important to the public with its limited resources, which is further refined in the hearings dealing with specific contentions. During the course of these proceedings, dealing with presumably central issues, the Staff is able to refine its draft statement and introduce the final statement into evidence. Finally, based on both the EIS and the evidence adduced in the course of the proceedings, the Board is able to issue its decision on the contentions, including a review and any changes desirable in the Final Environmental Impact Statement.

C. NEPA Requires A Procedure In Conformity with the Regulations

The procedure set out in the regulations is clear, and is clearly mandatory. However, even if the regulations were somehow read to have intended flexibility on these points, or indeed even if the regulations did not exist, that flexibility could not be applied to alter the procedural steps set out above without running afoul of the requirements of the Act itself. NEPA's requirement that environmental considerations be incorporated into the decision-making process in its earliest stages has been held repeatedly to require that at least a draft EIS be prepared before an initial decision be issued. NRC procedure particularly would have to comply with this requirement, since the Board's Initial Decision in fact has the effect of a final decision by the agency, bending possible appeals. 10 CFR §2.761.

Directly on point is Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1977), cert. den. 409 U.S. 849. The Commission there had failed to prepare its own EIS regarding a transmission line, and argued that it was not necessary until after its decision. The Court rejected this argument and held that the Commission must issue its statement prior to any formal hearings. As stated by the Supreme Court long ago in ____ ____, an agency may not violate its own rules.

The Court reviewed the language of NEPA, requiring a comprehensive integrated review of environmental impacts "at every distinctive and comprehensive stage of the [agency's] process." 455 F.2d at 420, quoting Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1972). It was not enough, said the Court, that the Commission pass judgment on the impacts; it must actively review their consequences before making a decision. Delay would result, but this was preferable to discovery impacts "at a stage where corrective action may be so costly as to be impossible." 455 F.2d at 423. (Similarly, putting off the in-depth review of an environmental statement until after a decision that might permit construction that is scheduled to begin essentially simultaneously, would begin the expenditure of sums for a project that might later be shown unacceptable.)

For these reasons, the Court in Greene County held (455 F.2d at 422):

> "we deem it essential that the Commission's staff should prepare a detailed statement before the Presiding Examiner issues his initial decision."

More recently, the rule was stated:

> "If §102(2)(c) [of NEPA] applies [to an agency action], the Commission is under a mandatory obligation to file an EIS at the commencement of the action. Failure to comply with this absolute requirement would operate to invalidate any order issuing from the administrative proceeding." Mobil Oil Corp. v. FTC, 430 F.Supp. 855 (S.D.N.Y. 1977) (emphasis in original).

Because, under NEPA and 10 CFR §51.5(a), an EIS is required in an operating license proceeding, it is also necessary that it be prepared before or during hearings, and be final before an initial decision. The obligation to prepare a draft EIS before hearings, and use this as the base for the agency's decision is clear, and it is clear it cannot be tampered with to the extent of shifting the EIS preparation beyond the decision.

While the Board commendably moved quickly to insure timely consideration of environmental impacts in scheduling this early hearing, subsequent revelation that construction is not needed now, and failure of the staff to comply with NEPA renders present has to illadvised an unnecessary. (See Motion)

For these reasons, and relevant portions of the following discussion of certification, Petitioner urges that the Board stay the present proceedings until preparation of an EIS, and incorporate consideration of the environmental statement in the hearings and in its Initial Decision.

NEPA also precludes segmented decisions e.g., Overlook Alliance. The Commission's internal division of the PPD into construction and operating imparts is invalid if it causes segmentation, and if disposed of separately, will do so. Del-AWARE's repeated requests to the Commission, starting in JUne, 1981 and continuing through its Contentions herein, and its formals § 2.206 Request, put the Commission on notice of the need to address these experts. They cannot be so segmented as now seems likely.

III. If Proceedings Are Not Promptly Stayed, Certification Would Be Necessary to Protect the Public Interest and Prevent Delay and Expense

Certification should be made to the Commission pursuant to 10 CFR §2.718(i) if the Board does not immediately stay proceedings for the reasons discussed supra, in Section II. This certification would then be necessary to protect the public interest in full consideration of environmental impacts in federal decision-making, and to prevent the delay that would be occasioned by postponing NEPA review until after the Initial Decision, when much of the hearings procedure would have to be repeated, and to prevent the expense to rate payers of bearing the cost of partial construction of a supplemental cooling water diversion which may ultimately prove unworkable and not be authorized for operation. These standards of public interest and delay and expense contained in 10 CFR §2.730(f), have been interpreted to guide the Appeal Board in directing certification, In re Public Service Co. of New Hampshire (Seabrook Sta. Units 1 &

2), 1 NRC 478 (1975), and so should properly guide the Board in the exercise of its discretion in certifying questions under §2.718(i).

Additionally, as set out above, "provision of statute [and] regulation compels the conclusion that evidentiary hearings should be deferred." This has not surprisingly been held to be a determinative factor in deciding whether to stay evidentiary hearings. In re Potomac Electric Power Co. (Douglas Point N.G.S., Units 1 & 2), 1 NRC 539, 542 (1979); In re Public Service Co. of New Hampshire, (Seabrook Station, Units 1 & 2), 2 NRC 668 (1975).

The public interest stake here has been clearly and incontrovertibly identified by Congress in enacting NEPA:

> "The Congress, recognizing the profound impact of man's activities on the interrelations of all components of the natural environment, ... and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government ... to use all practicable means and measures ... in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. §4331(a).

Authorizing the operation of Limerick using the Point Pleasant diversion without the close scrutiny of an EIS conforming to the requirements of 42 U.S.C. §4332(c) can hardly be said to "use all practicable means" to meet these goals. The public's interest in properly factoring environmental concerns into the decision-making process has

been pointed out on numerous occasions. E.G., Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 240-41 (3d Cir. 1980) and cases cited.

Not certifying the question, and continuing the proceedings without preparation of an EIS, has and will continue to occasion Petitioner considerable expense, closely tied to the public interest damage done. The Board has accepted certain contentions proposed by Petitioner and thus recognized the merit of investigating the issues contained in them. However, Petitioner does not have the resources to develop fully the information needed to fully assess and consider these impacts. As a single example, the Board has recognized the potential seriousness of operating the intake in the nursery pool below the Delaware and Tohickon's confluence. Petitioner and Petitioner's members have incurred costs, both money and time, and some hazard and inconvenience, in developing information about the hydrology of the intake site through diving and measurements from boats and buoys. While this information appears of considerable value in contrast to the existing data vacuum, hydrologic studies undertaken in preparing the EIS could provide additional needed specificity and detail.

The preparation of the EIS in conjunction with the hearings also would establish some movement towards a balanced presentation of facts. The applicant as a public utility can tap the vast financial resources of the rate-paying public, and has the option to pursue and present

facts it feels would support its application. In contrast, Petitioner, and other members of the public opposing the application, have no means of systematically tapping funds from every household. NEPA has put on federal agencies the responsibility of informing themselves of and considering environmental impacts. This serves to offset the economic imbalance and disadvantage often suffered in the representation of environmental issues, which imbalance NEPA is designed to correct.

As noted by the Court in Greene County, supra, 455 F.2d at 420, in explaining an agency's "primary and nondelegable" MEPA duties:

> "intervenors generally have limited resources, both in terms of money and technical expertise, and thus may not be able to provide an effective analysis of environmental factors."

The financial resources of intervenors, it should be clear, are not the determinative criteria by which the scope of agency NEPA responsibility is measured.

In addition to the costs on Petitioner, the applicant will also incur costs if the issue of NEPA procedure is not settled finally and as soon as possible. Construction might go forward and subsequently be annulled. Time would be lost in finalizing plans for the use of the alternative sources on which applicant has done preliminary studies.

Finally, the entire proceedings would ultimately be considerably delayed. While the Board may decide not to grant the requested stay, nonetheless the issue of NEPA procedure remains, and, because of its fundamental

importance to the protection of Petitioners interests in these proceedings, would be pursued elsewhere. Certification would speed the final resolution of the question, and thus is the preferable means of proceeding, as discussed in the following section.

IV. Decision by the Board or by Certification to the Appeal Board Is the Most Effective and Efficient Means to Dispose of the Question

The resolution of the proper procedural steps for compliance with NEPA is clearly critical to the viable continuation and result of these proceedings. Del-AWARE submits that the proposed resolution of this Motion directly by the Board or by certification to the Appeal Board is the most expeditious means of treating the issue, and that the Board should therefore exercise its discretion to grant the requested suspension or certify the question to the Appeal Board.

A. The Board is Empowered to Provide the Requested Action

The alternative request for action are both within the scope of the Board's general powers over the conduct of the hearings. The hearings would be suspended pending the EIS' preparation pursuant to 10 CFR §2.718(e) and (f), providing that the presiding officer may regulate the course of the hearings and dispose of procedural motions. The question would in the presiding officer's discretion, be certified to the Commission Appeal Board pursuant to 10 CFR §2.718(i).

B. Alternative Means of Resolving the Issue Would be More Disruptive of

the Proceedings

Alternative means of resolving the question of NEPA procedure are available to the Petitioner and, due to the critical nature of this issue, would be pursued by the Petitioner. However, these means would probably be more time-consuming and cause delay that is not necessary to make the sequence corrections and integrate NEPA into this operating license decision-making.

First, injunctive and declaration relief would be available in the District Court. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980). There the Alliance charged that the NRC had violated NEPA procedure in deciding to authorize the erection and operation of a Epicor II water treatment unit without preparing an EIS or making the Epicor II decision part of its NEPA consideration of the general problem of disposing of contaminated water in the reactor. The District Court dismissed for lack of jurisdiction, and the Third Circuit reversed.

The Court of Appeals determined that "the NRC does not have unfettered discretion" in timing its preparation of an EIS and that the District Court could hear a claim of noncompliance with NEPA. 619 F.2d at 241. The Court was particularly concerned with the NRC's decision to allow Epicor II construction before preparing even a draft EIS.

> "The Alliance makes the valid point that when by fragmenting its consideration the NRC postpones preparation of an impact statement until after private parties have been permitted to expend

> large sums on construction, the resulting change in status quo has the almost inevitable effect of distorting the later view of both the agency and the receiving court as to the desirability of the action in question.
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> ***
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> ... the timing problem is a real one especially when private parties are permitted by a federal agency to make major construction expenditures in advance of consideration of environmental issues. The Supreme Court in Kleppe held that once the agency, here the NRC, is presented with a proposal, as in the instance case, then the impact statement must be prepared." 619 F.2d at 240-41.

A favorable decision for PECo on the present schedule for Initial Decisions in our case would mesh neatly with the claimed planned construction start on December 15, 1982, and indeed has been scheduled with deference to PECo's desired starting date. Clearly this would prejudice any subsequent NEPA analysis of the desirability and impacts of the supplementary cooling water system. Clearly such a sequence of decision following by fuller consideration is unacceptable and is the type of claim that the Court of Appeals considered in Susquehanna Valley Alliance. However, while it could thus be brought before the District Court, it would be more expeditiously dealt with here.

A second means of resolving the NEPA timing issues would be through seeking relief directly through the Appeal Board. Directed certification may be obtained if the basic structure of the proceeding is affected in a pervasive and unusual manner.

Directed certification will be granted if procedures followed by the licensing board "thereafter to impede rather

than aid the full development of the record.". In re Consumers Power Co. (Midland Plants, Units 1 & 2), 5 NRC 565, 568 (1877). Certainly the delay of full NEPA evaluation of the Point Pleasant diversion until after approval of construction has a basic and pervasive effect on the proceedings. Equally, a decision based on a truncated record prior to full development of facts and impacts in the EIS can only be said to impede the record's development. Thus, not only is directed certification available to Petitioner, but there is also a reasonable likelihood that it would be sought successfully. This, along with the applicability of Susquehanna Valley Alliance, and the invalidity of any claims of prejudice to allow full consideration, emphasizes the propriety of granting the requested stay of proceedings or certification.

CONCLUSION

For the reasons set forth above, Petitioner Del-AWARE Unlimited respectfully requests that the Board suspend the present proceedings, pending preparation of an EIS, or certify the question of the need for suspension to the Commission, and in either case strike the testimony submitted by the Staff in these proceedings.

Respectfully submitted,

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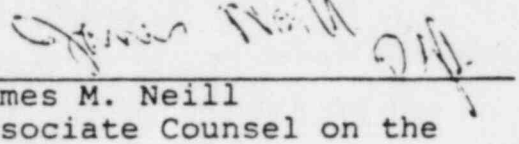

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