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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
OF ENERGY
WASHINGTON, D.C. 20545
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In the Matter of)	
)	
Philadelphia Electric Company)	Docket Nos. 50-352
)	50-353
(Limerick Generating Station,)	
Units 1 and 2))	

APPLICANT'S ANSWER TO APPLICATION FOR
RECONSIDERATION BY DEL-AWARE UNLIMITED, INC.

Preliminary Statement

On August 9, 1982, intervenor Del-Aware Unlimited, Inc. ("Del-Aware") filed a pleading requesting the Atomic Safety and Licensing Board ("Licensing Board" or "Board") to reconsider the determination made in its Memorandum and Order, dated July 14, 1982, that the federal representative had concurred in the decision to allocate Delaware River water to Limerick so as to preclude by statute the reconsideration of such matters in the captioned proceeding.

Philadelphia Electric Company ("Applicant") opposes this request on several grounds. First, no factual basis is shown for the assertion by Del-Aware that certain statements by the federal representative are inconsistent with his concurrence on the record. Second, Del-Aware's pleading is premised on a legal theory which fundamentally misconceives the nature of the statutory preclusion. Third, it was filed beyond the time provided in the Rules of Practice of the

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Nuclear Regulatory Commission ("Commission" or "NRC") for seeking reconsideration of a prehearing conference order and is therefore untimely. Applicant therefore asks that the Licensing Board deny the request for reconsideration and reaffirm its earlier disposition.

Background

In its Special Prehearing Conference Order ("SPCO"), dated June 1, 1982, the Licensing Board deferred a ruling on proposed Contention V-16 pending receipt of information as to whether the Delaware River Basin Commission ("DRBC") federal representative had concurred in the decision to allocate water to Limerick so as to trigger the operation of the statutory preclusion in Section 15.1(s) of the DRBC Compact. ^{1/} Under this provision, matters decided by DRBC in which the federal representative has concurred are conclusive upon other federal agencies, which are precluded from reviewing them anew.

Pursuant to the Board's inquiry, Applicant furnished the affidavit of Gerald M. Hansler, Executive Director of DRBC, which stated that the federal representative had in fact concurred in all docket decisions leading to final Section 3.8 approval of the Point Pleasant diversion project, except for one abstention which was subsequently followed by concurrences in the remaining decisions up to and including final approval. Based on this affidavit, the

1/ SPCO at 95-96.

Licensing Board held in its Memorandum and Order, dated July 14, 1982, that "the Board finds it is precluded from considering matters concerning the allocation of Delaware River water for cooling Limerick." 2/

Argument

I. The Statements of the Federal Representative Outside DRBC's Decision of Record do not Show any Lack of Concurrence

The gist of the request by Del-Aware for reconsideration is that certain remarks by Commissioner Tribbitt, the federal representative, at the time DRBC formally granted Section 3.8 approval to the Point Pleasant project reflect his awareness that further review would be conducted by the NRC. Del-Aware contends that these remarks somehow qualify his concurrence such that it would not have a preclusive effect. This assertion, however, is based upon a misreading of the record and an invalid theory of law.

First, the transcript excerpts of the meeting of the DRBC Commissioners on February 18, 1981 cited by Del-Aware contain nothing inconsistent with the previous rulings by the Licensing Board herein. Apparently, there is some confusion on the part of Del-Aware because there were two letters dated February 17, 1981 considered by the DRBC Commissioners at their meeting on February 18, 1981. One

2/ Memorandum and Order at 18-19 (July 14, 1982).

letter dated February 17, 1981 was sent by Mr. George Pence, Chief of the Environmental Impacts Branch, Region III, United States Environmental Protection Agency ("EPA"), to the NRC. This letter simply notes that EPA will provide comments to the NRC in its preparation of an environmental impact statement for Limerick.

The other letter dated February 17, 1981 was addressed to Commissioner Tribbitt from Jack Schramm, EPA Administrator, Region III. In this letter, the Administrator, stating the formal position of the agency, advised the Commissioners that EPA Region III had met with representatives of DRBC and the Pennsylvania Department of Environmental Resources regarding the Point Pleasant project. Mr. Schramm then stated that EPA's "substantive concerns with the NWRA portion have been addressed. We will encourage the NRC to include our concerns with water supply in its operational EIS for the PECO portion of the project." ^{3/}

Certainly, nothing in either of the letters from EPA supports the inference by Del-Aware that the federal representative believed that the NRC would conduct de novo a full-scale environmental review of the entire Point Pleasant

^{3/} Tr. 42-43 (DRBC Meeting of February 18, 1981). In the interest of providing a complete record to the Licensing Board and parties, Applicant has attached the entire portion of the transcript of this meeting applicable to the consideration of the Point Pleasant docket decisions.

project. To the contrary, the Commissioners were informed by Administrator Schramm, speaking for EPA, that most of its concerns had been resolved, and that other concerns could be adequately addressed by EPA in commenting upon the environmental impact statement for Limerick to be prepared by the NRC.

Nor does Applicant believe there is any logical basis for attributing to the federal representative any of the concerns specifically expressed in the letter from Mr. Pence. It appears that the letter dated February 17, 1981 to which Commissioner Tribbitt referred (Tr. 48) in stating that "EPA has no particular problem with [the] diversions" (Tr. 49) was the letter from the Administrator, which reflected the formal position of EPA to that effect. He was evidently not referring, as Del-Aware assumes, to the letter from Mr. Pence. Moreover, at his deposition on August 16, 1982, Mr. Pence reaffirmed that EPA's substantive concerns had been resolved and therefore EPA did not object to DRBC's proposed approvals for Point Pleasant. For the information of the Board and parties, he also stated that EPA does not consider that the United States Corps of Engineers should prepare an environmental impact statement for the project.

Further, settled principles of administrative law bar consideration of any comments by the federal representative beyond the four corners of the docket decisions formally approved by DRBC over the years, culminating in final Section 3.8 approval to the project. As the Supreme Court

stated in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 631 n.31 (1980), examination of an agency's decision must be conducted "on the basis of the agency's stated reasons for making that determination." Therefore, Commissioner Tribbitt's additional comments, while providing some information to the general public, are clearly extraneous to the DRBC's formal decisions of record, particularly Docket No. 65-76 CP(8) (February 18, 1981) and Docket No. D-79-52 CP (February 18, 1981), and are therefore not a part of them. See, e.g., United States v. Texas Pipe Line Co., 528 F. Supp. 728, 732-33 (E.D. Okla. 1978), aff'd, 611 F.2d 345 (10th Cir. 1980).

As a corollary to this principle, it is also firmly established that a party may not probe the mental processes of a federal administrator unless he has left no other record of the reasons for his decision. United States v. Morgan, 313 U.S. 409, 422 (1941); Hercules, Inc. v. EPA, 598 F.2d 91, 123 (D.C. Cir. 1978); Kent Corp. v. NLRB, 530 F.2d 612, 620-21 (5th Cir.), cert. denied, 429 U.S. 920 (1976); National Courier Association v. Board of Governors of the Federal Reserve System, 516 F.2d 1229, 1242 (D.C. Cir. 1975). To attempt any inference regarding the intentions of the federal representative in his concurrence beyond the published decisions of DRBC would necessarily involve impermissible conjecture and speculation into his mental processes.

As the federal representative, Commissioner Tribbitt was well aware of the legal effect of his concurrence under Section 15.1(s) of the DRBC Compact. If he intended to qualify his concurrence such that it would not have a binding effect on other federal agencies, he certainly knew the formal procedures necessary to accomplish this objective. No basis has been shown for assuming that Commissioner Tribbitt did not fully understand and intend that his concurrence would entail the standard effect of Section 15.1(s) of the DRBC Compact precluding review of the allocation decision by other agencies.

II. The Request for Reconsideration
is Untimely.

The pleading filed by Del-Aware requesting reconsideration of Licensing Board's holding was served on August 9, 1982. Under 10 C.F.R. §2.751a(d), however, any request for reconsideration of a licensing board's prehearing conference order must be filed within five days after service. In this instance, the request was filed well beyond the prescribed period. No extension had been previously requested by Del-Aware, nor does Del-Aware discuss its lateness in its pleading. None of the matters which Del-Aware addresses occurred recently so as to require a late filing. Under the circumstances, the request should be denied as untimely.

At the outset, it should be noted that the Licensing Board in this proceeding explicitly cautioned the parties

at the Prehearing Conference of the need to comply with all procedural requirements, "including those of timeliness" (Tr. 6). In fact, the Board specifically criticized counsel for Del-Aware for a previous late filing (Tr. 84-87). The lateness by Del-Aware in this instance is therefore particularly unacceptable.

The importance of compliance with the Commission's prescribed time limits by all parties has been emphasized by the Commission in the issuance of its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). Emphasizing the need for each licensing board to ensure that every proceeding "moves along at an expeditious pace," ^{4/} the Commission stated:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations.

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The Commission expects licensing boards to set and adhere to reasonable schedules for proceedings. The Boards are advised to satisfy themselves that the 10 CFR 2.711 "good cause" standard for adjusting times fixed by the Board or prescribed by Part 2 has actually

^{4/} 13 NRC at 453.

been met before granting an extension of time. Requests for an extension of time should generally be in writing and be received by the Board well before the time specified expires. 5/

Particularly in view of the abbreviated schedule for litigating supplemental cooling water issues, the lateness by Del-Aware in filing its request for reconsideration is clear grounds for denial. The Appeal Board has stressed that a party may not unilaterally alter a filing deadline. 6/ Parties admitted to a licensing proceeding are under a "definite requirement . . . [to] perform their procedural duties in accordance with the Commission's Rules of Practice (10 CFR Part 2), and do so in a diligent, timely fashion," including the filing of pleadings "within the time periods established by the Rules or the presiding Board." Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 815 (1975).

As the Licensing Board stated in the Three Mile Island proceeding, no party may expect that a board will ratify a late filing submitted as an fait accompli without prior permission because it "would in effect transfer control of the matter from the board to [the party's] representatives who must know well that the board cannot countenance such an

5/ Id. at 454-55.

6/ Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188-89 (1978); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554 (1979).

unstructured approach to litigation." 7/ Accordingly, the instant request should be denied as untimely.

Conclusion

For the reasons discussed above, the request for consideration is untimely and without merit. It should therefore be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr. / RMR

Troy B. Conner, Jr.
Mark J. Wetterhahn
Robert M. Rader

Counsel for the Applicant

August 19, 1982

7/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289 (Restart), "Memorandum and Order Ruling on Intervenors' Requests for Extension of Time to File Revised Emergency Planning Contentions" (January 8, 1980) (slip op. at 2-3).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Application for Reconsideration by Del-Aware Unlimited, Inc." dated August 19, 1982 in the captioned matter have been served upon the following by deposit in the United States mail this 19th day of August, 1982:

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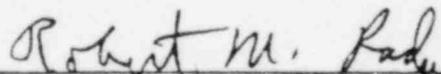
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TRANSCRIPT OF MEETING OF DRBC COMMISSIONERS

February 18, 1981

CHAIRMAN PICCO: For those of you with short memories, one of the major metropolitan areas with an effect on the Basin after experiencing a month like we've had so far, lifted their drought emergency declaration and had to reinstitute it three months later at a great cost of credibility and compliance. We don't intend to do that given the current figures.

The next item on the agenda will be the Ft. Pleasant project, which is split into two dockets: the Neshaminy Water Resources docket, 65-76, and the Philadelphia Electric Company docket, 79-52. I will ask the Commissioner from Pennsylvania to begin the presentation on these projects.

COMMISSIONER WESTON: Mr. Chairman, the Commission has before it today two dockets which I would like to deal with separately in discussion. There are some elements in common which I believe we should consider in common, but there are a number of points that make me feel that in order to keep them clear I am going to try from our perspective to address the documents separately.

Probably no project that this Commission has addressed of the nature of a public or industrial water supply has been equivalently controversial to these

documents that are in front of the Commission today. Nor are these new items of concern for this Commission. We have been through this road before.

I think it is important that we focus on what we have in front of us and the issues that were addressed at the November 16 hearing of the Commission, which was held separate from a regular Commission meeting in order to allow the maximum amount of time for the receipt of comments; and then we left the record open for at least a month after that and have even after the closing date of the record distributed a number of documents to the Commissioners, so that it is clear we have probably the most voluminous record of a public or industrial water supply ever to be compiled in front of this Commission.

I want to express first the feelings of the Commonwealth on the matter of the public water supply, the document that is entitled "Neshaminy Water Resources Authority." I think those members of the public who have heard our comments before know that the matter of public water supply in Bucks and Montgomery Counties is one of very serious concern to the Commonwealth of Pennsylvania, and this is not a new concern. It is one which was raised well over 20 years ago as we watched the type of development

that was occurring in those two counties and compared it to the type of water supplies that were then being predominantly relied upon -- that is, ground water.

Currently the water supplies in the area rely almost entirely on ground water resources of the triassic basin. Those intensive public water supplies and private -- not just domestic, but private industrial, self-supplied, and agricultural ground water withdrawals over substantial portions of those two counties -- have oversubscribed the resources to the best of our ability to analyze those resources. Withdrawals now exceed or will soon exceed the rate which ground waters recharged from precipitation, and particularly during dry years.

We have seen the results of that kind of water management over the past year of the drought, and this is not the first time we have experienced the problems in those two counties in public water supply. In the very short period of drought of '76-77 we experienced similar problems. That is primarily because the triassic formations themselves react very quickly to a drought. It is not one great aquifer, like the coastal plain of New Jersey with the Potomac-Raritan megathy. It is really a bunch of little ground water basins, and when you have

withdrawals, as happens in some of our areas, of 100 to 500 gpd per square mile and recharge rates that on a normal year are less than that and in a dry year are less in some cases than 100 gpd per square mile over a whole dry year, you can expect the kind of ground water depletion and problems which we've experienced.

That kind of problem is now exacerbated by the discovery of contamination in many of those supplies. The well-known one, which has been well publicized by state, the water suppliers, the media, and the Environmental Protection Agency, is trichloroethylene, a degreaser in both domestic and industrial use in the past, now banned in the State of Pennsylvania for certain uses. That has put a number of wells out of service.

We have at least two systems in the area that are now in very desperate shape as a combination of the depletion of some of their well yields and other wells that are out of service. Other systems in those two counties are being bailed out by neighbors, and those neighbors themselves, neighboring public water supply systems, cannot sustain the bail-out for very much longer without themselves getting into deep trouble during this drought.

The project of the Neshaminy Water Resources Authority has been studied over a 20-year period and re-studied and restudied and modified accordingly, as new plans in the two counties develop. What we now have before us is a downside project. We believe that the project has been carefully designed to encourage a limited, an orderly growth policy in the two counties. It does not open the door for wild development schemes, as some people think.

I would like to note a section of the docket, page 10, which describes the elements of the Commonwealth's water allocation to the Neshaminy Water Resources Authority. The State of Pennsylvania regulates water supplies to withdraw water in the state from surface waters, and this is such a project. We not only regulate those who withdraw the water, but those who connect to the withdrawal of water. Here we have a wholesale water system with a number of retail supplies connecting to the system.

Condition #9 of the Pennsylvania Permit requires each one of the retail water systems that connects to the project to apply for and receive a subsidiary allocation permit before proceeding to connect and receive

water from the Nesnaminy Water Resources Authority. The guidelines for review of applications for subsidiary allocations, as established by the Pennsylvania Department of Environmental Resources, specify a number of requirements for obtaining such subsidiary allocations; and in this docket are some of those briefly described. The guidelines themselves go on for a number of pages on each one of these issues.

Among them are a demonstration that water from the regional project is reasonably necessary to serve present and future needs of the retail system. In determining that we look not just to the retail water supplier's view of his needs, but to the populations, as shown in the Delaware Valley Regional Planning Commission's reports, the COWAMP 208 water quality plan for Southeastern Pennsylvania, the state water plan, and the two-county comprehensive plan.

There are some municipalities that we are aware sometimes overshoot their population projections for one or more purposes. We do not look to those population figures as the basis for determining needs. We look to broad regional planning that is done in a comprehensive and thoughtful way before we determine need.

Second, the submission of an adequate program to encourage water conservation by residential, commercial, and industrial customers. This goes beyond educational requirements. It goes into direct contact with consumers on a regular, not a one-shot or a drought basis -- but on a regular basis -- and includes the development of building standards for new construction and includes water saving devices.

This is a requirement that goes far beyond what we normally do in the case of a water allocation in Pennsylvania, but we felt it was necessary in an area which we recognize has limited resources to serve the public.

Each one of the retail systems must implement an adequate systematic program for the monitoring, repair, and preventive maintenance of this system to detect, correct, and, where possible, prevent leakage. This goes beyond the proposed policy of this Commission which we will discuss later in the meeting. We require that it be systematic and continuous leakage prevention. It's a very specific program in the guidelines that we are looking for.

Fourth, a review of the consistency of the

water supply program of the retail user with the waste water management, environmental and comprehensive plans in the area. You may recall that in hearings the question was raised as to whether the water from this system may be used in communities where it is not consistent with their planning. We compare the use of the proposed subsidiary allocation to the comprehensive plans of the two counties, which include development planning. This comes through a process under state law and we feel that that is the appropriate vehicle at the state level to address the nexus between planning on a comprehensive basis and water supply provisions.

Fifth, a review of any adverse environmental impacts arising from the subsidiary allocation which have not been previously assessed as part of the overall project. If there is some detail of the subsidiary program which is not part of the overall project, we will re-look at it and open that question for comprehensive review at the time that Pennsylvania reviews the permit.

We feel that the public water supply system at this time, since it has already been through one EIS by this Commission and a very comprehensive planning study by the state, two separate planning studies by each of the

counties, and then re-review of those studies by the county, reflects the best possible alternative to supply water in these two counties and to relieve the ground water situation.

We very strongly favor the Neshaminy Water Resources Authority's plan for public water supply.

If I may move on, Mr. Chairman, to the other docket, the Philadelphia Electric docket. I think all of the Commissioners, including the Commissioner from Pennsylvania, have been very seriously troubled and concerned with all of the issues relating to nuclear power in general and the Limerick plant in particular. I know I, and I believe my fellow Commissioners, have probably read more documents on this project than we have ever read. I have gone back to the original records, trying to determine what was reviewed and wasn't reviewed previously, and what is open and is not open at this time.

I think it is important that we realize what this docket deals with and what it does not deal with. The Limerick plant itself was approved by this Commission in the early 1970s and a final review of the construction of the Limerick plant under Section 3.8 of the Compact was issued in 1975. The construction of the Limerick plant is

not before this Commission at this time.

Two of the three water sources that were included in that original docket were also covered in construction. They are under construction as approved by this Commission. The third source, the Delaware, was approved in concept in 1975, but its construction was held up -- not because of the power plant, but because of a change in the sizing of the public water supply element of the project.

The Commission addressed in 1975 an Environmental Impact Statement prepared by the Atomic Energy Commission, which then changed its name to the Nuclear Regulatory Commission. That Environmental Impact Statement on Limerick and its water supply aspects was not just reviewed by this Commission, but was appealed to a court, the Third Circuit Court of Appeals of the United States, and that court found that that Environmental Impact Statement, and particularly the challenged elements of it relating to water supply, was adequate.

This Commission may reconsider, if it has major changes in the facts relating to a project, decisions it made earlier, but the burden of reopening a judicial decision -- which, as the lawyers know, goes by the term

res judicata -- when all issues have been previously addressed the burden of overcoming res judicata and re-opening a judicial decision is very high. It is not clear to me at this point, Mr. Chairman, that the burden is sufficient for this Commission to reopen the EIS.

At the same time there are other issues regarding the Limerick plant which are serious and have to be addressed, and, in fact, do have a forum to be addressed in. This Commission has addressed letters to the Nuclear Regulatory Commission to determine whether it would proceed with another Environmental Impact Statement on the Limerick plant, and particularly its operation.

Again, the docket on Philadelphia Electric notes those issues. They are safety issues in large part, relating to evacuation planning, the location of the plant. There are other issues pending before the Public Utility Commission. We don't know when the Public Utility Commission will render a decision on those elements.

This Commission, knowing that an Environmental Impact Statement will be prepared by the Nuclear Regulatory Commission at the operating stage and knowing that there are certain issues that have to be addressed by those other forums, must take care to assure that by

the decision we make today we do not prejudice the decision in those other forums.

The document in front of the Commission notes this problem and notes that Philadelphia Electric, as it proceeds on the basis of a decision by this Commission, proceeds at its risk, not at the risk of the public and not at the risk of this Commission. That is a decision that that company and its executives must address.

But if information developed in the Environmental Impact Statement by the Nuclear Regulatory Commission or information developed in the proceedings in front of the Public Utility Commission necessitates a change to this project or justifies in our minds a change to the project, we reserve the right to reopen this document. If something has to be changed in the construction, then so be it.

There certainly have been a number of groups that have commented on this project, and agencies. One of the most important, I think, at the hearing was the Environmental Protection Agency. I know, Mr. Chairman, you have a letter from Region 3 of EPA which you will read later as to their final comments on this project. I think the letter which we have received from EPA weighs heavily

in our decision on how we should proceed.

I think there is a final question which at least I have to address morally myself, and I think we all must, and that is how should we proceed with a decision on a project like this when we're in a drought. I have stated to this Commission a number of times that if we cannot justify a project during normal periods that can operate during a drought we ought not to approve it no matter at what time it comes before the Commission.

If a project comes before us in time of plenty but we do not think we have a reliable water supply in time of drought, we shouldn't approve it whether it's a time of plenty or a time of drought. I feel the same way on this project today.

We know by probably our best guess of the weather over the next couple of years that we have a chance this drought may be continued, but, on the other hand, it's probably going to end at some point. This project, even if we approve it today, will not be on-line for at least two or maybe three years. The public water supply element would have helped during this drought by reducing the demand off of very badly stressed ground waters and allowing the use of some surface waters to

balance the demand, again not opening the road for growth but re-balancing supplies to serve the existing users. The Limerick docket, on the other hand, is very clear about drought operations. Philadelphia Electric may not draw when the low flow of the river falls below 3,000 cfs, unless it develops its own storage and makes up gallon for gallon for its consumptive use. If it doesn't have the storage to make it up, it must shut down.

The Limerick operation is not a question in a drought. We've already made a decision to try and protect other water users in a drought by that condition.

I think, further, that with the conservation program requirements that are in both dockets, and particularly the public water supply, we have addressed the planning for future droughts so that we do not get into the kind of situation we have with some of our other water supplies. We have really done a better job at preventive planning in this program, in this document, in this project, than we have across the board. We should apply the same principles in other projects that come before this Commission.

Perhaps, Mr. Chairman, in the future -- and I know you have concerns about it and I do too -- in major

electric generating capacity built in this Basin we will look to the total water supply picture before we have decisions issued and then we have to re-review various elements.

Philadelphia Electric was not the one entirely at fault in this matter. There were a number of changes in the minds of the Commission regarding water supply and total planning in the Basin. But as we have in the Susquehanna Basin, I believe that the Delaware Basin ought to have a consumptive use make-up policy that is addressed at the very beginning when a new facility is being sited.

Further, I am not so sure that this Commission is going to look favorably upon new power generation with major consumptive uses in the fresh water portion of the Basin. We are going to have to target the remaining supplies in this Basin to the highest priority users, which are going to be domestic and public water supply for the 22 million people that are served by this Basin.

We have other areas where we can probably site power plants when we need them. The Susquehanna Basin has some room. The Ohio Basin has some room. I think we can find a balance across the Eastern United States to put

in power plants. But this Basin is a pretty well allocated Basin and we ought to be very careful about future major consumptive uses.

That summarizes my comments, Mr. Chairman. I think the dockets have been changed quite considerably since the November 18 period. I haven't gone into detail on all the points that were raised at the November 18 period, but I think those who raised questions, for example, about access during construction of the project, effects on the Delaware Canal of the pump station, aesthetic designs, the intake structures and their effects on fisheries, will find that there have been a number of changes in the conditions to try and spell out exactly what this Commission believes is necessary to mitigate any potential environmental effects.

We have, in fact, gone back and re-opened issues that in some cases people may have thought were settled in the past and required changes in the design to better accommodate this facility or these two projects to the Basin. I think that shows that we didn't just sit at the hearings and have a decision made up. There has been in the last four months a considerable reconsideration and reworking to make sure that we have the best possible

projects before the Commission.

CHAIRMAN PICCO: I'll start the Commission discussion of this issue. First, with a personal comment. This issue was brought home, although I know it had been on the horizon for some time, to me personally at the public hearing attended by most of you in this room. During that public hearing I had an opportunity to hear a pretty wide range of emotion on a very controversial issue.

By and large, the conduct of the people at that hearing was astounding. I mentioned at the hearing and will mention again that I don't think I had ever attended a hearing of that level of controversy that was, frankly, that well behaved.

However, one element of that hearing disturbed me greatly and I am going to comment on it now. The statement submitted by the Philadelphia Electric Company at that hearing standing on its own merits was simplistic in the extreme. Although they had submitted volumes of information to the Commission in the past in order to build a record upon which the Commission could act, I believe that the level of testimony that was given at that hearing was an insult, if not to the Commission then certainly to the members of the public who had enough concern about

the issue to attend the meeting.

Secondly, the performance of either the Philadelphia Electric people or their supporters was something that I hadn't seen since a high school debating match. The rolled eyes, smirks, and mutterings that accompanied opposing viewpoints were something that I thought I had left behind in junior high school. I found the performance personally obnoxious, and if the law did not require me to rule on the entire record I would have a substantial problem with Philadelphia Electric's performance at that meeting. The law does require me to vote on the entire record.

New Jersey, as many of you know, had several problems with the Point Pleasant project, many of them technical, three of them worth mentioning.

The first was the issue of operation in a drought emergency, which Commissioner Weston has touched on. The State of New Jersey believes that the 3,000 cfs limitation, operational limitation, at Trenton sufficiently protects the River Basin during a drought period.

The second issue, particularly relating to Limerick, was the issue of flow augmentation compensating storage. I had problems with the current language

in the permit, which is exactly like language that attaches to utility permits in New Jersey. I have since looked at all those permits and concluded that it would be unfair to require Philadelphia Electric to adhere to a higher standard than New Jersey expected of its own utilities, and therefore I don't believe that objection standing on its own merits was enough to sway my vote one way or the other.

The third and most important problem with this docket was the manner in which the environmental reviews were or were not conducted and were or were not current. The New Jersey Department of Environmental Protection was on record as requesting a full EIS for this project and continued to press for the same throughout the pendency of this docket. However, a letter from Jack Schramm, the Regional Administrator, dated February 17, 1981 to Governor Tribbitt, addresses many of these concerns and I would like to enter it into the record now.

"The division of water from the Delaware River at Point Pleasant is a complex proposal that has been a controversial issue for many years. EPA Region III both before and after the release of the DRBC Executive Director's Negative Declaration on August 25, 1980 supported the need for a full Environmental Impact

Statement on the Point Pleasant project involving the NWRA and PECO projects. On November 13, 1980 Mr. George D. Pence, Chief of EPA Region III's Environmental Impact Branch, gave testimony reaffirming the need for a full EIS.

"However, EPA recognizes the current drinking water needs of Bucks and Montgomery Counties. In Mr. Pence's testimony of November 18 he acknowledged 'the need and importance for a reliable water supply for Bucks and Montgomery Counties.' He further affirmed our commitment to working with the Commission, the public, and local government in the development and implementation of cost-effective and environmentally acceptable solutions.

"Since November EPA Region III has met with DRBC and Pennsylvania DER several times to clarify environmental issues related to the Neshaminy Creek Watershed Plan - Water Supply Plan, Docket No. D-65-76 CP(8). Issues discussed included an analysis of flows to the North Branch tributary, population and water use projections, water conservation controls, and the relationship of the Philadelphia Electric Company Docket No. 79-52 CP as it relates to components of the NWRA Docket.

As a result of these meetings our technical concerns involving the NWRA portion of the proposal have been resolved and the DRBC staff has incorporated the necessary changes into Docket No. D-65-76CP(8). Consequently the potential benefits to be derived from the diversion of flows from the Delaware River for water supply to Bucks and Montgomery Counties, with proper ground water/surface water management, outweigh any potential adverse impact.

"In regard to the PECO Docket No. D-79-52CP, which involves components necessary for the operation of the Limerick nuclear facility, several environmental issues must still be addressed. However, following our statement of November 18 we learned that the NRC will initiate an EIS supplement for the operating phase of the Limerick facility. EPA will encourage the NRC to address our concerns relative to water supply, and we understand the NRC has already begun inquiries to that effect. A conditional approval clause of Docket No. D-79-52CP, which has been added subsequent to the November 18 hearing, makes the decision contingent upon the outcome of the EIS.

"In summary, our substantive concerns with

the NWRA portion have been addressed. We will encourage the NRC to include our concerns with water supply in its operational EIS for the PECO portion of the project. I trust this information will be useful to you in your consideration of the two dockets before you."

"Sincerely yours,

"Jack J. Schramm
"Regional Administrator"

Since New Jersey's position closely paralleled the Region 3 position as enunciated at the hearing, I consider this letter to be dispositive of the State of New Jersey's concerns as far as the Environmental Impact Statement portion of these projects is concerned. Therefore, the State of New Jersey is prepared to vote for both dockets with the conditions attached by DRBC staff and agreed to by the federal Environmental Protection Agency.

Any other comments from Commissioners?

COMMISSIONER MT. PLEASANT: Mr. Chairman, with respect to the Meshaminy Watershed Plan, New York State appreciates the critical need and priority for providing sufficient water in the Delaware River Basin. This

Neshaminy Watershed Project will provide an adequate water supply not only to a significant area, but also to a major segment of the population in the Commonwealth of Pennsylvania. New York State has in the past supported the project as a component of the Delaware River Basin Commission's Comprehensive Plan. The proposed modifications to the project are based on the increased need for water and are a prudent approach, and New York State continues to support this project with a favorable vote.

With respect to the Philadelphia Electric Company portion of the docket, New York State in the past has also supported this project as an element of the Delaware River Basin Commission's Comprehensive Plan. The proposed increase in capacity of the reservoirs does not represent a major change in the project, and New York State intends to vote affirmatively for this portion also.

COMMISSIONER TRIBBITT: Mr. Chairman, I have four communications. The first is from the Executive Director to NRC; the second, from NRC to the Executive Director; the third, the letter addressed to me from EPA which you took the liberty to read; and, finally, a communication from EPA to NRC. I respectfully request that with the exception of the EPA letter the Secretary read

these communications.

SECRETARY WHITALL: This is from Mr. Hansler to Mr. Eisenhut of NRC:

"This is to confirm our recent conversation concerning the Limerick nuclear generating plant on the Schuylkill River in Pennsylvania. It is my understanding that the Nuclear Regulatory Commission intends to prepare an Environmental Impact Statement on the operating license aspect of the Limerick plant which is now under construction. If this is the case, it would be very much appreciated if you could so inform me in writing as soon as possible. The Delaware River Basin Commission intends to act on the Point Pleasant Pumping Station project, an adjunct to Limerick, within the near future."

And then he gives our telephone number.

The second letter, replying to Mr. Hansler, is from Mr. Tedesco, Assistant Director for Licensing of the Division of Licensing of NRC, and the date is December 16, which is one day following the date of the previous letter.

"This is in response to your letter of December 15, 1950 to Mr. Darrel Eisenhut concerning the

preparation of an Environmental Impact Statement for the Limerick generating station during the Nuclear Regulatory Commission operating license review. As required by NRC regulation contained in 10CFR Part 51, applicants for an operating license must submit an Environmental Report which will be reviewed by NRC as part of its National Environmental Policy Act review requirements.

"Based upon the applicant's Environmental Report the NRC staff will review the environmental impacts associated with the operation of the LGS, including those facilities that are required to support its operation. This review will specifically consider information and data that have been developed subsequent to the issuance of our final environmental statement for the construction permits. After completion of this review both draft and final environmental statements will be issued."

The remaining letter is addressed to Mr. Tedesco of the NRC from Mr. George Pent, Chief of the Environmental Impact Branch of EPA, and it is dated February 17, 1981.

"Philadelphia Electric Company's Limerick nuclear facility is a complex project that has been controversial for many years. We have recently been involved in numerous meetings with the Delaware River Basin Commission concerning plans to permit diversion of water from the Delaware River, in part for supplemental cooling water supply for the facility. We are particularly concerned with the consumptive use of scarce water resources, the mechanisms for provision of the necessary storage, and the physical and biological impacts on the natural streams which will convey the flows to Limerick.

"Therefore, we were pleased to hear from the DRBC, from Dr. Sam Worth at NRC in Washington, and from the article quoting you in the Philadelphia Inquirer, February 10, 1981, that NRC is planning to prepare draft and final Environmental Impact Statement supplements prior to issuance of an operating license for Limerick.

"We were also encouraged to note that you will be including review of the impacts of the supplemental cooling water diversion. DRBC has indicated that they would like to consult and coordinate with you

on those portions of the EIS.

"Since, as required by the National Environmental Policy Act, EPA will be reviewing the EIS, we would like to participate in the project scoping meetings so as to address the concerns we have raised in the past and provide for their resolution in a timely fashion during EIS preparation. We are looking forward to working with you."

COMMISSIONER TRIBBITT: Mr. Chairman, without objection I request that those communications which have been read be made part of this public hearing record.

CHAIRMAN PICCO: Any objections from the panel? (None) They will be entered as part of the record.

COMMISSIONER TRIBBITT: Mr. Chairman, if I might on behalf of the federal government just as other Commissioners are expressing themselves: In trying to correlate the responsibilities of various federal agencies on any subject that may be before a regulatory board such as the Delaware River Basin Commission -- sometimes with a great many opinions on authorities and jurisdictions, and with EPA being one of those who for some time had been one of the leading agencies to voice objections, it is quite clear to me with this communication dated February 17 that

EPA has no particular problem with diversions and they are looking directly to NRC for any EIS's relative to the subject matter before us and not to this particular regulatory agency.

Under those circumstances the federal representative feels he can very well cast an affirmative vote on these two matters before the Commission.

COMMISSIONER FICHLER: I would like to point out initially that when my colleague from Pennsylvania mentioned that he did not think there would be any more need for power plants in the fresh water part of the Basin I held my breath for a moment; and then he went on to say that he thought they could be located in the Ohio and Susquehanna. I was gratified to hear that.

We have paid a great deal of attention to these dockets before the Commission. I personally attended the hearing in Kulpville and have looked at the record very extensively and have studied the project to a great extent, and I have felt that it is one of the most complex and certainly one of the most important projects that has come before the Commission in the time that I have been on it. It was with that in mind that we spent as much time in Delaware looking at this as we did.

I am impressed that the EIS work that has been done on these two projects in the past has been quite extensive. It has taken place through the years and there has been a great deal of it.

We were concerned with several aspects of the project and very concerned, as are other members of the Commission, with regard to further projects in the future that might make consumptive withdrawals of water without provision for making up that water. I think that this is something that the Commission in the future will take a view of on new projects as they come along, as we have learned from the past, particularly this one and others as well.

I am also impressed with the fact that with regard to the Limerick aspect of the project the NRC has indicated officially that they will be doing an EIS on this prior to their final conclusions in the awarding of an operating permit.

I also note that the docket before us has been modified from that of the hearing at Kulpville to make very specific the kinds of conditions that pertain to these approvals, and those do include conditions for all other required approvals by local, state, and federal

agencies.

I also would reiterate what some of my colleagues have said: that should any of those approvals' further EIS work develop any new observations that the Commission certainly reserves the right to revisit this decision as new, important, and significant information is derived from those studies.

With those comments Delaware is prepared to vote for these dockets.

CHAIRMAN PICCO: Any other comments or questions from the Commission?

Mr. Secretary, would you roll call each docket, please.

SECRETARY WHITALL: Mr. Chairman, since it became known that these two projects were going to be on the agenda today we have received letters at the Commission from about 60 people and telephone calls from about 25 people all expressing opposition to approval of these projects. I have given each of the Commissioners a list of these names of these people, and if it is your pleasure we can have that included in the record.

CHAIRMAN PICCO: Note the objections and the list of people. We had that list prior to today's

meeting.

MR. GOLDBERG: Mr. Chairman, while we're talking about including things in the record, I might say that we presume that there will be a continuation of the existing lawsuit and we will get into a question of record, but basically all the documents and all of the reports and all of the memoranda that the Commission has with regard to this, whether formally identified as part of the record up to now or not, are going to be included within any record that ultimately is submitted to the court.

CHAIRMAN PICCO: For the information of the public, there is a background document prepared by the staff that addresses issues pro and con that were raised at the public hearing, and that is available by writing to DRBC headquarters.

Now, Mr. Secretary.

SECRETARY WHITALL: The first docket is the Neshaminy Water Resources Authority docket.

(All Commissioners present, upon roll call, voted in the affirmative.)

A unanimous vote, Mr. Chairman.

The second docket is that of the Philadelphia Electric Company.

(All Commissioners present, upon roll call, voted in the affirmative.)

Again a unanimous vote, Mr. Chairman.

CHAIRMAN PICCO: I declare the docket passed. The next item on the agenda is the Spring Meadow Trout Hatchery.

Dave.

MR. GOLDBERG: Mr. Chairman, there is before the Commissioners considerable material by way of memoranda and revised docket decision and other materials that relate to this matter. Because there have been a number of recent developments with regard to this I will try to summarize the state of the matter to the extent that I am familiar with it as best I can, and indicate where we are in terms of consideration of this matter by the Commission.

Then we have with us counsel for the applicant, Spring Meadow, and counsel for the Township of Lower Milford, which has been actively participating in this matter. They have been informed that they will have brief opportunity to make statements to the Commission concerning the matters the Commission will review today.

The Commission has three different components of the Spring Meadow situation before it. The first