

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
BEFORE ADMINISTRATIVE JUDGES:

Lawrence Brenner, Chairman
Dr. Richard F. Cole
Dr. Peter A. Morris

DOCKETED
USNRC

*82 SEP -8 P1:52

OFFICE OF SECRETARY
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In the Matter of
PHILADELPHIA ELECTRIC COMPANY
(Limerick Generating Station,
Units 1 and 2)

Docket No. 50-352
50-353

September 3, 1982

MEMORANDUM AND ORDER
(Denying Del-Aware's Request for Reconsideration
of DRBC Preclusion on Water Allocation Issues)

On August 8, 1982, Del-Aware Unlimited, Inc. (Del-Aware) filed an Application for Reconsideration of this Board's finding (set forth in a Memorandum and Order dated July 14, 1982, ruling on objections to the Special Prehearing Conference Order) that the Board is precluded from considering matters concerning the allocation of Delaware River water for cooling the Limerick plant. Both the Applicant and the Staff have filed responses to Del-Aware's Application.

The preclusion in question arises under section 15.1(s)(1) of the Delaware River Basin Compact which states, in part:

[W]henever a comprehensive plan, or any part or revision thereof, has been adopted with the concurrence of the member appointed by the President of the United States, the exercise of any powers conferred by law on any officer, agency or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan...

Pub. L. No. 87-328, 75 Stat. 688 (1961).

The Board held that it was precluded, by virtue of the federal representative's affirmative vote on inclusion of the Point Pleasant diversion in the Comprehensive Plan, from considering contention V-16 as it related to an increase in the salinity gradient in the Delaware River. (Order (July 14, 1980) at 18-19). The Board explained that a change in the salinity gradient could result if the quantity of water used in cooling Limerick were withdrawn, whatever its use. It would be the quantity of water withdrawn, not its particular use, which would lead to the changes in salinity. Moreover, any change in salinity would result not just from this water withdrawal, but from the total quantity of water withdrawn for uses approved by the Delaware River Basin Commission (DRBC). Special Prehearing Conference Order (SPCO), LBP-82-43A, 15 NRC _____, slip op. at 96 (June 1, 1982). See also id. at 70-71.

DRBC is charged with regulating the water supply and uses of water in the Delaware River Basin. SPCO at 70. This includes necessarily, the authority to decide for which of several competing possible uses water will be allocated. Since changes in the salinity gradient would result directly from the allocation without regard to how it is used, the remedy for these changes would be to change the allocation. A decision to change the allocation would substantially conflict with DRBC's decision authorizing it, and therefore, would be the type of action precluded by section 15.1(s) of the compact. Since NRC cannot change the allocation causing the alleged salinity changes, it would be a pointless exercise for NRC to reconsider by litigation in this hearing the causes and possible remedies of any such changes in salinity in the Delaware River and one in which NRC need not engage. Cf. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 24 (1978) (NRC need not

relitigate issue of environmental impacts caused by cooling system when bound to accept cooling system authorized by EPA).

Because the section 15.1(s) preclusion would bar the NRC from considering salinity gradient questions, it is important that this Board determine whether the federal representative to DRBC, Governor Tribbitt, concurred in the decision to add the Point Pleasant diversion to the comprehensive plan. The Board held in its July 14 order that Governor Tribbitt had, in fact, concurred in the decision. Order at 18. Del-Aware seeks reconsideration of that holding by the Board alleging that Governor Tribbitt based his concurrence on his explicit understanding that "the NRC would resolve all environmental issues relating to the withdrawal of Delaware River water (the allocation)." Application for Reconsideration (August 8, 1982) at 1.

The Board is concerned with the question of whether or not the federal member of the DRBC concurred in the decision, not with his reasons for doing so. Cf. Nothdurft v. Ross, 104 Misc. 2d 898 (N.Y. Sup. Ct. 1980) (beyond the province of the judiciary to hypothesize about the motives of legislature in enacting statute) aff'd 445 N.Y.S. 2d 222 (N.Y. App. Div. 1981). Del-Aware does not dispute that Governor Tribbitt voted for the addition to the comprehensive plan, but appears to suggest the vote was conditional. Chaos would result if an individual's vote on a proposal could be conditional. Imagine the impossibility of determining the conditions imposed on an affirmative vote and deciding whether at any point in time there were sufficient affirmative votes to render a proposal effective. The Supreme Court, recognizing the problems which would result

from questioning the authenticity of recorded votes, held long ago that the journal of the Congress in which votes are recorded "must be assumed to speak the truth". United States v. Bollin, Joseph & Co., 144 U.S. 1, 4 (1892).

The transcript of the February 18, 1981 meeting of the DRBC at which the proposals were discussed and voted upon shows a unanimous roll call vote by all the Commissioners. DRBC transcript at 52. Governor Tribbitt was present at that meeting and apparently voted affirmatively. There is no indication that when he voted, he intended a conditional vote. The Board will not consider material apart from his vote which is intended to show that the vote was other than the unconditional affirmative vote it appears to be.^{1/}

In any event, it is far from clear from his statements in the transcript of the DRBC meeting that Governor Tribbitt was laboring under a misapprehension of the type of actions NRC would take in evaluating the environmental impacts of the Limerick plant. It is not clear to the Board from reading the transcript and the letters it references what Governor Tribbitt (or EPA) understood to be NRC's intentions. Indeed, this very lack of clarity illustrates the problems with considering the motives for a vote and reinforces our determination that we should not concern ourselves with questions of motives or conditions.

Even if the preclusion were not effective, however, we would not admit contention V-16. As we indicated in our special prehearing

^{1/} We note that the Compact does provide a specific mechanism for the federal representative to indicate his nonconcurrency. In addition a mechanism is available to withdraw concurrence although the time frame on the latter is not clear to us from the provision of the Compact. § 15.1(s)(2). However, there is no indication that any filing was made to prevent the presumption of federal concurrence.

conference order, this is the type of issue for which the NRC Staff's reliance on DRBC's environmental studies is reasonable (particularly since the salinity gradient changes are attributable to total water withdrawal, not just isolated allocation). SPCO at 96. There has been no showing that the NRC will use DRBC data improperly. Nor is there any indication that the changes that have occurred in the proposed location of the intake would change the impacts on the salinity gradient. In the circumstances, Del-Aware has not made the necessary showing for admission of the contention.

In addition, as pointed out by both the Staff and the Applicant, this filing by Del-Aware is untimely. Del-Aware was given an opportunity to comment on federal concurrence in the allocation decision within 30 days of the issuance of the June 1, 1982 SPCO. SPCO at 96. It did not address the issue within that time. Nor was this motion filed within the five days provided by the rules for objections to special prehearing conference orders. 10 C.F.R. § 2.751a.^{2/} Del-Aware did not seek an extension of time for its filing or attempt to justify its lateness. Moreover, Del-Aware filed on August 25, 1982, a supplement to its request for reconsideration. This filing was made without Del-Aware's having obtained (or even requested) the Board's leave to make it. A moving party has no right

^{2/} Although not titled a special prehearing conference order, the July 14 order essentially elaborates on the SPCO. Moreover, it would not have been timely even under the more lenient 10 day period allowed for petitions to reconsider final decisions which may be relied upon for general guidance in the absence of a particular provision applicable to non-final decisions issued by licensing boards. 10 C.F.R. § 2.771. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 A.E.C. 645, 646 (1974). But see Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 874 n.8 (1980).

of reply to answers in NRC proceedings (and we view this as, in effect, a reply) except as permitted by the presiding officer. 10 C.F.R. § 2.730.

In its supplement, Del-Aware seemingly expands its motion to seek reconsideration of the Board's determination that its consideration of environmental effects should be limited to the effects of changes since the Construction Permit review and approval by the Appeal Board.

We note preliminarily that motions for reconsideration of the SPCO were due within ten days of its service. This supplement was filed more than two months after the SPCO was filed. Therefore, it is untimely.

Nor is there any merit to the request for reconsideration. The 1973 DRBC EIS upon which Del-Aware relies does not indicate that the entire project was too indefinite to evaluate, but only that intake entrainment could not be evaluated. The Board accepted Del-Aware's contention concerning the impact of the intake on fish. See SPCO at 87, contentions V-15 and V-16(a) (in part). Moreover, the Board did not limit its consideration to changes in the design as purported in Del-Aware's supplement, but rather to any significant change since the construction permit review. Thus, the Board accepted a contention concerning impacts of intake operations on the newly proposed Point Pleasant historical district because it deemed the proposal of a historical district to be a significant change. SPCO at 87, contention V-16b.

The Board considered at length in the SPCO the scope of its environmental review. See SPCO at 50-89. It then applied its reasoning to the particular contentions which were proposed. Del-Aware's request is not similarly focused on the particular contentions. Such focus is necessary and should be provided in all future filings so that the Board knows the

particular action sought.

Del-Aware also relies on an old January 5, 1981 letter from the Staff to the Applicant for the proposition that the Staff intended a broader review than the scope set forth by the Board. The Board established the scope of its review based on NEPA, NRC regulations, and applicable precedent. It did not rely on the Staff to define the scope of its review. The Staff may, if it desires, perform a more complete review than the minimum legally required.

In any event, nothing in the broad phrasing of the Staff's letter is inconsistent with the Board's rulings on the required scope of NRC review.^{3/} Del-Aware characterizes the letter as a commitment that the NRC will once again review ab initio the entire issue of the supplemental cooling water system, without limitation to changes in circumstances. Del-Aware also argues that the letter demonstrates a Staff intention to review DRBC's allocation decision. Del-Aware's characterizations, particularly after the lengthy discussion of similar arguments in the SPCO, are unsupported by the language of the letter.

We are denying Del-Aware's request for reconsideration not just because it is untimely, but because it lacks merit. In addition, we

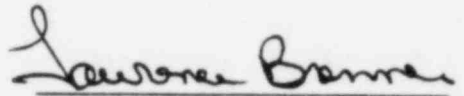
^{3/} The letter from the Staff in pertinent part states:

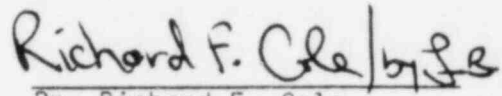
Cooling water supply and the diversion of Delaware River water was discussed by several participants at the meeting. We recognize that the final design of the diversion project was not completed when the Final Environmental Statement was issued for your Construction Permits. Therefore, the staff will thoroughly review the environmental impacts associated with diversion of Delaware River water. This area should also be thoroughly discussed in your tendered application.

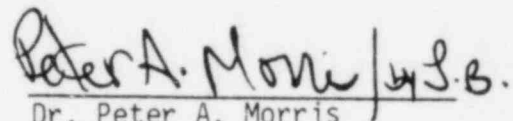
caution Del-Aware to comply with the filings and time-frames allowed by the rules of practice. If in a particular instance they prove particularly onerous, Del-Aware should request in advance the Board's permission to make a particular filing at a particular time, explaining its reasons. Unauthorized or untimely filings made without the Board's permission will be ignored in the future.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE


Dr. Richard F. Cole
ADMINISTRATIVE JUDGE


Dr. Peter A. Morris
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 3, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
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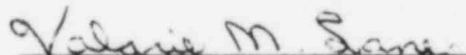
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COURTESY NOTIFICATION

As circumstances warrant from time to time, the Board will mail one copy of its orders and memoranda directly to each party, petitioner or other interested participant. This is intended solely as a courtesy and convenience to those served to provide extra time. Official service will be separate from the courtesy notification and will continue to be made by the Office of the Secretary of the Commission. Unless otherwise stated, time periods will be computed from the official service.

I hereby certify that I have today mailed the following: (1) Memorandum And Order Confirming The Scheduling of Responses To Del-Aware's "Application For Approval Of Petition To Amend Contentions", and (2) Memorandum and Order (Denying Del-Aware's Request For Reconsideration Of DRBC Preclusion On Water Allocation Issues), of this date to the persons designated on the attached Courtesy Notification List.


Valarie M. Lane
Secretary to Judge Brenner
Atomic Safety and Licensing
Board Panel

Bethesda, Maryland

September 3, 1982

COURTESY NOTIFICATION LIST

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