



June 7, 1983

ADJUDICATORY ISSUE SECY-83-222

(NEGATIVE CONSENT) COMMISSION LEVEL
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For: The Commission

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-726 (PHILADELPHIA ELECTRIC COMPANY)

Facility: Limerick Generating Station, Units 1 and 2

Purpose: To advise the Commission of an Appeal Board decision¹ which, in our opinion,

EX-5

Review Time Expires: June 27, 1983

Petitions for Review: None filed

Discussion: The issue considered in this Appeal Board decision was one left open in the recent decision of Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC _____, ___ n.6 (October 27, 1982) (Slip Op. at p. 6 n.6): whether the Appeal Board or the Licensing Board has jurisdiction to rule on a motion to reopen filed with the Licensing Board after the issuance of the initial decision but before the filing of

¹Under negative consent procedures, no further action by OGC is contemplated unless otherwise directed by the Commission.

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exceptions.² The Appeal Board, reversing a split decision of the Licensing Board, held that jurisdiction to rule on a motion to reopen resides with the Licensing Board until exceptions to an initial decision have been filed.

The issue in this case arises out of the operating license proceeding for the Limerick Generating Station, owned by Philadelphia Electric Company (PECO). As part of the project, the Point Pleasant Diversion of the Delaware River has been proposed in order to supply supplementary cooling water to the Limerick plant as needed during periods of low flow in the Schuylkill River, on which the plant is located.³ This diversion has been the subject of much controversy.⁴

One of the groups challenging the diversion project in court, Del-Aware Unlimited, Inc. (Del-Aware), is also an intervenor in the operating license proceeding. The group previously had filed 25 contentions concerning the supplementary cooling water system of the Limerick Generating Station. On March 8, 1983, the same day that the Licensing Board issued a partial initial decision disposing of these contentions (LBP-83-11, 17 NRC _____ (1983)), Del-Aware petitioned the Licensing Board to reopen the record and consider a late contention.⁵ On

²It is clear that the Licensing Board has jurisdiction before it issues an initial decision, and the Appeal Board has jurisdiction after the filing of exceptions to an initial decision (see Metropolitan Edison, supra).

³About half of the water from the diversion project will be used for municipal supply systems in Bucks and Montgomery Counties, Pennsylvania.

⁴A case concerning the matter is currently pending in the Third Circuit Court of Appeals. On May 17, 1983, the Bucks County voters passed a non-binding referendum calling for the County to withdraw from participation in the diversion project.

⁵When Del-Aware filed its request, it did not know the partial initial decision had been issued. Thus their petition was considered a motion to reopen the record rather than a motion for reconsideration by both the Licensing Board and the Appeal Board in this case. Del-Aware's revised contention alleged that a new water management plan for the Delaware River would reduce river flows and therefore render invalid previous analyses of the "river follower" method, under

March 17, 1983, the Licensing Board requested the Applicant, Staff, and Del-Aware to address the question of whether it has jurisdiction over the matter. Del-Aware failed to respond, but both the Staff and the Applicant concluded that the Licensing Board has jurisdiction.

The Licensing Board, in a split decision, disagreed with the Staff and the Applicant and held that the Appeal Board should take jurisdiction to rule on the motion to reopen the record (LBP-83-25, 17 NRC _____ (April 27, 1983)). The Board reasoned that it was not significant that there was only a partial initial decision rather than an initial decision covering all the issues in the case. It then stated that while no regulation or case law prevented it from taking jurisdiction, the practical reasons for doing so were not strong. The Licensing Board rejected the argument of the Staff and the Applicant that it should take jurisdiction because it was more familiar with the record than the Appeal Board. The Licensing Board countered that the Appeal Board would become familiar with the record in the appeal process, or, if no exceptions were filed, in its sua sponte review.⁶ The Licensing Board also reasoned that if it had jurisdiction, "forum-shopping" would occur. In its view, petitioners might file motions to reopen before filing exceptions, if they wished the Licensing Board to rule on the motion, or after filing exceptions, if they thought a better result would be obtained from the Appeal Board. The Licensing Board considered this potential forum-shopping undesirable. Finally, the Licensing Board wished to avoid the possibility that both it and the Appeal Board would have jurisdiction to act on the same issues at the same time. Such a situation could occur when the Licensing Board was considering the motion to reopen while the Appeal Board was conducting its review of the initial

which Limerick's operating power level would be adjusted in accordance with the availability of cooling water.

⁶Exceptions to the Licensing Board's partial initial decision were filed by Del-Aware soon after its motion to reopen the record was filed. The appeal process has been deferred by the Appeal Board until the motion is decided.

decision, either after exceptions were filed or in its sua sponte review.

The dissenting opinion, by Judge Cole, argued that the Licensing Board should take jurisdiction because it was more familiar with the record. Judge Cole observed that if a motion to reopen the record is filed in the period after an initial decision but before the filing of any exceptions, the Appeal Board at that point would only be in the initial stages of its review process.

In ALAB-726, the Appeal Board agreed with the dissenting opinion. It held that, until exceptions to an initial decision have been filed, jurisdiction to rule on a motion to reopen resides with the Licensing Board. It added that if no exceptions are filed within the allowable 10-day period and the Appeal Board has neither completed its sua sponte review nor extended the time for doing so, jurisdiction to rule on a motion to 7 reopen still resides with the Licensing Board.

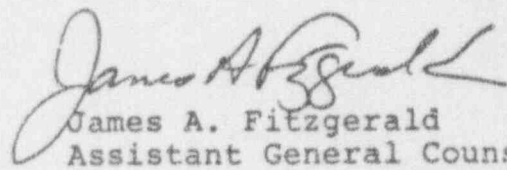
The Appeal Board, while agreeing with the Licensing Board's statement that neither the regulations nor case law prescribed the answer to the jurisdictional question, found several reasons for the Licensing Board to take jurisdiction. First, since sua sponte review does not begin until the 10-day period for filing exceptions has expired, and in many cases is deferred for several months, the Appeal Board will not have the familiarity with the issues involved in the initial decision until after the time for filing exceptions, if any, has passed. Thus in the interests of obtaining an expeditious ruling, the Licensing Board should take jurisdiction. To resolve the concerns expressed by the Licensing Board about forum-shopping, the Appeal Board noted that even if exceptions were filed before the motion to reopen, so as to give the Appeal Board jurisdiction, it could still refer the motion to the Licensing Board and defer the briefing of the appeal. Finally, the Appeal Board noted that since the time for the exercise of jurisdiction is

fixed, the possibility of dual jurisdiction over the same issues is foreclosed.

EX.5

Analysis:

OGC believes


James A. Fitzgerald
Assistant General Counsel

Attachment: ALAB-726

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Wednesday, June 22, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'83 MAY -2 P3:22

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

SERVED MAY 2 1983

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

Docket Nos. 50-352 OL
50-353 OL

MEMORANDUM AND ORDER

May 2, 1983
(ALAB-726)

The Licensing Board, in a split decision, has referred to us the "Request for Late Filed Contention V-26" filed by intervenor Del-Aware Unlimited, Inc. The Board concluded that it lacks jurisdiction to rule on this matter.

LBP-83-25, 17 NRC ___ (April 27, 1983). We disagree and, accordingly, reverse and remand the matter to the Board with instructions to rule on the merits of Del-Aware's request.

On March 8, 1983, the Licensing Board issued a partial initial decision concerning the supplementary cooling water system contentions in this operating license proceeding. See LBP-83-11, 17 NRC ___. On the same day, but without knowledge of the concurrent issuance of that decision,

Del-Aware deposited in the mail and thus served ^{1/} its "Request for Late Filed Contention V-26" on the Licensing Board. The Board then solicited the views of the parties on the question of where jurisdiction lies to rule on Del-Aware's request (i.e., the licensing or appeal board). Unpublished Memorandum and Order Directing Parties to Address Jurisdiction (March 17, 1983). ^{2/} Both the applicant and the NRC staff argued that the Licensing Board has jurisdiction; Del-Aware did not respond.

We see no valid purpose to be served by an extended metaphysical discussion of when jurisdiction -- like seisin -- passes from a licensing board to an appeal board. Certainly, there are no Constitutional dimensions to this jurisdictional dispute, and the important consideration is that Del-Aware's request be ruled upon without undue delay. We thus briefly note our areas of agreement as well as disagreement with the Board.

First, we agree with the Board that Del-Aware's request should be treated as a motion to reopen the record. Construing it as a motion for reconsideration would make

^{1/} See 10 CFR § 2.712(d)(3).

^{2/} The Board also directed the parties to address the merits of Del-Aware's request.

little sense, given that, at the time it was filed, Del-Aware was unaware that there was even a decision to reconsider. Del-Aware simply intended to have the record reopened for consideration of its new contention V-26 and any evidence related thereto, as contemplated by the Commission's regulations. See 10 CFR § 2.718(j).

We also agree that neither Commission regulations nor case law provides any clear answer to the question raised by Del-Aware's request -- i.e., which adjudicatory body has jurisdiction to rule on a motion to reopen filed at the same time as or after issuance of an initial decision but before an appeal has been taken. Indeed, as the Board correctly notes, this is an issue we explicitly left open in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC ___, ___ n.6 (Oct. 27, 1982) (slip opinion at 6 n.6). ^{3/} We part company with the Board majority, however, on the answer to that open question. We hold that, until exceptions to an initial decision have been filed, jurisdiction to rule on a motion

^{3/} In TMI-1 Restart, we held that "jurisdiction to rule on a motion to reopen filed after exceptions have been taken . . . rests with the appeal board rather than the licensing board." 16 NRC at ___ (footnote omitted) (slip opinion at 5-6).

to reopen resides with the licensing board. ^{4/} Similarly, where no exceptions have been filed within the time allowed and the appeal board has neither completed its sua sponte review nor extended the time for doing so, jurisdiction to rule on a motion to reopen lies with the licensing board. ^{5/}

^{4/} We agree with the Board that whether those exceptions are to a partial initial decision on some issues, or to an initial decision on all issues, is not an important factor. Thus, as used in our holding and elsewhere in this opinion, "initial decision" encompasses "partial initial decision." We also attach little or no significance to the subject matter raised by such a motion to reopen -- i.e., whether it relates to issues already decided by the Board, still pending before it, or not previously raised at all.

There is also no consequence to the fact that Del-Aware timely filed exceptions to the Board's March 8 partial initial decision subsequent to the filing of its reopening motion. Those exceptions were apparently filed to preserve Del-Aware's appeal rights, a particularly prudent course given the procedural uncertainties involved here. (In an order entered March 25, 1983, we deferred briefing of Del-Aware's exceptions while its motion remains pending.) They do not serve to oust the Licensing Board of jurisdiction over the reopening motion.

^{5/} See, e.g., South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC ___, & n.9 (Sept. 28, 1982) (slip opinion at 5-6 & n.9); ALAB-710, 17 NRC ___, __ n.3 (Jan. 13, 1983) (slip opinion at 2 n.3).

For a discussion of appeal board sua sponte review, see Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC ___, - ___ & n.4 (Sept. 1, 1982) (slip opinion at 4-7 & n.4). Generally, the appeal board either completes such review or extends the time for doing so within 45 days of issuance of an initial decision in a licensing proceeding. See 10 CFR § 2.760(a).

Given the absence of any clear administrative guidance on the matter, common sense and the realities of litigation dictate this result. As Judge Cole correctly points out in his dissenting statement, until exceptions are filed the Licensing Board, by virtue of its extensive involvement with the case, is obviously better suited to rule in the first instance on the merits of a motion to reopen a record that provides the factual predicate for its own initial decision. ^{6/} But more importantly, until exceptions are filed, there is literally no appeal to invoke our jurisdiction (see generally 10 CFR §§ 2.762(a), 2.785) and, necessarily, we have no familiarity with the case. ^{7/} (In this sense, an appeal board is in the same posture as a court of appeals during the time between issuance of a trial court judgment or final agency order and the filing of the appeal or petition for review.) The Licensing Board

^{6/} The significance of familiarity with the case in ruling on a motion to reopen cannot be overstated. For one thing, it means that the motion will likely be ruled upon more quickly. Further, one of the criteria determining the disposition of such motions is whether a different result might have been reached if the new material had been considered previously. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980). Generally, the initial decisionmaker is in the best position to determine if that is the case.

^{7/} In many instances, an appeal board is not even constituted until exceptions have been received.

correctly points out that NRC appeal boards have broader powers than most appellate bodies: we review initial decisions sua sponte (see note 5, supra), and in exceptional circumstances we can take evidence and make our own factual determinations. But neither of these powers enhances our knowledge of a proceeding before it reaches our docket or operates to give us jurisdiction over an initial decision immediately upon its issuance. 8/

In addition to taking advantage of the Licensing Board's greater familiarity with a case, our holding that the filing of exceptions triggers appeal board jurisdiction has other benefits. By fixing a time certain for the transfer of jurisdiction, the possibility of dual jurisdiction over the same issues is foreclosed. On the other hand, this approach has a certain amount of flexibility as well: where the filing of exceptions has preceded a motion to reopen and an appeal board is obliged to rule on the latter, it always has the option of -- in addition to granting or denying the motion -- referring

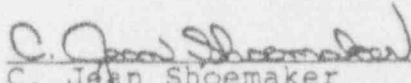
8/ In suggesting that an appeal board is familiar enough with a hearing record to be able to rule on a motion to reopen filed immediately after the initial decision, the Licensing Board gives great weight to the appeal board's sua sponte review responsibilities. LBP-83-25, supra, 17 NRC at __, __ (slip opinion at 12, 15-16). Such weight is misplaced. Sua sponte review does not begin until the time for filing exceptions has expired and, in many cases, is deferred some months in view of the priority given bona fide appeals.

it to the licensing board below for action.^{9/} Thus, attempts to "forum shop", as envisioned by the Licensing Board, may prove futile.

The Licensing Board's decision in LBP-83-25 is reversed, and Del-Aware's "Request for Late Filed Contention V-26" is remanded to the Board for disposition on the merits. ^{10/}

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

^{9/} In such circumstances, the appeal board would likely defer briefing of the appeal so as to avoid piecemeal or concurrent review. This practice would be consistent with that of many federal appeals courts, where briefing of a petition for review of "final" agency action is deferred pending agency resolution of residual matters, such as a motion to reopen. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985 (1981).

^{10/} Briefing of Del-Aware's appeal (see note 4, supra) remains deferred until further order.