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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Philadelphia Electric Company)	Docket Nos. 50-352
)	50-353
(Limerick Generating Station,)	
Unites 1 and 2))	

APPLICANT'S ANSWER TO "MOTION OF INTERVENOR
DEL-AWARE UNLIMITED, INC. FOR CHANGE OF HEARING
SCHEDULE, CONSOLIDATION OR TO STRIKE STAFF TESTIMONY"

Preliminary Statement

On September 27, 1982, only one week prior to the scheduled commencement of the evidentiary hearing on supplemental cooling water issues scheduled by the Atomic Safety and Licensing Board ("Licensing Board" or "Board") on July 13, 1982, 1/ Del-Aware Unlimited, Inc. ("Del-Aware") filed a motion 2/ which seeks to postpone the scheduled hearing. In effect the motion belatedly asks the Board to overturn its orders which established the law of the case on hearing the "water issues."

1/ See Order (July 13, 1982).

2/ Applicant responds in its Answer herein to the Brief in Support of Motion filed concurrently by Del-Aware with its motion. The undersigned counsel for Applicant did not receive the motion and brief in hand until mid-day September 28, 1982. Although the Staff advised that Del-Aware had filed motions to strike Staff testimony, they were not served on Applicant.

Del-Aware also seeks to consolidate issues pending before the Director, Nuclear Reactor Regulation ("Director"), pursuant to a petition filed by Del-Aware under 10 C.F.R. §2.206 on July 2, 1982, with the issues involved with the admitted contentions in the operating license proceeding before the Board. Alternatively, Del-Aware asked that the Licensing Board strike the prepared written testimony submitted by the NRC Staff in its entirety.

This extraordinary request by Del-Aware, filed only a few days before the start of the hearing, is a transparent attempt to distract the Board's and parties' attention from the fact that Del-Aware has almost wholly failed to make any semblance of a proper evidentiary presentation by way of prepared direct testimony. Both the Staff and the Applicant have objected vigorously to the bulk of the written testimony submitted by Del-Aware in support of its three contentions. Even a cursory review of these motions to strike and the submitted testimony clearly demonstrates the absence of any evidentiary basis to sustain Del-Aware's position on the contentions.

In view of these circumstances, Del-Aware has elected, as a last-minute tactic, to challenge the authority of the Licensing Board to adjudicate supplemental cooling water contentions in the manner set forth in the Board's Special Prehearing Conference Order ("SPCO"), dated June 1, 1982. Del-Aware ignores the fact that it elected not to seek

reconsideration regarding the Board's accelerated schedule, thereby acquiescing in the schedule and waiving any objection to its implementation. Having induced the Board and the other parties to rely upon its lack of any objection at that time, Del-Aware is now estopped from asserting its impropriety or illegality, especially at this late stage.

The other matters raised by Del-Aware are also without merit. In particular, Del-Aware's reckless and unprofessional accusations against Applicant's witnesses, based upon its own misinterpretation of statements by the witnesses at depositions, are not only baseless but appalling. It is regrettable that a party would resort to such fabrication as a tactic to compensate for its own inability to proffer "relevant, material, and reliable evidence" ^{3/} In any event, this is a matter for consideration at the hearing or in post-hearing pleadings, not in prehearing argument of counsel.

Finally, the Licensing Board has already ruled that matters pertaining to construction impacts are beyond its jurisdiction, and these particular issues are now pending before the Director pursuant to Del-Aware's petition under 10 C.F.R. §2.206. Applicant responded to the petition on September 3, 1982, and likewise responded on September 29, 1982 to a supplement to the petition. Accordingly, the motion by Del-Aware should be denied in its entirety.

3/ 10 C.F.R. §2.743(c).

Argument

- I. Del-Aware Waived Any Objection to the Licensing Board's Accelerated Schedule For a Hearing and is Estopped From Asserting Any Objection at This Time.

In its SPCO, the Board announced its schedule for an accelerated hearing on supplemental cooling water contentions, including its intention to hear testimony from the Staff in advance of its completion of the Final Environmental Statement ("FES") for Limerick. ^{4/} The Board stated:

Accordingly, in order to avoid the risks of rendering the above portions of contentions substantially moot and/or requiring the Applicant to undue costly (in time and money) construction work, we determine that every effort should be made to resolve the above summarized issues prior to construction of the Point Pleasant intake and associated pump station and the Bradshaw Reservoir. . . .

. . . . For the purpose of the identified limited issues, there is no need to await the issuance of the Staff's complete formal environmental statements on all issues related to environmental impacts of operation of Limerick. The Staff should give priority to completing its review of the environmental impacts alleged in these contentions so that a decision on these issues can be made by this Board prior to construction of pertinent facilities.

The Board expressly permitted objections to the SPCO in the

^{4/} SPCO at 88-89.

form of requests for reconsideration under 10 C.F.R. §2.751a(d). 5/

Accordingly, on June 28, 1982, the Staff filed a request for reconsideration of the SPCO, noting that, in the Staff's view, the Board's decision was inconsistent with the Commission's regulations implementing NEPA. 6/ Essentially, the Staff pointed out that the regulations require it to offer the FES in evidence in any proceeding involving an application and that it did not anticipate completion of the Draft Environmental Statement for Limerick until well after the date scheduled by the Board for the hearing. Although a request for reconsideration was filed by Del-Aware on other points, no objection was lodged with regard to the Board's requirement that the Staff present evidence on Del-Aware's admitted contentions prior to completion of the Limerick FES. 7/

In a subsequent Memorandum and Order the Licensing Board rejected the Staff's arguments as inconsistent with the spirit of NEPA and reiterated its intention to follow the accelerated schedule. 8/ Again, Del-Aware asserted no position to the contrary and did not request the Licensing

5/ Id. at 159.

6/ See NRC Staff's Request for Reconsideration at 10-13 (June 28, 1982).

7/ See Request of Del-Aware Unlimited, Inc. for Reconsideration (June 17, 1982).

8/ Memorandum and Order at 15-16 (July 14, 1982).

Board to certify to the Commission the issue of whether the Board had authority to require the Staff to submit evidence on the three contentions prior to issuance of the FES.

Only after three months of intensive prehearing discovery and submission of prepared written testimony has Del-Aware now, for the first time, asserted that the Board lacks authority to take such action. In effect, Del-Aware is seeking yet another reconsideration of the Board's previous holding, and it has done so without authority and well in excess of the time provided for by the regulations and the Board's SPCO. It is clear that Del-Aware has waived any objection it might have had to the accelerated hearing schedule. Indeed, by actively pursuing its contentions through intensive discovery and hearing preparation, similarly pursued by the Applicant and Staff, it has affirmatively acquiesced in the schedule fixed by the Board. It is therefore estopped from asserting at this late juncture that the Licensing Board lacked authority to order such an arrangement. The Board's rulings in its SPCO and subsequent order therefore constitute the law of the case on this issue. 9/

Time and again the Appeal Board has reiterated the principle that a party which "[f]ail[s] either to raise satisfactorily a particular factual issue or (once the

9/ See generally Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB "Memorandum and Order" (February 12, 1981) (slip op. at 6-7).

record has been closed) to express himself in the prescribed manner regarding how that issue should be resolved . . . is scarcely in a position, legally or equitably, to protest the determinations made by the Board in connection with it." ^{10/}
For the same reasons, a party which has failed to object to a Board's scheduling order and which has actively pursued the litigation for months, is estopped from asserting on the eve of the hearing that some aspect of the schedule is improper or unauthorized by the Commission's regulations. ^{11/}

II. The Testimony by Applicant's Witnesses at Depositions and in Their Prepared Submission Is Correct and Consistent.

In a further effort to camouflage its own failure to present any semblance of an affirmative case in chief, Del-Aware cites to portions of depositions of Applicant's witnesses and other documents which Del-Aware contends include inconsistent statements. This weak attempt to discredit Applicant's witnesses by twisting their statements and taking them out of context is entirely without merit and reflects, at least, Del-Aware's basic misunderstanding of

^{10/} Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391, 1396 (1977), quoting Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974).

^{11/} It has been ruled that a party to an NRC proceeding may be estopped by its conduct from asserting a position contrary to its previous representation. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), Docket No. 30-6931, "Memorandum and Order" (March 31, 1982) (slip op. at 8-9).

NWRA's and Applicant's plans for construction at Point Pleasant and the Limerick facility's use of the Point Pleasant diversion for preoperational testing and commercial operations.

Del-Aware's discussion of what Mr. Bourquard stated at the deposition manifestly misstates and distorts his testimony. Del-Aware's counsel conceives that the four phases set forth in the attachment to Mr. Bourquard's letter to the Corps of Engineers, dated September 9, 1981, for the work to be performed at Point Pleasant must be performed sequentially. Mr. Bourquard made abundantly clear in the testimony (Tr. 46-56) that this was not the case. In this letter the work involving the intake is included in "Phase 3." Obviously, if work had started in September, 1981, one or more of the other phases would necessarily have to commence because under the conditions imposed by the Delaware River Basin Commission, work in the river is prohibited except between November and March. ^{12/} Specifically, Del-Aware's counsel repeated the question several times and Mr. Bourquard continually pointed out that the phases need not be done in sequence. Because Del-Aware has conveniently overlooked these facts, the referenced pages of the transcript have been attached for the Board's convenience.

Del-Aware also claims an inconsistency between Applicant's estimate to the NRC Staff for the completion of

^{12/} DRBC Docket No. D-65-76 CP(8) (February 18, 1981)
(Condition N).

Limerick Unit 1 and its representations to the Licensing Board regarding the need for the Point Pleasant diversion to provide cooling water for preoperational testing. The "inconsistency" which Del-Aware detects simply does not exist. Fuel loading occurs immediately at the end of construction and preoperational testing. Accordingly, a targeted July-October 1984 fuel loading is fully consistent with an estimated date for completion of construction in October 1984. In any event, it is hoped that construction of Limerick Unit 1 will in fact be completed prior to October 1984. Del-Aware has also overlooked the fact that cooling water from Point Pleasant will likely be necessary for the completion of preoperational testing for some three months prior to the fuel loading date. ^{13/} Preoperational testing also includes testing the water delivery system. Further, once the diversion has been initiated, Applicant is obliged under conditions imposed by DRBC to maintain a flow of 27 cfs in the East Branch of the Perkiomen Creek during its normal low flow periods and 10 cfs during the rest of the year. ^{14/}

The assertion by Del-Aware that Applicant has estimated April 1985 for completion of the Point Pleasant project is

^{13/} See Applicant's Supplemental Response to Interrogatory 12 at p.1 (September 15, 1982).

^{14/} See DRBC Docket No. D-79-52 CP at p. 6 (February 18, 1981).

another example of its misunderstanding of a particular document. ^{15/} Had counsel asked about the document at the deposition, its purpose would have been explained to him. It is a management tool used to estimate a construction schedule on the basis of a normal 40-hour, single shift work week is used to determine whether increased shift activity and/or overtime might be required. In fact, NWRA in its request for bids has specified that the contract work, including the Point Pleasant intake, must be completed in time for operation in mid-1984 (i.e., 560 days after commencement).

Del-Aware's allegations regarding NWRA's having missed its schedule are overstated. It is correct that the request for bids were issued on September 3, 1982. However, ample time remains for the contracts to be awarded such that work can commence on or before December 15, 1982. Del-Aware's implication that the fact that County commissioners have requested a financial analysis would delay approval of the contracts is incorrect according to our information. The Applicant understands that the report will be submitted in November and there is no reason to believe that review of this analysis will in any way delay awarding the bid.

With regard to the Bradshaw Reservoir, Applicant is pursuing its application before the Pennsylvania Public

^{15/} Motion of Intervenor Del-Aware for Change of Hearing at 4. (Deposition Exhibit D-37-1 for identification).

Utility Commission ("PUC") for a finding of necessity for the pumphouse. Applicant has no reason to doubt that such a finding will be made. The PUC hearing has been held and any objections raised at the hearing have been withdrawal. The approval is expected in the near future. In any event, whether or not Del-Aware considers construction of the Bradshaw Reservoir prior to such time "improvident," rather than good engineering practice, is not the basis for any action by the Licensing Board.

As to the availability of materials for installation in the river, Del-Aware incorrectly assumes that his fancied delivery time of nine to twelve months would prevent in-river excavation. The document upon which Del-Aware relies (D-66 for identification) provides another instance where counsel did not inquire to determine its nature. Had counsel examined D-67 carefully, he would have noted that it is a January 1981 document concerning the Johnson screens for the Perkiomen intake, not Point Pleasant.

Assuming such a lead time, however, for the Johnson screens for the Point Pleasant intake, it has nothing to do with the concrete piping which must be emplaced in the river and into which the Johnson screens will be installed. This piping can be obtained in about three months.

In any event, the critical portion of the work to be performed in the river is the excavation for the intake structure concrete piping, particularly including whatever blasting may be required to remove the rock which may be

present. If working conditions in the river permit, the concrete piping could be installed this winter. If not, it would be installed next year after the silting, which will occur, has been removed by suction. It is therefore quite possible to complete the installation of the concrete piping work for the intake this winter.

With regard to the Staff's environmental review, no showing has been made to support Del-Aware's rather ironic allegation that the Staff is unprepared for the hearing. A review of the Staff's prepared testimony demonstrates its relevance and thoroughness.

Another major defect in Del-Aware's motion is its further arguing with the Board to change its rulings as to its jurisdiction over construction impacts. The Licensing Board has repeatedly rejected this proposition and, pursuant to the Board's suggestion, Del-Aware has in fact requested, by letters dated July 2 and August 13, 1982, that the Director take action pursuant to 10 C.F.R. §2.206 regarding construction impacts. Applicant responded to this request by submittals dated September 3 and September 30, 1982. There is no basis for the Licensing Board to respond to Del-Aware's continued pressure regarding construction impacts.

Finally, Del-Aware's contention that the licensing proceeding should be suspended because of the decision by the Pennsylvania Public Utilities Commission on August 23, 1982 is totally lacking in merit for the reasons previously

discussed by Applicant in opposition to Del-Aware's request to amend its contentions. ^{16/} Del-Aware's speculative allegations regarding this decision and its possible outcome are not a basis to postpone the scheduled hearing.

Conclusion

The Licensing Board should reject this last-minute attempt by Del-Aware to delay the scheduled evidentiary hearing on supplemental cooling water contentions. Resort to such delay tactics as the instant motion and Del-Aware's continued pressure on the Board to change previous rulings, and its equally belated attempt to amend its contentions, at a point when the Licensing Board and the parties are necessarily focusing upon hearing preparation, cannot fairly be characterized as responsible actions. As the Appeal Board has noted, "[t]he line between zealous advocacy and overreaching harassment is a narrow one." ^{17/}

In overstepping this boundary, Del-Aware has also unfairly attacked the integrity of Applicant's witnesses. While a presiding licensing board's primary adjudicatory function is to make the necessary findings of fact and conclusions of law pertinent to the application for

^{16/} See Applicant's Answer to "Application for Approval of Petition to Amend Contentions" submitted by Del-Aware Unlimited, Inc. at 6-9 (September 24, 1982). As a matter of information, the Applicant filed its appeal of the PUC decision on September 23, 1982.

^{17/} Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 1391, 1396 (1977) (footnote omitted).

operating licenses in this proceeding, it also bears important responsibility for the conduct of the proceedings in a manner consistent with the Commission's Rules of Practice. These concerns should also guide the Board in its disposition of Del-Aware's motion.

For the reasons discussed more fully above, the motion to reschedule the hearing and other requested relief should be denied.

Respectfully submitted,

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October 1, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF :
PHILADELPHIA ELECTRIC COMPANY : DOCKET NOS.
 : 50-352
(LIMERICK GENERATING STATION : 50-353
UNITS 1 & 2) :

Depositions of Vincent Boyer,
Haines Dickinson, Paul Harmon, and Everett Bourquard,
taken on behalf of the Intervenor, at the law offices
of Sugarman & Danworth, Suite 510, North American
Building, Philadelphia, Pennsylvania, on Friday,
August 6, 1982, beginning at 10:10 a.m., before
Kathleen S. Seiter, a Registered Professional Reporter
and Notary Public.

MR. CONNER: Would you give us back the stuff you examined, so it doesn't get mixed up?

MR. SUGARMAN: Oh, yes.

Off the record.

(Discussion off the record.)

BY MR. SUGARMAN:

Q While Mr. Harmon is gone, I will go back onto this -- perhaps we can deal with the timing question at this point.

Mr. Bourquard, if I may ask you, and if some other witness needs to answer, that would be helpful, have you been responsible for specifying the timing aspects of the project? In other words, the construction scheduling.

(Mr. Bourquard responding)

A You mean when construction would start?

Q I mean, the elements of construction, the phasing of the construction by the contractor.

Have you designed that, or have you prepared that material yet?

A Yes.

Q Does it exist, with respect to Point Pleasant, I'm talking about?

A Yes.

Q Is there some reason why that was not produced?

A Well, it was furnished to U.S. Army Corp of Engineers. And I think you have a copy of it.

Q I understand what you're saying. When was that furnished to the Corp of Engineers?

A I think it was September of '81. But I'm guessing now.

Q Have you prepared any documents on construction phasing since that time?

A No. Except there was a -- there was one part that was taken out and submitted to DER, in connection with the canal relocation.

Q One part of it was taken out?

A Well, it was done by phases. And one phase related to the canal, and for the canal crossing permit. And we submitted that part of it.

Q I want to show you a document.

MR. SUGARMAN: I want that it be marked as D-4 for identification. It is

the letter from E.H. Bourquard to Baldwin,
dated September 9, 1981.

(Letter dated September 9, 1981,
to Mr. Baldwin from E.H. Bourquard, marked
as Exhibit D-4 for identification.)

BY MR. SUGARMAN:

Q I will ask you, Mr. Bourquard, if that's the
document you were referring to?

(Mr. Bourquard responding)

A Yes. That's September 9, 1981.

MR. CONNER: Do we have a copy of
this?

MR. DICKINSON: I would think so.
Yes, I guess.

BY MR. SUGARMAN:

Q Can I understand that these phases, as
described in D-4, are sequential? That is, that the
first phase will be completed before the second phase
starts?

(Mr. Bourquard responding)

A It wouldn't necessarily have to be, no.

Q But was that your plan?

A No, not necessarily. We were given the phases in which the work would be done. But it wouldn't necessarily have to be done in that fashion.

Q But is this the essence -- I'm just trying to say, not is this completed. But as I see it, this document looks to me like it says that this is one way to do it.

The first phase is the installation of the intake conduit under the canal. The second phase is the installation of the remainder of the intake conduit and gate well, et cetera.

MR. CONNER: Mr. Bourquard, do you want to refresh your recollection?

MR. BOURQUARD: Yes, I would like to see it.

A You will note in here, it says the construction procedures for installation of the facilities comprising the Point Pleasant Pumping Station intake, will require the following general activities, the sequence and extent of which may be varied by the contractor within the constraints imposed by the specification and by pertinent permit requirements.

Q And have you prepared the specifications yet?

A We're in the process of doing that now.

Q Will you be specifying any phasing different from that in D-4?

A No. Not generally, no. No. It may go into more detail.

Q How long is it estimated that phase one -- how much time will phase one consume?

A Offhand, I don't know. I would have to check back at the detailed --

Q Just generally, general estimate, engineering judgment, if you like, more or less than six months?

A I would say probably more than six months. The first phase is where we put the intake on the canal, and would probably be somewhere three to six months.

Q Is there a reason why that is phased first?

A No. I think this just happened to be a political part of it. And it looks like we will not do that first.

One of the reasons being, that they probably will do blasting elsewhere, rather than under the canal part of this.

TIMING
2/2/76

And another condition would be, depending upon the time of year that we have to start the work. We are required by DRBC to undertake the work in the river between November and March.

Q And when you find out what part of the year you will start, then you will know what the phasing is? Is that what you're saying?

A Yes. The contractor will set up the phasing.

Q What is the constraint in terms of projection completion? What is the limiting element, time-wise?

A I don't quite get what you mean by that.

MR. CONNER: You mean, how soon does the contractor have to be done?

MR. SUGARMAN: No.

BY MR. SUGARMAN:

Q What is the limiting activity? What is the activity which is going to take the longest?

(Mr. Bourquard responding)

A Oh. Well, the construction of pumping station, I would guess. Yes.

Q By the pumping station, you mean the building?

A Yes.

Q And would I be correct in saying that that's about 25 months?

A No. It won't be that long, no.

Q Again, the document is being copied, but I remember seeing a bar chart critical paths, that showed the pump station, your estimate, 22 months, and PECO changed that to 25 months. Or maybe they estimated 22, and you changed it to 25.

A Well, I think the total project will probably take about two years.

Q About three years?

A Two years.

Q Two years.

A And while we may have a bar chart, I'm sure it will be all the parts of the project may be worked on at one -- concurrently.

It won't necessarily be a contract that we will work on a particular area, and just let the rest of it sit there.

If feasible to work on it, I'm sure he will do that.

Q Are there any constraints that require that any

of your phases -- you have three phases there -- to be done in any particular sequence, other than what you just described?

A No. No. It will be --

Q There is nothing in the specifications that requires that it be done in any particular sequence?

A No, no. Other than the subject, of course, to the constraints that are imposed by the DRBC, DER, and other regulatory agencies. Yes.

Q And the only one that you know of is the one that you just referred to?

A DRBC's, yes.

Q What would it do to the construction schedule, if anything, to go into and do the river portion of the construction in the winter of '83-'84, as opposed to the winter of '82-'83?

Does it make any difference which November to March period it is done in?

A Yes, I would say very much so. I hope we can get some of the work done during this coming year.

Q What difference would it make to the completion of the project?

A Well, he's limited -- in other words, he is working during the winter months. And he will try to perform this in times when the water is low enough to give him an opportunity to do it.

So he will be taking advantage of low water at every opportunity, I'm sure. So he would start in as soon as possible.

Q Well, is the work in the river going to be completed in one winter or two winters?

A Well, it depends on, I would say, how much high water he gets.

Q Can you go into that in more detail, please?

A Well, he's going to be doing the work from barges. And during a high flow period, he's not going to be able to get much work done.

It is just simply a case that he won't be able to get at it.

Q I beg your pardon?

A He won't be able to get at it when they have high flows in the river.

Q Have you made any projections, in making up your estimated times of completion, as to the like-

likelihood of flows of such levels as would preclude him getting into the river?

A No. No. We didn't say that above a certain level, he wouldn't be able to get into it, or below a certain level, he would. No, we've done nothing like that.

Q And what is that certain level?

A I say we have not done that.

Q Do you have any idea what level that might be?

A No.

Q Do you have any idea whether that level has historically occurred, whatever that level might be? In other words, whether there have ever been flows in the river, in November to March, that would preclude his working?

A No. I don't know any particular year when it happened. But I'm sure there have been flows in November to March that would have kept him from doing work.

Q How can you know that without knowing what those flows would be?

A Well, I have a generalized idea. I haven't

gone down in pinpoint as to what flow would stop him, and what flow would not stop him.

Q What is the basis of your generalized idea?

A Well, the fact that, as you get higher flows, you get higher velocities. And you have a problem keeping your equipment anchored in place.

Q At what flow would the velocity be such as to give him a problem?

A This, I don't know.

Q I see. When is Limerick scheduled to first need water from Delaware River Unit One?

(Mr. Boyer responding)

A Summer of 1984.

Q And for what purpose? Is that for operating?

A For preliminary operation, yes. The final check out stage and preliminary operation.

Q And you're estimating the final check out stage and preliminary operation for the summer of '84?

A Fuel load is scheduled between July and October, 1984.

Q And so when would the final preliminary operation take place?