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

In the Matter of	Docket No. 50-352 50-353
PHILADELPHIA ELECTRIC COMPANY	
(Limerick Generating Station, Units 1 and 2)	October 20, 1982

CONFIRMATORY MEMORANDUM AND ORDER
(DENYING MOTION OF DEL-AWARE TO CHANGE HEARING SCHEDULE)

This Memorandum and Order confirms the substance of the ruling made on October 4, 1982, on the record of this proceeding. Tr. 755-62.

On September 27, 1982, intervenor Del-Aware Unlimited, Inc. filed a motion asking the Board to postpone the hearings scheduled to begin October 4, 1982. Del-Aware argued that the hearings may not proceed in the absence of, at a minimum, a draft environmental statement (DES).

The Staff had previously objected to the scheduling of the hearing at this time because the final environmental statement (FES) would not

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be available. See Memorandum and Order, slip op. at 17 (July 14, 1982). In our Memorandum and Order of July 14, 1982, we acknowledged that we could not force the Staff to reach a position on the limited issues which are to be heard during the October hearings. However, we discussed the advantages of completing hearings on these issues before construction on the supplementary cooling water system commenced.*/ We also noted that in holding hearings on the three contentions in question, the Board would not be addressing the ultimate cost/benefit balance. Id. at 15-18. See also Special Prehearing Conference Order (SPCO), LBP-82-43A, 15 NRC____, slip op. at 87-89 (June 1, 1982). Therefore, the cases now cited by Del-Aware are inapplicable to this limited hearing.

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*/ The Board explained:

> The courts have emphasized that Congress intended that agencies give serious consideration to environmental costs and that this requires agencies to consider actions to avoid these costs. Hence, the courts have stated they will not permit NEPA to become a "paper tiger" and compliance with it "a pro forma ritual." See Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1114, 1128 (D.C. Cir. 1971). It is commonly recognized that as construction continues, the cost of corrective action to minimize environmental harm may increase, even to the point where such action is not reasonably possible. Id. at 1128; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 959-60 (1978); Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977). In an effort to comply with Congress's intent in enacting NEPA, the Board intends to consider these contentions before construction has advanced so far that there is no realistic opportunity for it to order actions which it may determine are necessary to minimize harm to the environment.

Order at 3-4.

Nothing that has occurred since our July 14 order has convinced us that the scheduled October hearing is an inappropriate time to consider these issues. The advantages, discussed in the July order, of holding the hearings before construction begins remain. In addition, the Staff has prepared for the scheduled hearing, and its prefiled testimony indicates that it has been able to reach some useful conclusions.

Del-Aware acknowledges that the Board scheduled these hearings in October to insure timely consideration of environmental matters. See Del-Aware's Brief in Support of Motion at 12. However, Del-Aware argues that it is no longer necessary to hold the hearings at this time since, according to Del-Aware, construction need not or can not begin in December 1982, as originally scheduled.

Assuming arguendo that Del-Aware is correct that construction could be delayed beyond the original schedule, the Board does not accept that that warrants the postponement of these hearings, particularly at this late date. The Board does not in the first instance control the construction schedule. Nor is a decision by this Board necessary before construction can commence. The construction is the subject of a previously issued valid FES, unless relief being sought as to changes in construction impacts alleged by Del-Aware is granted by the NRC Staff Director of Nuclear Reactor Regulation pursuant to Del-Aware's 10 CFR § 2.206 petition. See SPCO, slip op. at 82-86.

In many cases the construction of the supplementary cooling water system would already have proceeded, and any mitigation measures required by the Board at the operating license stage would be after-the-fact modifications. Realizing that it was preferable to consider these matters and any necessary mitigation measures before construction began, the Board took advantage of the unbuilt status of the project and scheduled hearings before its planned construction. However, if due to Del-Aware's insistence the hearings are not held as scheduled, the construction may continue. The purpose of the hearing is to consider whether measures in advance of construction are needed to mitigate operational impacts. If we adopted the "wait and see" attitude, which would result if Del-Aware's request for long delay was granted, the advantages attributable to holding the hearings before construction might be lost.

This does not mean that an FES is not required before an operating license is issued. Nor does it mean that contentions could not be raised based on that FES. See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ____, slip op. at 11-18 (1982). However, the FES is not necessary for this very limited hearing.

We note in addition that this extraordinary request by Del-Aware is very late. It has been filed very close to the beginning of the hearing, after three months of intensive discovery and other hearing

preparation by the parties and the Board. There is no reason given or apparent as to why this matter was not raised by Del-Aware at the time it was raised by the Staff in June 1982, as an objection to the Special Prehearing Conference Order, or even before.

Del-Aware's motion asks the Board to consider again a matter which we have considered extensively, beginning with the January 1982, special prehearing conference, and in written rulings thereafter. See SPCO, slip op. at 82-89; Memorandum and Order, slip op. at 2-5, 15-18 (July 14, 1982). When a party, without giving any new reasons or any new data, continuously in effect seeks reconsideration of rulings thoroughly considered previously, we believe that party oversteps the bounds of zealous advocacy, and we take note of that in this instance.

We decline to certify this question to the Commission or to the Appeal Board. There is nothing in our ruling here that is inconsistent with our previous rulings, for which appellate review was never sought.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
October 20, 1982