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 Nos. 50-352-OL 50-353-OL
PHILADELPHIA ELECTRIC COMPANY	
(Limerick Generating Station, Units 1 and 2)	March 17, 1983

MEMORANDUM AND ORDER DIRECTING PARTIES TO ADDRESS JURISDICTION TO RULE ON DEL-AWARE'S "REQUEST FOR LATE FILED CONTENTION V-26" AND CONFIRMING EXCLUSION OF CONTENTION V-25

On March 8, 1983, the Board's "Partial Initial Decision (On Supplementary Cooling Water System Contentions)" (PID) was issued and served by deposit in the mail. See 10 C.F.R. § 2.712(d)(3). On that same date, Del-Aware served by deposit in the mail a "Request for Late Filed Contention V-26". Contention V-26 relates to minimum flow objectives of the Delaware River as managed by the Delaware River Basin Commission (DRBC). Del-Aware asserts that it is based on information which is new and material to the matters considered at the evidentiary hearing.

We agree that the subject of Del-Aware's motion is related to the matters considered in the P.I.D. Moreover, the subject of the supplementary cooling water system is unrelated to the other contentions

(raised by other intervenors) pending before us. Indeed, in a cover letter Del-Aware requests that the petition also be considered as a motion to reopen the record. We agree that the substance of Del-Aware's motion may fairly be so construed.

Although apparently unknown to Del-Aware due to the coincident service by mail of its motion and the P.I.D., Del-Aware's motion was not served prior to the issuance or service of the P.I.D. See 10 C.F.R. 2.718(j). In a recent order, the Appeal Board held that it, and not the Licensing Board, had jurisdiction to rule on a motion to reopen filed after exceptions had been taken. Metropolitan Edison Co., (Three Mile Island, Unit 1), ALAB-699, 16 NRC ___ (slip op. at 5-6) (October 27, 1982). The Appeal Board also noted (slip op. at 6 n.6):

> We leave for another day the question of where jurisdiction lies to rule on a motion to reopen filed after the issuance of the initial decision but before the filing of exceptions.

It appears that day has arrived. Accordingly, the Applicant and NRC Staff shall address in their responses, in addition to their substantive arguments, the question of whether this Licensing Board has jurisdiction to rule on Del-Aware's motion. Del-Aware may address the

jurisdictional question if it does so in a brief filed by March 29, 1983.[1/]

The parties should consider the points discussed and the cases cited in ALAB-699, supra. To the extent they may be pertinent to the arguments of the parties, and so the parties can either support or disabuse us of certain considerations which have occurred to us at this juncture, we note the following preliminary observations and questions:

1) As noted above, there are contentions pending before us which are unrelated to the subject of Del-Aware's motion to reopen (or add a new contention). We believe this circumstance does not support a finding that we have jurisdiction to reopen the record on issues considered in the P.I.D. See Duke Power Co. (Perkins, Units 1, 2 & 3), ALAB-597, 11 NRC 870, 874 n.8 (1980). Cf. Florida Power & Light Co. (St. Lucie, Unit 2), ALAB-579, 11 NRC 223, 225-226 (1980); Virginia Electric and Power Co. (North Anna, Units 1 and 2), ALAB-551, 9 NRC 704 (1979); Public Service Co. of New Hampshire (Seabrook, Units 1 and 2), ALAB-513, 8 NRC 694 (1978). However, our preliminary

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1/ In view of the jurisdictional considerations raised in this order, and our emphasis on the need for thorough briefs on the issue, we sua sponte extend the due dates for the filing of the Applicant's response from March 23 to March 29, and for the filing of the Staff's response from March 28 to April 1. The Staff's response shall be received by the Board by 4:00 p.m. on April 1.

view, and perhaps the precedent just cited, appears to be inconsistent with the suggestion in ALAB-699, supra, slip op. at 5, based on precedent cited therein[2/], that "...a licensing board has authority to reopen a proceeding until it has issued a complete initial decision on all issues before it" (emphasis added).[3/]

2) It may be that analogies or distinctions useful to deciding our jurisdiction to consider a motion to reopen after issuance of an initial decision (but before exceptions have been filed) can be drawn from cases dealing with the question of whether a licensing board has jurisdiction to rule on a motion to reconsider its initial decision. An Appeal Board case which answered the question in the affirmative looked to the regulation governing petitions to reconsider final Commission decisions (10 C.F.R § 2.771), apparently including the time requirements of that regulation, for general guidance in the

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2/ But see Perkins, ALAB-597, which we cite above. It appears to supersede the Perkins Appeal Board's apparently preliminary observation in ALAB-591, 11 NRC 741, 742 n.3 (1980), relied on in ALAB-699, slip op. at 5.

3/ It is not readily apparent to us from the decision in the Diablo Canyon case, cited in ALAB-699, at p. 5, that it was in the posture implied by ALAB-699 -- that of no issues pending before the Licensing Board at the time the motion to reopen on a seismic issue was filed before the Appeal Board. It may be that the NRC Staff, as a party to that case, can inform us on this point.

absence of a particular provision regarding reconsideration of initial decisions. Consumers Power Co. (Midland, Units 1 and 2), ALAB-235, 8 A.E.C. 645, 646-47 (1974). See also Commonwealth Edison Co. (Byron, Units 1 and 2), ALAB-659, 14 NRC 983, 985 n.2 (1981), a more recent case apparently imputing the jurisdiction to reconsider under § 2.771 to licensing boards. However, the Appeal Board took an apparently narrower view of the applicability of § 2.771, as guidance, in the circumstance of an initial decision. Perkins, ALAB-597, supra, 11 NRC at 874, n.9.

3) Federal court procedure applicable to a motion to reopen after issuance of a District Court decision, and any rationale set forth by the courts and commentators (e.g., in comments accompanying the rules or in federal practice treatises), may be instructive.

4) Is the answer to the question of whether a licensing board has jurisdiction to rule on a motion to reopen filed after issuance of its decision but before the filing of exceptions affected by whether or not the movant actually files exceptions? Cf. Byron, supra, 14 NRC at 984 n.1. Does the decision in Three Mile Island, ALAB-699, supra, stand for the proposition that a licensing board would certainly lose jurisdiction upon the filing of exceptions, as distinguished from the expiration of the time period for filing of exceptions? (It appears to us,

preliminarily, that ALAB-699 did not consider this possible distinction.)

5) If any party believes that Del-Aware's motion may not fairly be construed as a motion to reopen, and that it is material to the question of jurisdiction if the motion is considered exclusively as a request to add a new contention, such party may so argue and we will reconsider our observation to the contrary in light of any arguments.

Contention V-25

In the March 8, 1983 cover letter to the motion discussed above, counsel for Del-Aware supplies additional information in support of the admission of Contention V-25. The information, according to Del-Aware, shows that there is "net yield" water capacity available from the Blue Marsh Reservoir and that this "suggests" the water is "substantially available" and sufficient for one Limerick unit, but insufficient for two units.

On the same date as Del-Aware's letter, we issued an unpublished Order denying Del-Aware's request for reconsideration of our earlier ruling that Contention V-25 was not admissible. That earlier "Memorandum and Order (Denying Del-Aware's Petition to Amend Contention)" (unpublished) was issued on January 24, 1983. We have accordingly viewed the argument informally provided in Del-Aware's

letter in light of whether it provides a basis to reconsider our above cited January 24 ruling and March 8 denial of reconsideration. It does not.

Del-Aware's basic argument regarding the Blue Marsh Reservoir previously has been rejected by us. As we have ruled repeatedly in the above referenced orders, in earlier orders cited in the March 8 order, and on the record when the Executive Director of the DRBC was questioned about Blue Marsh availability for Limerick (Hansler at Tr. 1206-09), the decision of DRBC that Blue Marsh capacity may not be allocated for Limerick is not reviewable by us. Del-Aware once again has failed to even acknowledge, let alone provide a basis for reconsideration, of this ruling in the order of January 24, 1983 (slip op. at 13). As noted, that ruling in turn was consistent with earlier rulings in orders and on the record, on DRBC's jurisdiction over water allocation decisions. We reiterated the point yet again in the March 8, 1983 denial of reconsideration (slip op. at 8).[4/]

In addition, we have now ruled in our March 8, 1983 order (slip op. at 7) that given our findings in the P.I.D., there appears to be no basis to contend that an alternative cooling water system would have significantly smaller operational environmental impacts than the

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4/ Del-Aware failed to provide the enclosures referenced in its letter. However, we do not require them in view of the basis of our ruling on Contention V-25.

proposed Point Pleasant diversion. This ruling is also dispositive of the issue of whether the alternative of utilizing Blue Marsh water should be considered, assuming arguendo that we may review DRBC's determinations of water allocation.

Accordingly, although it appears we have jurisdiction to reconsider our order of March 8, 1983, we decline to do so. That order (and the earlier rulings relied on therein) therefore remains as our final determination, subject to appellate review, that Contention V-25 is not admissible as an issue in this proceeding.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 17, 1983