

09/27/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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Docket Nos. 50-352
50-353

NRC STAFF MOTION TO STRIKE DIRECT
TESTIMONY OF DEL-AWARE WITNESSES

I. INTRODUCTION

By its "Order (Approving Schedule Proposed by Staff and Del-Aware)" dated July 13, 1982, the Atomic Safety and Licensing Board directed that written direct testimony for the hearing session of this proceeding scheduled for October 4-8, 1982 be received by the Board and the parties participating in this hearing session by September 20, 1982. The testimony was to be limited to the three issues related to impacts of operation of the proposed Point Pleasant intake and pumping station identified in the Board's "Special Prehearing Conference Order," dated June 1, 1982 (at 87), as modified by its "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order), dated July 14, 1982 (at 4-5). By "Memorandum and Order (Providing for Filings Related to Testimony on Supplementary Cooling Water System Contentions)," dated August 23, 1982, the Board further required that trial briefs be filed with the written direct testimony (at 2-3) and provided that any motions to strike pre-filed testimony should be received by September 27, 1982 (at 5).

DESIGNATED ORIGINAL

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On September 20, 1982, the NRC Staff and Applicant served their testimony in-hand on the Board and parties. Del-Aware, however, served on that date only a portion of the testimony it proposed to present at the hearing. Some of this "testimony" was in the form of "memoranda" to Del-Aware's counsel, which are represented as being digests of the depositions of certain witnesses whom the Board has subpoenaed at Del-Aware's request. It is unclear to Staff whether Del-Aware intends to serve any pre-filed testimony, as required by the Board, of the four proposed witnesses (Gerald Hansler, Executive Director for DRBC; George Pence of EPA, Region III; Dr. Harold Brundage, a consultant to NWRA on shortnose sturgeon; and Thomas May, a consultant to the Corps of Engineers on the impacts of the Point Pleasant intake and pumping station) for whom digests of depositions have been filed. Nor has the testimony of the other two witnesses for whom subpoenas have been issued, Messrs Richard McCoy and Joseph Miller, employees of the Fish and Wildlife Service, Department of the Interior, been received by the Staff as of the date of this motion. In its letter to the Secretary of the NRC, dated September 20, 1982, enclosing its testimony, Del-Aware stated that Messrs. McCoy and Miller have prepared written testimony for presentation in this hearing but that their testimony had not yet been approved for release by the Fish and Wildlife Service.

Since Del-Aware has not yet served any pre-filed testimony of the six subpoenaed witnesses, Staff is not in a position to file any motions to strike with respect to the testimony these witnesses may offer. Although Staff recognizes the difficulty Del-Aware faces in calling witnesses who will not appear voluntarily in its behalf, we consider its

memoranda to be an inadequate substitute for pre-filed direct testimony. Del-Aware was under an obligation to commence procedures for calling these witnesses early enough so that their testimony could be filed on September 20, 1982, as required by the Board. Staff believes, based upon a review of the memoranda prepared by Del-Aware and the representations in the "Application of Del-Aware Unlimited Inc. for Issuance of Subpoenas" as to the purposes for which these witnesses are being called, that much of their testimony may be beyond the scope of the proceeding. Since we do not, however, yet have a reliable indication of what their testimony will be, Staff reserves the right to move to strike their testimony, in whole or in part, at such time as it may be presented.^{1/}

Deficiencies in the testimony and trial brief filed by Del-Aware on September 20, 1982, have also made difficult the drafting of a motion to strike. Specifically, the pre-filed testimony does not state on what issue each item of testimony is being offered. Staff has attempted to make this identification through the trial brief. Despite the difficulties imposed by these deficiencies, the Staff has drafted this motion to strike with respect to the direct testimony of the following persons filed on September 20: J. T. Phillippe, Michael Kaufmann, Charles Emery, Stanley Plevyak, James ("Jim") Darrah, Peirce Lewis, and

^{1/} It is not yet clear whether the subpoenaed witnesses will appear. Staff does not know whether service was made by the September 23, 1982 date designated by the Board, nor whether any motions to quash have been, or will be, filed.

Richard McNutt.^{2/} The Staff also has addressed in this motion to strike the "Supplemental Testimony of James Darrah" and the "Direct Testimony of Samuel Landis," which were served on the Staff on September 22, 1982, two days after the filing date permitted by the Board. In the event that the Board does not reject this testimony due to its untimeliness, Staff requests that its motion to strike as to that testimony be considered by the Board.

This motion is based upon those considerations of whether the testimony offered is "relevant, material and reliable" and "not unduly repetitious," the standard for admissibility of evidence set forth in 10 C.F.R. § 2.743(c), which can be assessed from the testimony itself. If the Board does not grant this motion to strike, the Staff may after voir dire examination move to strike the testimony for lack of competency to sponsor particular items of testimony.

One important practical consideration should be weighed by the Board in determining whether to receive all of Del-Aware's testimony. There is only one week scheduled for this hearing session and the schedule established by the Board in order to reach a determination on these issues prior to the December 15, 1982 projected start of construction of the Point Pleasant Diversion would not as a practical matter permit any further hearing sessions. As developed in this motion, the Staff believes that much of the testimony offered by Del-Aware is not relevant

^{2/} The Staff has also moved to strike the corresponding sections of Del-Aware's trial brief.

to the three admitted issues.^{3/} The Staff and Applicant, and to a lesser extent Del-Aware, have filed testimony which the Staff believes to be relevant to a determination on these issues. It appears to the Staff that it will be difficult enough to cover this testimony within the one-week hearing session without hearing witnesses whose testimony is not focused on the three admitted issues.

For all of the reasons outlined above, Staff moves the Board to strike certain of Del-Aware's proposed testimony, as specifically identified below.

II. DISCUSSION

A. Contention V-16a

Contention V-16a states:

Noise effects and constant dredging maintenance connected with operations of the intake and its associated pump station will adversely affect the peace and tranquility of the Point Pleasant proposed historic district.

In its trial brief, Del-Aware indicates that it is offering the testimony of three witnesses, Peirce Lewis, Samuel Landis and Richard McNutt, on Contention V-16a. The testimony of Professor Lewis, who teaches geography at Pennsylvania State University, addresses the character of 19th-century canal towns with specific reference to the village of Point Pleasant. Mr. Landis's testimony concerns the

^{3/} Much of the testimony which the subpoenaed witnesses may offer also appears not to be relevant to the admitted issues.

archeological value of the Point Pleasant site. Mr. McNutt's testimony concerns his observations of ice and debris in the Delaware River at or near the proposed intake site.

Del-Aware has not offered any expert testimony on the noise impacts of the operation of the intake and its associated pump station.

1. Professor Lewis's Testimony

The conclusions stated in Professor Lewis's testimony are based on presumptions rather than on facts. The first full paragraph on page 4 reads:

Documents seem to suggest that the pump station will be a fairly large scale affair, presumably much larger than most of the buildings in Point Pleasant. It is easy to imagine this project could irreparably and irreversible damage the historical ambience of such a small and fragile nineteenth century community simply because it is inconsistent with the nineteenth century scale and character of the town.

The Staff is aware of the existence of documents which establish the dimensions of the proposed pump station. One need not speculate as to whether the pumphouse is "large scale."

The last paragraph of Professor Lewis's testimony is objectionable in that it invites speculation concerning what residents would do if confronted with presumed impacts from the construction and operation of the pumping station. Also, as Professor Lewis has not visited the area, there is nothing in his testimony to establish that the area is known to him as peaceful and tranquil and that the operation of a pumping station

there would constitute a "significant change."^{4/} Even if Professor Lewis were to visit the area between now and the time of the hearing, this "off-season" visit would not provide a basis for testimony which purports to treat the general character of the village.

As it is based on generalized speculation concerning the need to preserve the historic character of Point Pleasant with no specific reference to what if any effects the operation of the pump station will have on its neighbors, the Staff moves to strike Professor Lewis's testimony in its entirety as irrelevant to any issue raised by Contention V-16a.

2. The Testimony Of Samuel Landis

The direct testimony of Samuel Landis, filed on September 22, 1982, concerns the archeological significance of the Point Pleasant area. The impacts which Mr. Landis's testimony addresses appear to relate to construction impacts and the Board has ruled that such impacts will not be considered in this operating license proceeding. See Special Prehearing Conference Order of June 1, 1982 at 81-89. Mr. Landis's testimony does not address noise effects or constant dredging maintenance. As there is nothing whatsoever in Mr. Landis's testimony

^{4/} The peace and tranquility which Professor Lewis assumes is belied by other witnesses on whom Del-Aware has relied for testimony on other contentions. For example, Norman Torkelson, who was identified by Del-Aware as someone who would provide testimony concerning the impact of the intake structure on water quality and the effect on fish in that area and on boating and recreation, was deposed in Philadelphia on August 12, 1982, and testified that "rafts, canoes, fishing boats, outboard motor boats, jet boats, jet skis, air boats and sail boats are all present in the area." Mr. Torkelson's testimony is based on observation; Professor Lewis's on pure speculation concerning the character of the area.

which touches in any way on the admitted contention V-16a, the Staff moves to strike as irrelevant that testimony in its entirety.

3. Mr. McNutt's Testimony

At Mr. McNutt's deposition, counsel for Del-Aware represented that he was being offered as a fact witness on the conditions of the Delaware River and it was on that basis that he was deposed. Tr. 3-4. In its trial brief, Del-Aware states that Mr. McNutt will testify to the likelihood of damage to the intake structure and the need for frequent maintenance. It is not clear whether Del-Aware now intends to offer Mr. McNutt as an expert witness. The Staff objects to the receipt of expert testimony from Mr. McNutt and moves to strike all testimony which goes beyond his observations of the river. Accordingly, the Staff moves to strike the following parts of Mr. McNutt's testimony: The second sentence of the second paragraph of the first page of Mr. McNutt's testimony, beginning "South of the riffle," the last sentence of the second paragraph, and the last sentence of the third paragraph on the second page should be struck because they offer opinion testimony in an area in which Mr. McNutt is not qualified to testify and in which his counsel has represented that he will not testify.

The first sentence on the third page, "Argument is moot as to the potential," should be struck because it states an opinion to which Mr. McNutt is not qualified to testify.

The second sentence on the fourth page, "If there was something placed in the river in the path of such rock and debris, a dam would be created (similar to the picture) and the obstruction would be buried," should be struck, as it goes beyond Mr. McNutt's observation.

On the fifth page, the last sentence of the first paragraph, "If there was an intake structure in their path it would be damaged or clogged," should be struck, as the question of whether rocks and debris could damage an intake structure of a certain design is a question for an expert, not for a fact witness.

The third paragraph on the sixth page through the next to the last paragraph on the eight page purports to be expert testimony on the ability of the proposed intake structure to survive damage from ice and debris. Mr. McNutt states that he is a "certified ... manufacturing technologist," that he has expertise in "creative technology," and that he is "a person not unfamiliar with the capabilities of metal to withstand punishment." Whatever Mr. McNutt's expertise may be, it is not apparent from the recitation that he is qualified to offer an expert opinion on the need for constant dredging maintenance connected with operations of the intake and the portions his testimony identified above should, therefore, be struck.

Also, the Staff believes that the testimony of Mr. McNutt should be struck because it provides nothing probative in response to the Applicant's statement that the intake structure would not require maintenance dredging because the river bottom at the intake site is composed of rock.

B. Contention V-15 and V-16a (in part)

Contention V-15 and V-16a (in part) states:

The intake will be relocated such that it will have significant adverse impact on American shad and shortnose sturgeon. The relocation will adversely affect a major fish resource and boating and recreation area due to draw-down of the pool.

The testimony of J. T. Phillippe, Michael Kaufmann, Charles Emery, Stanley Plevyak and Jim Darrah, is offered on this contention.

1. Testimony Of J. T. Phillippe

J.T. Phillippe's testimony addresses low flows in the Delaware, i.e., flows below 3000 cfs as measured at the Trenton gage. Because DRBC has prohibited Philadelphia Electric from taking water from the Delaware for Limerick when the Trenton flow is below 3000 cfs, the effect of withdrawal at flows below that measurement need not and should not be addressed in this proceeding. The contention as admitted concerns effects of the relocation of the intake; the conditions under which water may be withdrawn by PECO is a matter within the jurisdiction of the Delaware River Basin Commission rather than this agency. (See SPCO at 70-71 and Memorandum and Order of July 14, 1982, at 10).^{5/} Therefore, Mr. Phillippe's testimony beginning at the second question on page 2 through the first answer on page 6 dealing with low-flow conditions must be struck. For the same reasons the last Q&A on that page must be struck.

2. Testimony Of Michael Kaufmann

The testimony of Michael Kaufmann addresses at some length the matter of "pollution block" downstream of Point Pleasant. Inasmuch as the Board has previously ruled that effects of the allocation of Delaware

^{5/} During the deposition of Gerald Hansler, Executive Director of the Delaware River Basin Commission, held in West Trenton, New Jersey on August 31, 1982, Mr. Hansler testified and his counsel confirmed that the 3000 cfs limitation on Delaware's taking from the Delaware for Limerick could not be waived by the DRBC except through public process. See attached pages 19, 20, 45, 46.

River water will not be considered in this proceeding because they are within the jurisdiction of the Delaware River Basin Commission, the Staff would strike testimony concerning the "pollution block." Accordingly, the paragraph beginning on page 5 and concluding on page 6, the paragraph beginning on page 6, the paragraph beginning on page 8 and the first paragraph on page 9 must be struck.

The Staff reserves the right to move to strike the last Q&A on page 11 and the first two Q&A's on page 12, which are based on the observations of Stanley Plevyak, should examination of Mr. Plevyak fail to corroborate Mr. Kaufmann's statements.

The second full paragraph on page 15 concerns the operation of the intake at flows below 3000 cfs. The Staff submits that it should be struck for the same reasons that Mr. Phillippe's testimony on the same subject should be struck. (See, the discussion of Mr. Phillippe's testimony on withdrawals under low flow conditions, supra). Similarly, the Staff would strike the last phrase under "Juvenile" on page 18: "especially during low flow".

The Board has specifically ruled out consideration of construction impacts in this proceeding. Accordingly, on page 16 of Mr. Kaufmann's testimony under the heading "Summation of Facts" the Staff would strike the phrase "The rubble created during construction" from the first sentence of the second full paragraph as irrelevant. For the same reason, on page 17, "Effects of Construction" and the two phrases thereunder and the second item on page 18 under "Eggs and Larva" should also be struck.

3. Testimony Of Charles Emery

It is not clear to the Staff how Mr. Emery's testimony relates to any issue raised by Contention V-15 and V-16a (in part). It concerns sampling techniques. Based on an encounter with unidentified employees of Radiological Management Corporation (RMC), Mr. Emery makes certain observations about the sampling techniques of RMC. The Staff is aware that one of the members of Philadelphia Electric's witness panel, Paul Harmon, is an employee of RMC. His testimony as regards his sampling techniques is more reliable than the hearsay offered by Mr. Emery. Similarly, if he appears, Mr. Brundage could speak to his sampling techniques if Mr. Brundage's sampling techniques are at issue here. Mr. Emery's testimony concerning travelling screens and the manner in which Ichthyological Associates samples them is not relevant to the issues raised by a contention concerning the impact of passive screens. The Staff would, therefore, strike the second Q&A on page 1 and the Q&A on pages 2 and 3 of Mr. Emery's testimony.

4. Testimony of Jim Darrah

Two constituent parts of Mr. Darrah's testimony have reached the Staff, the first on September 20, the second on September 22. The Staff has not yet been able to determine for what Mr. Darrah's testimony is being offered. As part of Mr. Darrah's proposed testimony, the Staff has also received photocopies of photographs which are of such poor quality that it is not possible to determine what they are intended to represent or what might be detectable on the original.

The testimony submitted on September 20th seems to relate to the bottom contour and current at the intake site. However, there is no

indication of how - or if - the current was measured. It would seem that Mr. Darrah is offered as a fact witness, as Del-Aware has not filed his professional qualifications or indicated what Mr. Darrah's profession is. As the Staff regards determinations regarding the bottom contour and current of the Delaware to be matters beyond the competence of fact witnesses, the Staff moves to strike Mr. Darrah's testimony.

C. Contention V-16b

Contention V-16b states:

Seepage of water and toxics from Bradshaw Reservoir will cause a risk of groundwater contamination and hydraulic saturation.

Del-Aware states in its trial brief that "contentions related to seepage through the more normal seepage actions have been obviated by further inquiry ... and by the substitution ... of off-site borrow material" At 9-10. The Staff understands Del-Aware to mean that it is now satisfied that seepage from the Bradshaw will not be a problem. Therefore, it would seem that contention V-16b has been withdrawn. However, in lieu of seepage, on which both the Staff and Applicant have offered extensive testimony, Del-Aware now seeks to assert that the Bradshaw will "slump," causing groundwater pollution as well as other risks to the public health and safety. Del-Aware should not be allowed to amend its contention V-16b for several reasons: (1) Applications to amend contentions, no matter how late, should be in the form of a motion and not presented in passing in a trial brief; (2) The NRC's current requirements do not include safety review of dams other than those whose failure might have radiological health and safety consequences;

(3) Pennsylvania Department of Environmental Resources, which has jurisdiction over the safety of the Bradshaw has issued a permit for its construction (and Del-Aware has appealed PaDER's award of that permit). Del-Aware has now filed testimony on this newly submitted contention. The third Q&A, on page 7 of J.T. Phillippe's testimony addresses the slope stability of the Bradshaw under proposed operating conditions. The Board should not receive testimony on a new-filed contention whose admissibility the other parties have not had an opportunity address; the Staff, therefore, moves to strike it.

CONCLUSION

For the reasons set forth above, the Staff moves the Licensing Board to strike those parts of the proposed testimony of Del-Aware identified in the body of this motion.

Respectfully submitted,

Stephen H. Lewis
by APH

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Dated in Bethesda, Maryland
this 27th day of September 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 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION TO STRIKE DIRECT TESTIMONY OF DEL-AWARE WITNESSES" in the above captioned proceeding have been served this date in-hand on the persons identified below by an asterisk. Service will be made upon the remaining persons by deposit in the United States mail, first class, or as indicated by double asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 27th day of September 1982:

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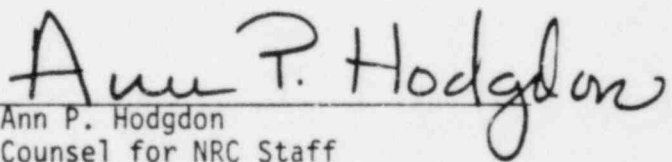
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Atomic Safety & Licensing Board**
U.S. Nuclear Regulatory Commission
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Atomic Safety & Licensing Appeal
Panel**
U.S. Nuclear Regulatory Commission
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Ann P. Hodgdon
Counsel for NRC Staff

the proposed docket was considered, and the proposed docket was voted upon.

Q Was there any discussion as to why it was appropriate, necessary, to have a stream master?

A I don't recollect. I don't recollect.

Q Fine. Now, I come back to my question.

Have you had occasion, at any time, to interpret the terms of the Philadelphia Electric diversion?

A I would not interpret the terms. I think the terms are self explanatory. They are allowed to take up to a certain amount of water from the Delaware River.

Q Is there a condition on that relating to the flow at Trenton?

A Yes, there is.

Q What is that condition?

A That condition is that the portion used by Philadelphia Electric for Limerick can be withdrawn from the Delaware River, so long as the river's flow would exceed three thousand second feet at Trenton, unless the utilities group, based upon another docket

action by the Commission, had provided off-stream storage within the basin.

Q If that off-stream storage is provided, then what is the term and condition of Philadelphia Electric's withdraw?

A Then they could draw up to the amount they are entitled to under their withdraw docket, not to exceed that, provided they release that amount from a reservoir system.

Q So, for example, if the flow is 2,000 at Trenton, and they want to withdraw 49 mgd, they may do so if they release 49 mgd from the upstream storage?

A Yes.

Q Did you have occasion to prepare a negative declaration with respect to the operation of the project

A I had occasion to prepare a negative declaration with regard to the overall Point Pleasant Project, which included the NWRA portion and the Limerick portion.

Q And would that have been prepared and dated by you approximately August 25th, 1980?

flow at Trenton.

I can't predict what docket holder, or who will come in with a request for a variance, and most important, what the action of the commissioners, or in this case, the commissioners and the parties to the Supreme Court will be, because that's a decision made by the Commission.

Q Now, in this particular case, that is, if Philadelphia Electric were to seek a variance in order to continue to maintain the operation of the Limerick Plant, in the absence of supplemental storage releases, what approvals by the Commission would be required? What are the procedures?

A The docket holder would have to ask for a variance from the Commission, in affected dockets. And probably the two affected dockets would be the one dealing with the three thousand second feet limitation, and off-stream storage, and the NWRA docket, which was the final one. There may be others.

Q What relief would have to be sought with respect to the NWRA docket? Why would a variance be required there?

A I said I'm not sure as to which of the dockets would be involved. There are, what, eight or nine. I'm not sure. There are many dockets involved with this project.

Q I'm just saying, would there have to be any change in the NWRA terms and conditions of withdraw?

A I would have to go back and look at this.

MR. GOLDBERG: You are in an area, which really is not Hansler's bag. It is probably more mine.

Let me say, whatever would have to be done -- and I wouldn't attempt to answer the question as to how, procedurally, we would go through it -- would have to be done. But I'm quite consistent, that regardless of the details of the procedure as such, that it would have to be done in a public process by the Commission.

BY MR. SUGARMAN:

Q All I was trying to drive at, this would not be a unanimous action, then it would not require the consent of the Supreme Court party?