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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,)	
Units 1 and 2))	

APPLICANT'S MOTION TO STRIKE TESTIMONY
PROFERRED BY DEL-AWARE UNLIMITED, INC. AND
MOTION TO STRIKE ABANDONED CONTENTIONS

Preliminary Statement

Pursuant to the Memorandum and Order of the Atomic Safety and Licensing Board ("Licensing Board" or "Board"), dated August 23, 1982, Philadelphia Electric Company ("Applicant") hereby moves that specified testimony or portions of testimony submitted by Del-Aware Unlimited, Inc. ("Del-Aware") in support of its three contentions be stricken for the reasons discussed below.

In some instances, Del-Aware has failed to file prepared testimony or exhibits as required or has not filed this material by the deadline set by the Board. In others, it has merely provided a memorandum containing an outline or rough notes of testimony sought from the witness or a characterization of statements made by the witness at depositions. In yet other instances, Del-Aware has submitted testimony from witnesses who were neither

identified in accordance with the Board's discovery orders nor made available for depositions.

For much of the testimony, the witnesses have offered no qualifications for the expert opinions expressed. Each of these witnesses is therefore without competence to testify concerning his conclusions. Other portions of the testimony and exhibits are illegible, incomprehensible or reproduced so poorly that it fails to meet the Board's requirement for exchange of testimony. Sponsoring witnesses for exhibits are not clearly identified. Moreover, a great deal of the testimony is irrelevant and immaterial to the three admitted contentions.

For the reasons discussed more fully below, the testimony which Applicant moves to strike does not therefore constitute "relevant, material and reliable evidence" as required by 10 C.F.R. §2.743(c). The absence of any demonstrated special expertise in many subject areas shows a lack of support for the argumentative and conclusory opinions expressed by the respective witnesses. Much of the testimony is merely philosophical in content without reference to identifiable issues and completely lacks any framework grounded in accepted scientific or technical disciplines and methodology. Further, much of the testimony constitutes an attempt to generalize concerning the witnesses' personal experience and observations without any particular nexus to the design, structure and operation of

the Point Pleasant pumping station and intake structure and the Bradshaw Reservoir.

In this context, it is appropriate to note the comment of the Licensing Board in Susquehanna, upon being advised by intervenor that it did not intend to submit direct testimony in the required prepared written form. The Board stated:

This approach is not only inconsistent with the general thrust of NRC rules (10 CFR Section 1.743(b)) but with our previously expressed goal of avoiding "trial by surprise." It would make it most difficult for the Board to formulate informed questions for the witnesses and hence to be adequately prepared for hearing. Clearly it raises a question whether that Intervenor, at least, looks upon a licensing proceeding as a forum for resolving technical questions in the fairest and most comprehensive manner, or alternatively, whether it views this proceeding merely in terms of a podium for soapbox oratory. We need scarcely add that this latter approach is intolerable and will not be countenanced by this Board. 1/

For these reasons, the testimony specifically discussed below should be stricken.

Additionally, Del-Aware has filed no testimony on two entire contentions and certain aspects of the other contention. For the reasons discussed below, the Board should strike the second sentence of Contention V-15 and V-16a (in part) and Contentions V-16a and V-16b in their entirety, as abandoned.

1/ Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597, 602 (1979).

Argument

I. General

The Board's August 23, 1982 Memorandum and Order required that the parties physically exchange testimony by September 21, 1982. Certain of Del-Aware's proposed testimony and exhibits were not provided to Applicant, Staff or the Board on that date. Moreover, Messrs. Landis, Darrah, Sigstedt, Norkevich and Morgan were not previously identified as witnesses and made available for depositions. This fails to comply with the discovery plan agreed upon by the parties pursuant to the Board's Order and constitutes an independent and separate reason for rejection of this proffered material. The following testimony and exhibits fall within this category and should not be permitted to be used as part of the intervenor's case:

1. Testimony of McCoy and Miller ^{2/} (not yet received).
2. Direct Testimony of Samuel Landis (received late on September 22, 1982).
3. Supplemental Darrah Testimony (received late on September 22, 1982).

^{2/} The allegation that the U.S. Fish and Wildlife Service is reviewing the testimony (September 20, 1982 letter to the Board from R. J. Sugarman) does not excuse compliance with the Board's Order. Del-Aware has known for some time that it intended to call these individuals as witnesses. It has not shown that it made any special effort to assure that this testimony would be timely filed.

4. "Narrative Val Sigstedt" (received late on September 27, 1982).

5. Attachments to Items 2 and 3, supra (late, illegible or incomprehensible copies).

6. "Cross section of the Delaware River at Point Pleasant prepared by S. Norkevich" (received late on September 22, 1982).

7. Series of photographs with two page explanation taken by George Morgan (received late on September 22, 1982; illegible).

8. Exhibits D-59, D-60, D-61, D-64, D-6⁵ D-67 (not supplied with Trial Brief).

9. Exhibit D-98 (McNutt Photos).

II. Del-Aware's Proffered Testimony
Should be Stricken as Specified Below.

1. Testimony of George D. Pence. Del-Aware has submitted an internal memorandum apparently prepared by a person within its attorney's law office who is unidentified as to title. The author of the memorandum has apparently reviewed Mr. Pence's deposition and restated or characterized in her own words what was said by Mr. Pence at that time. It is not even clear that this document summarizes all of what Mr. Pence stated at his deposition. ^{3/} The format of this memorandum, which was

^{3/} See, for example, the parenthetical questions at the end of this document.

evidently written without Mr. Pence's involvement, is not prepared testimony by Mr. Pence. It is not evidence. It would neither serve as a basis for the parties' cross-examination of this witness nor any finding of fact by the Licensing Board. Neither does it state Mr. Pence's qualifications to testify concerning the subject matter. Accordingly, it should be stricken.

Additionally, the "testimony" would be irrelevant and immaterial to the admitted contentions even if it were properly prepared. The memorandum merely recounts the author's view of Mr. Pence's personal opinion as to the scope of environmental review which he thinks should be conducted by or coordinated among the various concerned State and federal agencies as to the Point Pleasant diversion. Mr. Pence has shown no competence to testify as the legal (or for that matter, technical) spokesman for the Environmental Protection Agency ("EPA"). In any event, the positions EPA may or may not have taken before the Delaware River Basin Commission ("DRBC") and the U.S. Army Corps of Engineers involving the Point Pleasant project is irrelevant to the three admitted contentions.

On the only matter of possible relevance, there is no foundation for the opinion expressed as to the existence of "toxics" in the Delaware River. The "testimony" only refers to "[s]ome evidence" and "[h]istoric data" and other

unspecified "concern" about the level of toxics. ^{4/}
Furthermore, it is clear that at that point Mr. Pence is addressing the possible effects of toxics on the Perkiomen and Neshaminy Creeks, which are outside the scope of the admitted contentions. Mr. Pence's qualifications to testify as to water quality and human health effects have not been furnished and, in any event, there is no substantive basis in the proffered "testimony" for any conclusions as to the level of toxics in the Delaware River. This "testimony" should be stricken in its entirety.

2. Outline of deposition of Harold Brundage.

Applicant moves to strike this testimony on the basis discussed above that it is not prepared testimony as required by the Licensing Board, but is merely the statement of one person's impression of Mr. Brundage's deposition. Except to the extent that it indicates that shortnose sturgeon are not present in the vicinity of the Point Pleasant intake, the memorandum even concedes that it lacks probative value. This testimony should be entirely stricken.

3. Outline of testimony of Thomas G. May. Applicant likewise moves to strike this "testimony" on the grounds discussed above. Further, the proffered "testimony" is irrelevant and immaterial to the contentions. Most of the memorandum simply discusses Mr. May's recommendation to the

^{4/} Outline of testimony - George D. Pence at 7-8.

U.S. Army Corps of Engineers as to the scope of the environmental review conducted by that agency for the Point Pleasant intake structure in the context of that agency's perception of its jurisdiction. ^{5/} Otherwise, the testimony breaks down into a number of items which fail to state any facts or offer any opinions relevant to the Point Pleasant pumping station, intake structure or the Bradshaw Reservoir. For example, on the third page, Mr. May admits according to the "testimony" that he did not review "the safety related aspects of Bradshaw with respect to seepage and stability." This discussion of Mr. May's view of the scope of the Corps' environmental review and its progress to date, without any express findings or formal conclusions by the agency, is irrelevant and immaterial and should therefore be stricken altogether.

4. Memorandum on testimony of Gerald Hansler.

Preliminarily, it is noted that DRBC has already advised the NRC of its position regarding any testimony by Mr. Hansler, stating:

The actions taken by the DRBC in connection with the application of the Philadelphia Electric Company are a matter of public record and this record speaks for itself. No individual commissioner or member of the staff of DRBC can speak for the Commission beyond

^{5/} In fact, he testified in his deposition that "our recommendations are simply recommendations to be accepted or rejected by the Corps." Deposition of Thomas G. May (Tr. 48) (August 19, 1982).

what is set forth in the documents and records of DRBC. All of the records of DRBC are available for inspection by an interested party and Del-Aware has fully availed itself of the opportunity to inspect these documents. 6/

This "testimony" is in the same form as the previous three individuals and should be stricken. In any event, the decision-making process within DRBC which led to its granting final Section 3.8 approvals for the Point Pleasant project or its possible consideration of any variance from any conditions imposed by DRBC is irrelevant and immaterial to the admitted contentions. Although DRBC's Final Environmental Impact Statement (1973), Negative Declaration and Final Environmental Assessment (August 1980), and its docket decisions relating to the Point Pleasant project are certainly relevant to the admitted contentions, these documents, as DRBC has stated, speak for themselves, just as the federal court decisions sustaining them also speak for themselves. Their characterization by particular witnesses has no probative value.

5. Direct testimony of Jim Darrah and supporting material. This individual was not identified as a potential witness during the period designated by the Licensing Board for the taking of depositions. Nor was he identified as a potential witness in Del-Aware's answers to the Applicant's

6/ Motion to Quash or Modify Application to Take Deposition of Gerald M. Hansler, Executive Director, DRBC at 2 (August 10, 1982).

and Staff's interrogatories. His testimony relates to a purported survey of Delaware River flow velocity in the channel at Point Pleasant, which was undertaken on September 17, 1982. There is no reason why the survey discussed in the testimony could not have been taken at an earlier date. It is unclear as to the purpose or issue to which this material is addressed.

In any event, no personal qualifications have been filed for this witness, and his testimony does not otherwise show any special expertise or knowledge in the area of hydrology. The idea that a scuba diver could detect differences in flow velocity of 1 fps or increments thereof simply by feeling the movement of the water or looking at bubbles is patently absurd. The late-filed material of Messrs. Darrah, Sigstedt and Norkevich adds nothing to the substance of the testimony and does not even indicate what purported factual dispute it addresses. All of this testimony including the related late-filed material should be stricken.

6. Direct Testimony of Stanley Plevyak. Applicant likewise moves to strike this testimony on the grounds that he was not identified and made available for deposition and not listed as a potential witness in answer to interrogatories. Further, no proffer of ichthyological or other qualifications to support testimony as to walleye spawning in the pool has been made. This testimony should be stricken altogether.

7. Direct testimony of Professor Peirce Lewis.
Del-Aware similarly did not designate this individual as a witness during the period for taking depositions or otherwise include any information pertaining to his testimony in answering the Applicant's and Staff's interrogatories. No showing has been made by Del-Aware as to why the information included in the proffered testimony could not have been obtained prior to discovery.

Moreover, whatever his professional qualifications, the witness is certainly not qualified to testify as to Point Pleasant. The witness candidly acknowledges that he has "not visited Point Pleasant" and that his testimony is therefore based "entirely on written and cartographic documentation, and not on first hand experience." ^{7/} Even assuming that the witness could develop sufficient competence from the documents listed in his testimony to testify as to the specific characteristics of Point Pleasant, the development of this testimony at the eleventh hour with no opportunity to depose the witness is prejudicial to Applicant.

The proffered testimony does not address any of the three admitted issues and should be stricken as an improper attempt by Del-Aware to expand its contentions. Although the Board has allowed Del-Aware a contention relating to alleged "[n]oise effects and constant dredging maintenance"

7/ Direct testimony of Professor Peirce Lewis at 2.

upon the 'peace and tranquility of the Point Pleasant proposed historic district," the Board has unambiguously rejected broader issues relating to generalized, esthetic impacts associated with the construction and presence of the Point Pleasant pumping station and intake. In an earlier order, rejecting proposed Contention V-14, the Board concluded that such impacts, "although they will continue after the plant begins operations, are essentially attributable to construction" and therefore beyond the jurisdiction of the Board. ^{8/} Moreover, it is important to bear in mind that the admitted contention relates to the impact of noise upon the surrounding area, not any potential effect such noise may have upon a decision by the Advisory Counsel on Historic Preservation to designate the village of Point Pleasant on the National Register.

Thus, the gist of the testimony is that "the pump station will be a fairly large scale affair, presumably much larger than most of the buildings in Point Pleasant" and therefore "inconsistent with the nineteenth century scale and character of the town." ^{9/} This is exactly the kind of sweeping contention rejected by the Board in its previous order. In his only reference to noise effects, the witness speculates that "[i]t is not hard to imagine that

^{8/} Memorandum and Order at 5 (July 14, 1982).

^{9/} Direct testimony of Professor Peirce Lewis at 4 (emphasis added) .

[the community's] attitude could be changed markedly if local residents found noise from the pump station to be objectionable" ^{10/} The witness has not identified the level of noise or the area in which such level would have any impact upon the "peace and tranquility" of the Point Pleasant community, nor shown any competence or expertise in acoustics or engineering. Without such a nexus to the specific contention at issue, this testimony is therefore irrelevant and immaterial and should be altogether stricken.

8. Testimony of Richard McNutt. In his testimony, this witness purports to offer expert testimony as to the ability of the Point Pleasant intake structure to withstand impacts from ice floes and large debris floating downstream in the Delaware River. Although a lay witness may testify as to ice or debris he personally observed in the river, if otherwise of probative value and relevant, he must demonstrate professional qualifications by training, experience or other expertise to testify as a hydrologist or structural engineer. Mr. McNutt, despite his experience in "creative technology," ^{11/} has no qualifications to give opinion evidence on the capacity of the intake structure to withstand the impacts from any alleged ice and debris. The testimony is also replete with objectionable hearsay.

^{10/} Id. at 5 (emphasis added) .

^{11/} Testimony of Richard McNutt at 5.

Accordingly, this testimony should be stricken based upon the incompetence of witness and as inadmissible hearsay.

9. Direct joint testimony of Michael Kaufmann. The testimony of this witness pertains to Contention V-15 and V-16a (in part) regarding alleged adverse impacts on American shad and shortnose sturgeon resulting from the "relocation" of the Point Pleasant intake structure. Applicant moves to strike that portion of this testimony which goes beyond the scope of the admitted contention. In particular, it is important to note that the contention as admitted by the Board does not broadly include all alleged adverse impacts on American shad resulting from the operation of the intake structure. Rather, the contention only permits Del-Aware to litigate impacts resulting from the alleged relocation of the intake.

The Board's intent is clear from the Board's discussion of American shad vis-a-vis this contention in its Special Prehearing Conference Order at page 94, where the Board stated:

The impact that the intake might have on American shad was considered at the construction permit stage. We are informed by Del-Aware that since that time the location of the intake has been changed so that it is currently expected to be located in a spawning area for the shad. The Applicant has not disputed that the intake location has been changed. This is a change of sufficient significance to warrant present consideration of the impact the intake may have on the shad.

Accordingly, the Board granted this contention only as to the narrow issue of any difference in impacts to American shad resulting from the alleged relocation of the intake. The general discussion of the habits of the American shad in the Delaware River is therefore beyond the scope of this contention.

For example, the discussion in the testimony of the formation of a "pollution block" in the Delaware River is clearly irrelevant and immaterial to impacts attributable to the minor adjustment in the location of the intake structure. Any impacts resulting from discharges from the North Branch Water Treatment Plant are also clearly irrelevant to Limerick and, in any event, are irrelevant to the change in intake location. ^{12/} Even in the small portion of the proffered testimony which specifically refers to the Point Pleasant area, ^{13/} no distinction is made between impacts resulting from the operation of the intake at its previous and present locations.

Accordingly, the Board should strike those portions of the proffered testimony discussing American shad which do not relate specifically to impacts to that species resulting from the "relocation" of the intake structure in the Lumberville pool. As the Board is well aware, the Pennsylvania Fish Commission actively opposed the granting

^{12/} See Direct Testimony of Michael Kaufmann at 2-3.

^{13/} Id. at 9-10.

of final Section 3.8 approvals for the Point Pleasant project in the DRBC proceedings. ^{14/} Del-Aware is simply attempting to provide certain employees of that agency with another forum in which to express their continuing opposition.

Similarly, the testimony is irrelevant and immaterial in its discussion of alleged impacts to fishing at Point Pleasant. The only relevant contention clearly asserts that the allegedly adverse impacts from the relocation will result from "draw-down of the pool." The testimony as to shoreline fishing at Point Pleasant ^{15/} contains nothing about drawdown and clearly exceeds the scope of this contention. The remaining discussion in the testimony reverts to a generalized consideration of impacts on American shad without regard to the specific location of the intake structure, all of which should be stricken. ^{16/}

10. Direct testimony of Charles Emery, III. Applicant moves to strike this testimony on the ground that it

^{14/} The opposition of this agency to the project was noted by the Court in Delaware Water Emergency Group v. Hansler, 536 F.2d 26, 46 (E.D. Pa. 1981), aff'd mem., 681 F.2d 805 (3d Cir. 1982).

^{15/} Id. at 13-14.

^{16/} It is not clear what function is served by the "NOTES" appearing at pages 16-19 of the testimony. It is uncertain whether this material is intended to constitute testimony or was merely part of the witness's preparation. Whatever its intent, it is not proper prepared testimony and is otherwise objectionable for the reasons stated above. It, too, should be stricken.

irrelevant and immaterial to any admitted contention. Its only apparent purpose is to challenge the validity of certain fish sampling done by Ichthyological Associates conducted "at major water uses along the Delaware River" as part of a survey pursuant to the issuance of an NPDES permit under Section 316(b) of the Clean Water Act.

First, the adequacy of Applicant's fish sampling techniques in the Delaware River related to other facilities is not in contention in the instant proceeding. Second, the relevance to these studies in conjunction with the Point Pleasant intake structure is nowhere demonstrated. No foundation whatsoever has been laid for the comparison of the techniques discussed in this testimony ^{17/} and what has been done at Point Pleasant. Therefore, this testimony should be stricken in its entirety.

11. Testimony of J.T. Phillippe. This testimony relates to flow characteristics of the Delaware River. It is not clear as to which contention(s) the testimony has been proffered, but certain portions are clearly irrelevant and immaterial to any of the contentions. The witness's characterizations of his letter dated May 10, 1982 to Colleen Wells, a member of Del-Aware, are plainly

^{17/} It is noted that the testimony discusses "traveling screens" in use at other power plants. The Point Pleasant intake will use new, state-of-the-art wedge wire screens, not traveling screens.

irrelevant and should be stricken. ^{18/} All of the testimony on pages 1-6 merely discusses water conditions in the Delaware River. However, it has nothing to do with the contention relating to the relocation of the intake or noise and maintenance and thus should be stricken. No contention relates to historic river flows in the Delaware and this testimony should not be considered. Assuming it were considered, the testimony is not competent concerning historic flows from 1913 or 1920 because the calculations based thereon ignore the addition of dams and reservoirs to better manage the river and to maintain higher flows.

The comments as to the Delaware River Basin Commission permitting pumping for Limerick, other than as presently authorized, is pure speculation and are mere unsupported conclusions without any foundation. The witness is not competent to testify as to whether or under what circumstances DRBC will permit Applicant to divert water from the Delaware River based upon compensatory water supplied by the Merrill Creek Reservoir. ^{19/}

The testimony based upon the Pickering et al. study referred to on page 5 is without adequate foundation. There is no showing that the 1964 measurement at 2000 cfs at

^{18/} Testimony of J. T. Phillippe at 1. The letter is not attached to the testimony, nor has it been proffered as an exhibit to be offered in evidence.

^{19/} Id. at 5.

Trenton, one-third mile below the proposed intake, reflects water surface elevation at the intake.

The evidence offered concerning the location of the channel and eddy is patently based upon nothing but an examination of documents and hearsay information and should be stricken on this basis. Also, the location of the channel in the river one-third mile below the intake is irrelevant. The paragraph dealing with the derivation of the water passing through the intake is incompetent since it is obviously without foundation and based on mere speculation.

The section entitled "OTHER QUESTIONS" ^{20/} which discusses slope stability and the design of the reservoir embankment is clearly beyond the scope of any admitted contention and should also be stricken.

12. Direct Testimony of Samuel Landis. This testimony, which was served late on Applicant's counsel on September 22, 1982, discusses archaeology in the area of Point Pleasant and purports to show impacts which may result from construction at Point Pleasant or, apparently in the witness's opinion, primarily from the intrusion of local artifact collectors. Preliminarily, no professional qualifications have been served with this testimony, and it should be stricken in its entirety on that ground alone. Second, the testimony is wholly irrelevant and immaterial to

^{20/} Id. at 7.

any of the admitted contentions. There is no nexus between archaeological matters and, for example, alleged noise effects and dredging maintenance as admitted issues under Contention V-16a. It is also noteworthy that the Licensing Board earlier rejected a contention which sought to litigate construction impacts upon fossils. The Board held that such impacts "are outside the jurisdiction of this Board." ^{21/} Accordingly, this testimony should be stricken in its entirety as irrelevant and immaterial and by reason of the witness's failure to demonstrate his professional competence to testify.

III. Motion to Strike Abandoned Contentions

A review of the proffered testimony from Del-Aware indicates that no testimony has been offered on two entire contentions and certain aspects of the third admitted contention. In order to define the issues for which an evidentiary presentation is needed at the hearing, Applicant hereby files this motion to strike. In its trial brief (pages 9-10), Del-Aware admits that "contentions related to seepage through the more normal seepage actions have been obviated by further inquiry since the time that the contention were [sic] filed" The only proffer made regarding Contention V-16b is related to slumping of the walls of the reservoir, a matter clearly outside any

^{21/} Special Prehearing Conference Order at 151 (June 1, 1982).

reasonable reading of this contention and also outside the scope of the NRC's jurisdiction. Thus, Contention V-16b should be stricken as abandoned.

As to Contentions V-15 and V-16a (in part), there has been no testimony to the effect that "draw-down of the pool" in which the intake has been "relocated" will adversely affect fish, boating or recreation in the area. Accordingly, this portion of the contention should be treated as abandoned. It is Applicant's witnesses' uncontroverted testimony that draw-down of the immediate river area will not exceed 3/4 inch under any operating circumstances, and that such fluctuation in water level will be insignificant to fish or recreational activities. ^{22/}

As to Contention V-16a, no testimony has been proffered by Del-Aware at all. In particular, there has been no showing that there will be any dredging maintenance required for operation of the intake and pump station. The Applicant's testimony that no such maintenance dredging is anticipated, given the particular design of the intake structure in the river bottom, is unopposed. ^{23/} None of the testimony submitted by Del-Aware discusses noise effects

^{22/} See Applicant's Testimony on "Water Issues" at ¶27. The Staff has taken approximately the same position, noting that the change in water level caused by pumping would be less than one inch. See NRC Staff Testimony of Rex G. Westcott at 3.

^{23/} See Applicant's Testimony on "Water Issues" at ¶32; NRC Staff Testimony of Anthony Policastro at 2.

attributed to the operation of the Point Pleasant intake and pump station. The only portion of testimony which even purports to discuss noise effects merely "imagines" that the surrounding community's attitude could change "if local residents found noise from the pump station to be objectionable" ^{24/} Without any reference to the level of noise anticipated or the affected areas, this speculative opinion is meaningless. This contention should also be treated as abandoned.

Conclusion

For the reasons discussed more fully above, the testimony or portions of testimony identified herein should be stricken. The Board should strike the second sentence of Contentions V-15 and V-16a (in part), and Contentions V-16a and V-16b in their entirety, as abandoned.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

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September 24, 1982

^{24/} Direct Testimony of Professor Peirce Lewis at 5. As noted, this testimony is improperly proffered and should be stricken for other reasons.