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UNITED STATES OF AMERICA OFFICE OF SECRETARY  
NUCLEAR REGULATORY COMMISSION DOCKETING & SERVICE  
BRANCH I

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 ANSWER TO "APPLICATION FOR  
APPROVAL OF PETITION TO AMEND CONTENTIONS"  
SUBMITTED BY DEL-AWARE UNLIMITED, INC.

Preliminary Statement

On September 20, 1982, two weeks prior to the commencement of the hearing in this accelerated proceeding for consideration of supplemental cooling water issues, Del-Aware Unlimited, Inc. ("Del-Aware") filed a motion requesting the Atomic Safety and Licensing Board ("Licensing Board" or "Board") herein to admit three new contentions. Without exception, the matters contained in the new proposed contentions have been previously considered and rejected by the Licensing Board as beyond its jurisdiction.

Applicant opposes the request to amend contentions as extremely late and prejudicial to its right to a timely and orderly disposition of supplemental cooling water issues. There is certainly no point in belaboring the obvious in stating that the grant of this application at the eleventh

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hour would be patently unfair. <sup>1/</sup> Nor would there be any use in treating these individual contentions in the formal detail appropriate to contentions submitted on a timely basis. The Board has already heard the parties' respective positions stated and restated on these matters on a number of occasions. For Del-Aware to raise again contentions twice rejected by the Board borders on contempt. If Del-Aware still disagrees with the Board's jurisdictional findings, it should take the matter up on appeal rather than burden the Licensing Board and parties with dilatory pleadings. The applications to add new contentions should therefore be denied.

Argument

I. The Contentions Are Beyond the Jurisdiction as Determined by the Licensing Board and Otherwise Invalid.

Applicant will address each of the three proposed contentions seriatim.

Proposed Contention V-22. This contention seeks to litigate alleged environmental impacts which will result from the operation of the Merrill Creek Reservoir, particularly the alleged increase of salinity and its impact upon oyster production and public water supplies. The Board

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<sup>1/</sup> In its recent Memorandum and Order at 8 (September 3, 1982), the Licensing Board cautioned Del-Aware "to comply with the filings and time-frames allowed by the rules of practice." The Board added: "Unauthorized or untimely filings made without the Board's permission will be ignored in the future."

has previously found that such alleged impacts are inextricably tied up with the water allocation decisions of the Delaware River Basin Commission ("DRBC"). As the Board is well aware, salinity intrusion is one of the problems Del-Aware has attempted to litigate as part of its overall assertion that the NRC should reexamine de novo the Point Pleasant project as a depletive use of Delaware River water. The Board has flatly ruled that allocation of water for depletive uses by DRBC is beyond the jurisdiction of the NRC. Specifically, the Board stated:

Nor will we consider problems of depletion of Delaware River flow volume. This is an allocation decision, entrusted to the DRBC. See SPCO at 70-71.

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The Applicant has supplied the Affidavit of Gerald M. Hansler, Executive Director of the DRBC, to the effect that the federal representative concurred in all docket decisions leading to the final approval of the Point Pleasant project save one, and that one abstention was followed by further concurrences. Therefore, in reliance on Mr. Hansler's affidavit, the Board finds it is precluded from considering matters concerning the allocation of Delaware River water for cooling Limerick. [Contention V-16], which we have found concerns allocation questions, is, therefore, denied. 2/

Del-Aware again raised this issue in a motion filed on August 8, 1982, asking the Licensing Board to reconsider its Memorandum and Order cited above. Accordingly, in a

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2/ Memorandum and Order at 10, 18-19 (July 14, 1982).

subsequent Memorandum and Order, dated September 3, 1982, only two weeks prior to the instant application by Del-Aware, the Licensing Board firmly reiterated its decision, noting that Del-Aware's request for reconsideration was untimely and without merit. Referring to the order quoted above, the Board stated:

The Board held that it was precluded, by virtue of the federal representative's affirmative vote on inclusion of the Point Pleasant diversion in the Comprehensive Plan, from considering contention V-16 as it related to an increase in the salinity gradient in the Delaware River. (Order (July 14, 1980) at 18-19). The Board explained that a change in the salinity gradient could result if the quantity of water used in cooling Limerick were withdrawn, whatever its use. It would be the quantity of water withdrawn, not its particular use, which would lead to the changes in salinity. Moreover, any change in salinity would result not just from this water withdrawal, but from the total quantity of water withdrawn for uses approved by the Delaware River Basin Commission (DRBC). Special Prehearing Conference Order (SPCO), LBP-82-43A, 15 NRC \_\_\_\_\_, slip op. at 96 (June 1, 1982). See also id. at 70-71. 3/

Adding allegations pertaining to the Merrill Creek Reservoir to its earlier rejected contentions does not render them any less objectionable. In fact, it renders them more so.

At page 3 of its Application, Del-Aware admits that the Merrill Creek project is still "subject to environmental clearance" by the DRBC. It is clearly up to the DRBC, which

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3/ Memorandum and Order at 2 (September 3, 1982).

is presently considering the matter, to issue a final decision on whether Merrill Creek or other supplementary storage facility should be required. The Appeal Board's decision at the construction stage is directly on point as to the role of the NRC and this Board regarding the necessity and approval of supplemental storage capacity in conjunction with the Limerick facility:

The DRBC being a federal agency for NEPA purposes, it will now be for that agency alone to determine whether the construction and utilization of a supplemental reservoir represents a better alternative than operation as a "river follower." If its determination is in the affirmative, it can direct the applicant to proceed with the reservoir. In any event, its decision concerning the reservoir will not be subject to review by the Commission (except to the extent that such a decision might have any collateral safety implications). 4/

Under the circumstances, it is an affront to the Licensing Board and an imposition upon the Applicant and Staff for Del-Aware to ask the Board yet another time to change its mind. This contention should be denied.

Proposed Contention V-23. This contention seeks to litigate DRBC's ongoing assessment of water needs in the Delaware River Basin. For the reasons discussed above, this matter is clearly beyond the jurisdiction of the NRC and is quintessentially an allocation decision for DRBC. The basic fallacy, that no decision allocating water for a particular

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4/ Limerick, ALAB-262, 1 NRC 163, 206 (1975) (emphasis added).

project such as Point Pleasant can ever be made because of DRBC's ongoing reevaluation of water resources in the Basin, was laid to rest by the United States District Court in Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 44 (E.D. Pa. 1981), aff'd mem., 681 F.2d 805 (3d Cir. 1982), which stated:

The difficulty with plaintiffs' position, from a purely practical viewpoint is, that there have been, are now, and undoubtedly will continue to be for an indefinite number of future years, continuing studies by DRBC and other governmental and private agencies concerning all aspects of the Delaware River and utilization of the waters of this great natural resource. Many studies overlap each other both as to time span, content and agencies involved. The situation will never be fixed or static. There will always be population changes, varying needs and demands for water and continuing industrial, commercial and residential relocations. The whole concept of the Compact compels DRBC to make continuous study of both immediate and long range needs and "from time to time review and revise" the Comprehensive Plan in order to meet the needs of the basin. If plaintiffs' suggestions are adopted, it is quite apparent that it would be virtually impossible to ever amend the Comprehensive Plan to approve the construction of any substantial projects because of incompleted on-going studies.

This new contention should also be rejected.

Proposed Contention V-24. This contention seeks to relitigate the cost-benefit analysis for Limerick by reevaluating Schuylkill River alternatives for supplemental cooling water, which Del-Aware maintains "are available and

preferable." <sup>5/</sup> This contention is entirely lacking in specificity and bases and does not otherwise state a litigable issue. It is therefore lacking in merit and should be rejected.

Initially, it is noted that the order of the Pennsylvania Public Utilities Commission ("PUC") is subject to further review upon appeal, which was filed on September 23, 1982. Even given the action by the PUC, therefore, the question of whether Limerick Unit 2 will be constructed remains unanswered. On the record, however, it is indisputable that the application for Unit 2 is pending. As long as an applicant is actively pursuing a license for which it has applied, there is no basis for the NRC to assume that the unit in question will not be built and operated. <sup>6/</sup> Whatever the final result of the action taken to date by the PUC, the observation by the Appeal Board in the Tyrone proceeding that "[t]he requirements of State law are beyond our ken" is therefore equally applicable here. <sup>7/</sup>

Even if Limerick Unit 2 were not completed, for whatever reason, it does not logically follow, as Del-Aware

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<sup>5/</sup> Del-Aware Application for Approval of Petition to Amend Contentions at 2.

<sup>6/</sup> See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466-CP, "Memorandum and Order" (March 9, 1982).

<sup>7/</sup> See Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 275 (1978).

asserts, that the Point Pleasant project would be rendered unnecessary for Limerick. As the Department of Environmental Resources, Commonwealth of Pennsylvania ("PaDER") stated in rejecting this assertion:

Even if Unit 2 is delayed or cancelled, cooling water requirements for efficient operation of Limerick Unit 1 would still necessitate completion of the proposed Point Pleasant diversion. Under conditions imposed by DRBC, cooling water for Limerick may only be withdrawn from the Schuylkill River when river flows at the Pottstown gage exceed 530 cfs with one Limerick unit operating, or 560 cfs with both proposed Limerick units operating. The difference in the number of days in which Schuylkill River flows would be unavailable under these conditions for one versus two units is insignificant. In sample drought years of 1964, 1965 and 1981, Schuylkill River water could not be withdrawn for cooling water for both units at Limerick 133, 193 and 160 days respectively. If only one unit were operating at Limerick, Schuylkill flows would be available only 7 to 12 additional days of the year (or three percent more of the time).

Further, the ultimate fate of Limerick Unit 2 would have little effect on the engineering of the water supply facilities. If the possibility exists that a second unit will eventually be constructed over the life of the project, sizing of the Bradshaw Reservoir, conduits and transmission mains to accommodate the water requirements of both units would be prudent. Building in such capacity would avoid the need for later construction of such facilities, or the need to install duplicate facilities. (At the same time, some elements of the project, such as pump installation,

could be developed in modules or phases.) 8/

Additionally, Del-Aware has not specified which "alternative" it believes to be available and environmentally preferable. Neither has it cited any basis to support this proposition. In rejecting proposed Contention V-1<sup>a</sup>, by which Del-Aware sought to litigate the same issue, the Board likewise noted:

[T]here has not even been a showing of the availability of the alternatives. Use of a supplemental reservoir on the Schuylkill, for example, would require approval by the DRBC which has already approved the present system, apparently after considering the option of a reservoir on the Schuylkill. 9/

This contention should also be denied.

II. The Proposed Contentions Do Not Meet The Criteria Established By 10 C.F.R. §2.714(a)(1)(i)-(v) For Admission of Late Contentions

Del-Aware has failed to make any meaningful showing under the requirements in 10 C.F.R. §2.714(a)(1)(i)-(v) for the acceptance of late contentions, particularly contentions proposed on the eve of a hearing. While Del-Aware addresses its untimeliness in terms of the formal issuance of orders or reports by concerned agencies, these formal issuances are not determinative as to lateness. Rather, the critical

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8/ PaDER Environmental Assessment Report and Findings - Point Pleasant Water Supply Project at 29 (August 1981) (Applicant's Exhibit 3).

9/ Special Prehearing Conference Order at 100 (June 1, 1982).

inquiry is the point at which Del-Aware learned of the existence of the underlying matter it wishes to litigate. It is obvious from the fact that Del-Aware has sought to interject issues relating to DRBC's allocation decisions into this proceeding at every juncture that it has been fully cognizant of the Merrill Creek Reservoir application for quite some time. The same is true of DRBC's ongoing reevaluation of Delaware River Basin water resources. <sup>10/</sup> It is also noted that, while a formal written opinion did not issue from the Pennsylvania PUC until August 27, 1982, its decision was adopted and publicly announced on May 7, 1982. It was the subject of widespread media attention at that time. The contentions are therefore untimely without good cause. <sup>11/</sup>

Nor has Del-Aware satisfied the remaining requirements for admission of late contentions. It can adequately protect its interests in the issues it wishes to litigate

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<sup>10/</sup> For example, Del-Aware has frequently cited DRBC's Level B Study as a basis for its arguments.

<sup>11/</sup> Rather than repeat at length the authorities as to timeliness upon which Applicant relies, the Board is respectfully referred to the following pleadings in which Applicant has more fully discussed the NRC case law. See Applicant's Answer to Del-Aware Unlimited, Inc.'s Application for Approval of Petition to Amend Contentions at 8-13 (September 3, 1982); Applicant's Answer to Del-Aware Unlimited, Inc.'s "Supplement to Request for Reconsideration Regarding the Impact of Federal Member Concurrence in DRBC Order and Renewed Request for Reconsideration of Scope and Environmental Impacts to be Considered" at 8-9 (September 1, 1982); Applicant's Answer to Application for Reconsideration by Del-Aware Unlimited, Inc. at 7-10 (August 19, 1982).

here in other proceedings before the appropriate agencies having cognizance and jurisdiction over the subject matter.<sup>12/</sup> Inasmuch as these issues are beyond the jurisdiction of the NRC, there is no need to develop a sound record as to DRBC's water allocation decisions and the PUC's decision in this proceeding. Finally, the admission of these late contentions will necessarily result in substantial delay of the hearing and severe prejudice to Applicant, particularly if the Board should issue a stay of the construction of the Point Pleasant project scheduled to commence on or about December 15, 1982.

Conclusion

For the reasons discussed more fully above, the proposed new contentions should be denied.

Respectfully submitted,

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September 24, 1982

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<sup>12/</sup> For example, Del-Aware is currently litigating or otherwise participating in various aspects of the Point Pleasant project, including the matters it seeks to raise here, before DRBC, PaDER, the Corps of Engineers, and the Pennsylvania PUC, in addition to the NRC.