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* NOT ADMITTED IN PA.

June 16, 1983

Honorable Lawrence Brenner
Honorable Richard F. Cole
Honorable Peter A. Morris
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555



Re: Docket Nos. 50-352 OL &
50-353 OL

Dear Judges:

Although the Applicant has given notice of the Pennsylvania Supreme Court decision to the Appeal Board, it has not given notice to the Licensing Board, and I therefore enclose herewith for the Board's information a copy of the Pennsylvania Supreme Court decision unanimously reversing the Commonwealth Court, and holding that the PUC acted within its powers and properly in ordering PECO to cancel or suspend construction of Unit 2.

On June 10, 1983, the PUC ordered PECO to provide a response as to its election within 120 days, and on the same date, by public announcement, PECO advised that it will not take any action until the expiration of the 120 days. A copy of the news report is also enclosed.

In response to the May 17 referendum, on May 25, 1983, the Delaware River Basin Commission decided to seek information as to local agencies' intentions with respect to future water supply. A copy of Commissioner Weston's statement relating to the actions being taken by the Commission is enclosed.

While the initial action by the DRBC related explicitly only to the public water supply portion of the project, Del-AWARE understands that it was intended to relate to the plans of all applicants, which would include Philadelphia Electric Company.

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In these circumstances, it appears that it can no longer be contended that it is clear that PECO will eventually need water for two units, that the timely completion of the Point Pleasant diversion is no longer a likely possibility, and that the DRBC decision of February 18, 1981 is now under active reconsideration by that Commission.

In these circumstances, notwithstanding the Board's partial initial decision of March 8, 1983, and the fact that that decision is on appeal to the Appeal Board, Del-AWARE submits that the Board should now admit a new contention, not limited to the environmental impacts of the proposed diversion but dealing, as well, with the effects of continuing to pursue this option, on the welfare of the Applicant, its financial viability, and the impact on its customers, within the terms of Part 50 of the Commission's regulations, as well as Part 51.

I request that this letter serve in lieu of a new proposed, new contention and new bases and arguments, as I believe that the foregoing contains all the elements required by the Board's rules.

By copy of this letter, I also request that the staff indicate to the Board and to the public whether it will now, at last, take action with regard to the Pennsylvania Public Utility Commission decision, and generally, what action it intends to take with respect to the apparently disappearing water supply for Limerick, and the Pennsylvania authorities' decision, and PECO's indecision, regarding Unit 2, in view of its overall responsibilities.

Sincerely,



Robert J. Sugarman

RJS/lby
Enclosures
Service List

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Letter by mailing a copy of the same to the following persons this 15th day of June, 1983.

Lawrence Brenner, Esq., Chairman
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ann Hodgdon, Esq.
Benjamin H. Vogler, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

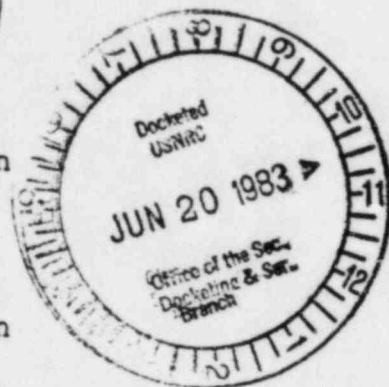
Troy B. Conner, Jr. Esq.
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Secretary
U.S. Nuclear Regulatory Commission
Attn.: Chief, Docketing & Service Branch
Washington, DC 20555

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Charles W. Elliott
Brose and Poswistilo
1101 Building
11th & Northampton Streets
Easton, PA 18042




Robert J. Sugarman

Dated:

A circular stamp with a scalloped outer edge. Inside the circle, the text "JUN 20 1983" is prominently displayed in the center. Above this date, the words "EX-100" and "EX-100" are faintly visible. Below the date, the text "Office of the Sec. of Defense" is written in a stylized font, with "Branen" written underneath it. The stamp is placed over the bottom of the document, partially obscuring the words "Appeal" and "Branen".

J-145-1

Court¹ which reversed an adjudication of the Pennsylvania Public Utility Commission ("PUC") which declared that it would refuse to approve additional securities proposed to be issued by the Philadelphia Electric Company ("PECO") in conjunction with construction of the Limerick 2 nuclear power plant.

In August, 1980, the Pennsylvania Consumer Advocate, as representative of consumer interests before the PUC², petitioned the PUC for an investigation of the need for and fiscal wisdom of constructing the Limerick Nuclear Generating Station, consisting of two units, Limerick 1 and Limerick 2, scheduled for completion in 1985 and 1987 respectively. The PUC initiated an investigation, and, following extensive discovery and hearings, the presiding administrative law judge determined that completion of both Limerick units was in the best interest of ratepayers, as well as of PECO. Exceptions to this finding were filed, following which the PUC rejected, in part, the administrative law judge's decision and issued a declaratory order³ that if PECO did not suspend or cancel construction of Limerick 2 the PUC would not register, pending completion of Limerick 1, any new securities issuances⁴, the proceeds of which would be used, in whole or in part, for construction of Limerick 2.

¹Philadelphia Electric Co. v. Pennsylvania Public Utility Commission, _____ Pa. Commw. _____, 455 A.2d 1244 (1983).

²See 71 P.S. §309-2.

³Pursuant to 66 Pa. C.S.A. §331(f), which provides for issuance of declaratory orders.

⁴Securities of public utilities must be registered with the PUC prior to issuance. 66 Pa.C.S.A. §1901(a).

This order reflected the PUC's conclusion that completion of Limerick 2 is not financially feasible⁵ due in part to the PUC's unwillingness to provide rate increases of such magnitude as would be required to support construction of that project, whereas the combined cost to completion of both Limerick units would range from five to six billion dollars. The PUC further concluded that exorbitant funding burdens of Limerick 2 would incur risk of deterioration in future service, as well as endanger the timely completion of Limerick 1, due to PECO's already grossly substandard financial condition, associated with an existing bond quality rating of just BBB (Standard and Poors' lowest investment grade) that would predictably decline to a speculative rating upon issuance of securities to fund Limerick 2. Such a decline, the PUC reasoned, would in all likelihood preclude PECO's access to financial markets altogether.

⁵ We find that the record amply supports the PUC's determination, the finding of financial infeasibility being supported by substantial evidence. See 2 Pa. C.S.A. §704 (substantial evidence required). Further, PECO's challenge to the sufficiency of the record, based upon the fact that the PUC relied upon evidence not appearing in the record bearing the instant case number, is without merit. Although some of the evidence relied upon appears in the record of what is, in form, another case, to wit PECO's rate determination case bearing a different number, that case involved the same major parties as well as the same administrative law judge and the same counsel. The record of the rate case evolved concurrently with that of the Limerick case, and the substantial similarity and interrelationship of issues in the two cases was expressed, in the rate case record, by PECO's counsel. Under these circumstances, elevation of form above substance so as to distinguish between the two records would be unwarranted.

The primary issue presented is whether the PUC can properly withhold approval of securities necessary to the financing of Limerick 2. The PUC's authority over approval of such securities is set forth in Section 1903(a) of the Public Utility Code, which provides, in pertinent part, as follows:

§1903. Registration or rejection of securities certificates

(a) General rule.--Upon the submission or completion of any securities certificate . . . the commission shall register the same if it shall find that the issuance or assumption of securities in the amount, of the character, and for the purpose therein proposed, is necessary or proper for the present and probable future capital needs of the public utility filing such securities certificate; otherwise it shall reject the securities certificate. The commission may consider the relation which the amount of each class of securities issued by such public utility bears to the amount of other such classes, the nature of the business of such public utility, its credit and prospects, and other relevant matters.

Act of July 1, 1978, P.L. 598, No. 116, §1, 66 Pa. C.S.A. §1903(a) (1979) (emphasis added). It is claimed that the PUC has too far intruded upon PECO management's realm of exclusive discretion by determining that the power plant in question is not requisite to the company's capital needs. While the statute expressly delegates to the PUC authority to determine whether proposed securities are "necessary or proper" to meet those needs, PECO claims that management, not the PUC, must determine capital needs, and that the PUC is constrained to take

management's stated needs as a given, and then inquire only as to whether the securities are necessary to finance those needs. The PUC, however, asserts that the statute confers authority to reject management's opinion as to capital needs, in the limited realm where securities issuance is required in order to finance those needs.

It is well established that, absent express legislative authority, the PUC is powerless to interfere with the general management decisions of public utility companies. Swarthmore Borough v. Public Service Commission, 277 Pa. 472, 478, 121 A. 488, 489-490 (1923). The Public Utility Code does not expressly grant the PUC general authority over the siting and construction of all utility plants. Nor does it require PUC approval for expansion of all facilities, the discretion of the company's management over such matters being generally beyond the PUC's power to supersede. Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 337, 105 A.2d 287, 293 (1954). Even the PUC concedes that it is without power to order that construction of Limerick 2 be ceased, an order which the PUC did not issue here. PECO contends that, through the refusal to approve securities funding the project, the PUC is attempting to exert indirectly a power that has not been bestowed directly or by necessary implication. Delaware River Joint Toll Bridge Commission v. Carver, 399 Pa. 545, 550, 160 A.2d 425, 428 (1960). We disagree, and, for the reasons that follow, believe

the PUC's action to be directly authorized by the securities registration provision of the Public Utility Code.

Abuses of managerial discretion may be buffered against consumer impact through exercise of the PUC's rate-setting powers, disallowing rate increases which would reimburse utilities for expenditures imprudently made. E.g., Park Towne v. Pennsylvania Public Utility Commission, 61 Pa. Commw. 285, 295-297, 433 A.2d 610, 615-617 (1981). Nevertheless, due to the unique character of public utilities, as, in effect, governmentally licensed monopolies, imprudent management decisions may occur that are not shielded from public impact through free market competition, or even through the traditional rate-setting mechanism. Indeed, the PUC, in issuing the subject order, concluded that if construction of Limerick 2 were to proceed the probable delays and cost overruns would likely result in the ultimate cost of the plant being excessive, and, hence, result in unreasonably high rate charges if the plant's cost were to be included in rates.

The PUC has general administrative power and authority to supervise and regulate all public utilities, pursuant to the powers and duties with which it is charged, 66 Pa. C.S.A. §501(b). It is responsible not only for assuring just and reasonable rates, 66 Pa. C. S. A. §1301, but for overseeing maintenance of adequate, efficient, and continuous utility

service, 66 Pa. C. S. §1501. Maintenance of that service cannot be achieved without preservation of the utility itself, and circumstances may arise where it is desirable to hinder a utility from falling victim to imprudent capital spending programs which are of such great magnitude as to imperil the company's continued viability.

Routine day-to-day management decisions, which bear lesser risk to the utility as an ongoing concern, and which do not portend such ultimate danger of burdening the public with large rate increases to rescue the utility from extinction, or of impeding the utility's ability to raise capital through securities offerings, have traditionally been beyond the ambit of the PUC's control. Nevertheless, we believe the legislature intended, through the foregoing securities provision, to enable the PUC to intercede with respect to management's capital spending programs when these are of such great size as to require special securities financing. These programs, having extraordinary potential for determining the course of rates and service, are not mere daily management matters reserved for corporate autonomy. Such programs inevitably affect the utility's "credit and prospects," these factors being expressly set forth in the statute as entering into the judgment as to whether a securities issuance is "necessary or proper" for the capital needs of the company. The interpretation urged by PECO, however, would effectively limit the PUC's inquiry to a

determination of whether such securities were "necessary or proper" to fund the capital improvement plans of the company, thereby foreclosing scrutiny of the underlying needs. We believe such an interpretation would too narrowly define the PUC's authority⁶, in view of the probable legislative intent to shield the public from the effects of management's unchecked discretion in the limited realm of capital spending projects that are so large in relation to the company's internal funds as not to be sustainable without external financing. While this is a severe intrusion upon matters that, in an unfettered, competitive, free enterprise economy, would normally be within management's dominion, public utilities are not models of competitive behavior, and, as monopolies, have been subjected to a uniquely comprehensive regulatory scheme. Accordingly, the PUC has authority under the securities registration statute to disapprove the proposed issuance of securities, based upon PECO's credit and prospects. The action of the PUC is consistent with the

⁶ But see Public Service Co. of Oklahoma v. State, 645 P. 2d 465 (Okla. 1982); Kelly v. Michigan Public Service Commission, 412 Mich. 385, 316 N.W. 2d 187 (1982); Appeal of Public Service Company of New Hampshire, 454 A.2d 435 (N.H. 1982).

regulatory power which has been vested in it by the legislature⁷.

Order reversed.

Mr. Justice Larsen and Mr. Justice Zappala concur in the result.

Mr. Justice Nix did not participate in the consideration or decision of this case.

⁷Other issues raised in the instant appeal are not presently reviewable. As part of its order declaring the unavailability of registration for securities to finance the construction of Limerick 2, the PUC directed that, if construction of that facility is suspended or cancelled, PECO must file an energy conservation plan designed to avert the need to install other additional capacity, thereby offsetting the relinquished generating capacity of Limerick 2. The need to review the scope of PUC authority to require such a conservation plan is negated by PECO's having taken the position that it has no objection to filing the requested plan.

Further, the opinion accompanying the PUC's order contained criticism, of an advisory nature, directed at PECO's decision in 1976 and 1978 to defer completion of the Limerick facilities. Such mere criticism, however, does not constitute an adjudication and cannot be reviewed on appeal.

Similarly, the opinion included a statement of the PUC's intention to deny, in any subsequent rate case, compensation to PECO for any funds thereafter used to continue construction of Limerick-2, such compensation being known as the Allowance for Funds Used During Construction ("AFUDC"). This statement of intention is likewise not an adjudication, and the AFUDC issue is, thus, not ripe for review.

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The Philadelphia Inquirer

business

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section

C

♦ Tuesday, June 7, 1983

PE reported seeking \$1 billion credit line for Limerick

By Harry M. Gould Jr.
Contributing Staff Writer

In an apparent effort to obtain an alternative method for financing its controversial Limerick nuclear-generating facility, Philadelphia Electric Co. is negotiating a five-year \$1 billion line of credit from a consortium of 25 U.S. and foreign banks, according to several financial sources.

The banking consortium, with New York's Citibank believed to be acting as the lead bank, has reportedly not yet given its final blessing to the

deal, which has been the subject of intense negotiations for several months.

Any agreement also would require the approval of the Pennsylvania Public Utility Commission.

Both Citibank and PE have refused comment on the status of the negotiations. But several Wall Street financial sources, including Moody's Investors Service Inc., the bond-credit rating agency, have confirmed the existence of the proposed financing agreement.

In its June 6 Bond Survey newsletter,

Moody's wrote that a \$1 billion "revolving credit agreement is being negotiated with a consortium of banks to provide 'bridge' financing until Limerick is completed."

The newsletter, which was based on information Moody's obtained from PE as part of the agency's regular surveillance of PE's bond-credit status, further stated that the utility "now intends to go back to the PUC and show that the (revolving credit agreement) is an appropriate vehicle to carry out the financing of Limerick within the intent of the August

order."

The PUC issued an order last Aug. 27 — upheld May 27 by the Pennsylvania Supreme Court — saying it would block any attempts by the utility to raise capital for work on Unit 2, which it considers "not in the public interest." The PUC has, however, supported funding for Limerick's Unit 1.

A spokesman for PE declined to respond to any questions relating to the proposed financing agreement, including inquiries regarding the company's intended uses for the

bank funds.

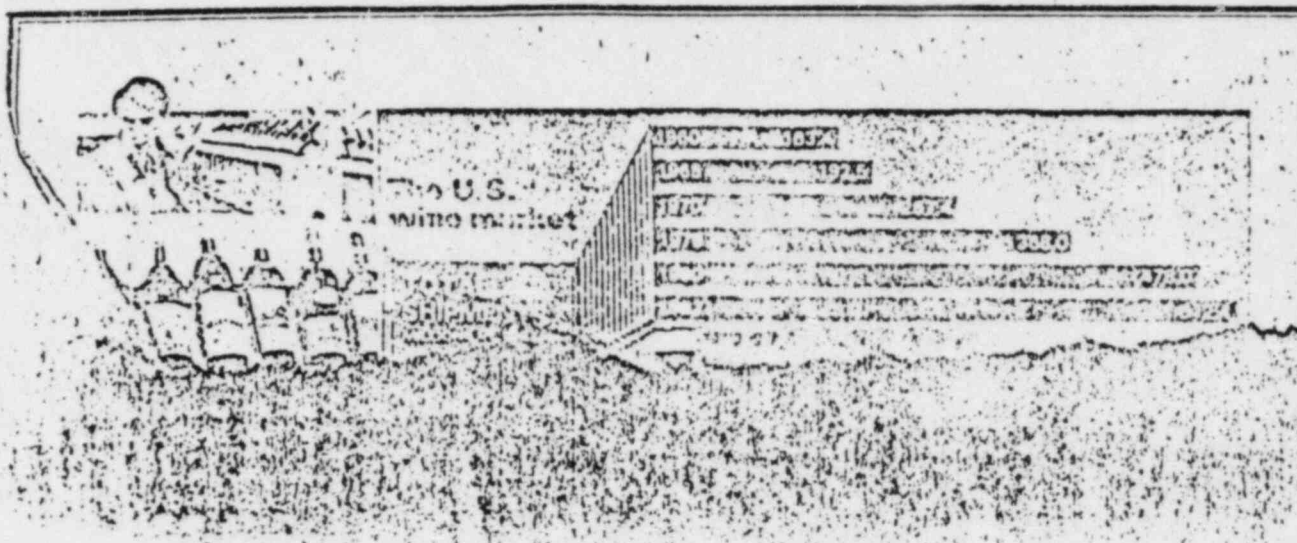
The PUC has final authority on the decision. It can accept or reject long-term capital-project financing efforts.

It was unclear yesterday whether PE intended to seek commission approval to use the funds for construction of Limerick's Unit 2, the second of the utility's two unfinished nuclear reactors in Montgomery County.

Most of the sources familiar with the proposed credit agreement described PE's efforts both in positive and negative terms:

In general, sources viewed the move as positive, in the sense that the arrangement would provide PE with greater flexibility in meeting its Limerick-related financial needs, but they also viewed it as negative in that it indicated PE's continued financial weakness, as demonstrated by the company's desire to seek Limerick financing outside the traditional capital markets.

"It gives them a safety valve if they run out of conventional financing capability," noted D. Maxwell Logan. (See PE on 10-C)



Feldstein warns that deficit may cause down

Bob
Robin:

May 25, 1983

The attached is a copy of the statement
Tim Weston read at the DRBC meeting today
about Pt. Pleasant and as justification
for the following vote which tabled for
"future consideration" action to approve
a well for a project in Newtown Twp., Bucks.
(1st page attached). (Not in the NWRA
service area).

MEN

The Commission notes that recent development and actions in Bucks County have raised serious questions and confusion regarding the planned commitments of the parties involved to develop and management water resources in the Bucks and Montgomery County area.

To a substantial extent, actions by the Commission to approve water allocations and projects in these two counties have been predicated on the assumption that these plans or commitments will be carried through to fruition.

At this point, DRBC doesn't wish to add to the confusion or to interfere with the current process by the parties as they sort out their positions. In order to present the status quo, and allow time for the parties to make their decisions this Commission deems it prudent to table further action on pending projects affecting water resources--especially ground water resources in these two counties--until the plans and commitments of the parties are clarified.

The decision on what actions should now be taken is, at least initially, a matter for consideration by the local parties involved. This Commission does not want to second-guess the decisions they might make regarding any alternative or course of action. Nor do we wish to second-guess the possible outcome of proceedings in other forums to determine or enforce the rights and interests of any of the involved parties.

It should be recognized, however, that any alternatives or actions proposed which fail to recognize the legitimate rights and interests of all involved citizens and water users in the shared water resources of this basin will not likely form the basis for favorable action by the Commission.

The responsibility for decision at this point lies with the parties involved. The Commission will, of course, make available to the parties its information, technical assistance, and offices, to the extent requested in the interest of assisting these decisions.

For this reason I would move that this matter be tabled for future consideration by the Commission.

DOCKET NO, D-80-78 CP

DELAWARE RIVER BASIN COMMISSION

Ground Water Protected Area

Indian Rock Water Company - Newtown Artesian Water Company
Ground Water Withdrawal - Golden Acres Development - Well No. 21
Newtown Township, Bucks County, Pennsylvania

PROCEEDINGS

This is an application referred to the Commission, pursuant to an Administrative Agreement under Sections 2-3.4 (a) and 2-3.7 of the Administrative Manual - Part II, Rules of Practice and Procedure, by the Bucks County Department of Health on behalf of the Pennsylvania Department of Environmental Resources (PADER) on October 17, 1980, for an allocation of ground water and review of a ground water withdrawal project in the protected area. The project was approved by the PADER on December 29, 1980, but it is withholding its permit (No. 0980507) until the project is approved by the DRBC.

The application was reviewed for inclusion of the project in the Comprehensive Plan, approval under Section 3.8 and for a withdrawal permit under Section 10.3 of the Delaware River Basin Compact. Because of the lack of adequate geohydrologic data and analysis of effects on existing ground water supplies and the aquifer withdrawal limits, the applicant was required to conduct additional pumping tests in the summer of 1981 and comply with the requirements of the protected area regulations. Supplemental technical information for the application was received from the applicant on January 4 and 21, 1982 April 15, 26 and 30, 1982, and April 15, 1983. The Bucks County Planning Commission has been notified of pending action on this docket and has not expressed objection to approval by the DRBC. A public hearing on this project was held by the Delaware River Basin Commission (DRBC) on May 25, 1983.

DESCRIPTION

Purpose.-- The purpose of this project is to construct and operate a new water supply system to serve the proposed Golden Acres residential development consisting of about 1,750 units estimated to be completed in about nine years. The proposed Well No. 21 will supply the water requirements for those units that are expected to be completed within three to five years.