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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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 REQUEST BY DEL-AWARE
UNLIMITED, INC. TO SET ASIDE THE PARTIAL
INITIAL DECISION ON SUPPLEMENTARY
COOLING WATER SYSTEM CONTENTIONS

Preliminary Statement

By a letter dated May 15, 1984, which the Appeal Board ruled would be treated "as a properly tendered motion," intervenor Del-Aware Unlimited, Inc., ("Del-Aware") renews its challenge to the Partial Initial Decision ("PID") relating to the supplementary cooling water system for the Limerick Generating Station ("Limerick") issued by the Atomic Safety and Licensing Board ("Licensing Board") on March 8, 1983.^{1/} Exceptions to the PID were filed by Del-Aware and subsequently briefed by the parties. On December 5, 1983, the presiding Atomic Safety and Licensing Appeal Board ("Appeal Board") heard oral argument.

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413 (1983).

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As the Appeal Board is undoubtedly aware, Del-Aware has been actively seeking the admission of numerous, related contentions before the Licensing Board since issuance of the PID. As discussed below, some of these contentions allege political and legal obstacles that Applicant is encountering in the completion of the Point Pleasant diversion, which will provide supplementary cooling water for Limerick.^{2/} The Licensing Board has repeatedly rejected these arguments and strongly admonished Del-Aware against repetitively pursuing them in renewed motions for admitting late contentions. In essence, Del-Aware's instant request for relief makes the same arguments and should therefore be denied on the same basis.

It is entirely unclear what rule or procedure Del-Aware relies upon in requesting that the Appeal Board "set aside" the PID. Taken as an adjunct to its appeal, the request is clearly untimely. If interpreted as a request to reopen the

^{2/} For example, in its letter of May 15, 1984, Del-Aware alleged that on April 5, 1984, NWRA filed an extensive brief in the Bucks County Court of Common Pleas in support of its position that the Agreement between it and PECO is void. Del-Aware stated: "If successful, NWRA would be relieved of any obligation to provide the water transmission facilities for PECO." A copy of the brief referred to was attached.

On May 29, 1984, the Court of Common Pleas of Bucks County entered an Opinion and Order rejecting the position that the Agreement between PECO and NWRA is void. A copy of the opinion will be forwarded upon receipt.

record to consider "newly discovered evidence," Del-Aware has not even discussed, much less satisfied, the legal requirements for reopening the record and litigating new contentions. Accordingly, its request for relief should be denied.

Argument

I. None of the Matters Raised by Del-Aware is a Basis for Vacating the PID.

The thrust of Del-Aware's argument is that political opposition to the Point Pleasant project and related litigation concerning the obligations of the Neshaminy Water Resources Authority to construct the project have created difficulties in its completion. Del-Aware has been pursuing such a contention now for the past year. In a pleading filed with the Licensing Board on May 25, 1983, Del-Aware sought admission of a new late contention, proposed as Contention V-28:

In passing upon the operating license, the Commission must consider the feasibility of providing water to Limerick in time for its projected start-up date, and in view of the complications, disarray [sic], and apparent legal obstacles to PECO's utilization of Point Pleasant, PECO must pursue alternative water sources in order for the NRC to continue processing its application, or to grant approval.^{3/}

^{3/} Del-Aware's Supplementary Motion to Reopen and/or to Admit New Contention V-27, V-28 at 5 (May 25, 1983).

In a subsequent Memorandum and Order, the Licensing Board summarily denied this proposed contention, noting that it failed to raise any litigable issue. The Board stated:

With respect to proposed Contention V-28, if and when PECO were to materially change its proposal to obtain supplementary cooling water in the event the Point Pleasant Diversion would not be allowed to operate due to "legal obstacles" involving other permitting authorities, the Nuclear Regulatory Commission at such time would have to reconsider its previous assessment of environmental impacts in light of changes proposed by PECO.^{4/}

Notwithstanding the rejection of its proposed contention, Del-Aware submitted the following late contention in a pleading filed December 15, 1983, regarding political opposition to the Point Pleasant project and related litigation, as proposed Contention V-32:

The action of the Bucks County commissioners on November 18, 1983, in passing the ordinance, with the intent, inter alia, of implementing the results of the referendum of May 18, 1983, calling for a halt to the project, and the action of the Bucks County Common Pleas Court on December 6, 1983, denying applicants [sic] Motion for Preliminary Injunction which would have barred the Commissioner from any implementation of the ordinance, demonstrates that the applicant has no available supplemental cooling water system, and therefore no prospect

^{4/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983) (slip op. at 9 n.3).

of operating the plant properly
. . . .5/

Del-Aware again moved in a pleading filed January 12, 1984 for the admission of a yet another late-filed contention which, although considerably garbled, raised basically the same point. As proposed, Contention V-35 stated:

The applicant has a available and inadequate amount water to operate the cooling water system for one unit. It has now been determined on the basis of adjudicatory record that there is a substantial likelihood of significant erosion from any further operation of the system. Accordingly, an operating license cannot issue for Limerick Unit 1, since there is in adequate cooling water available [sic].6/

Although the Licensing Board determined that it lacked jurisdiction to rule upon these and other late contentions filed by Del-Aware, the Licensing Board severely criticized Del-Aware as follows:

Del-Aware files contentions which are worded such that one must guess both what is being contested and what the bases are for the issues. To the extent the contentions are comprehensible (within the range of uncertain guesses by the reader), they are reformulations of contentions which have previously been advanced by Del-Aware and either rejected by or litigated before this Board. Yet Del-Aware, even at this late

5/ Del-Aware's Request for Late Filed Contentions at 1-2 (December 15, 1983).

6/ Del-Aware's Request to File Late Filed Contention or to Reopen at 1 (January 12, 1984).

point in the posture of the proceeding on its issues, undertakes no obligation to even point out, let alone discuss and distinguish, our many previous rulings on its previous similar contentions. Such practice is not only regrettable, it is fatal to Del-Aware's motions in light of the factors governing the admissibility of late-filed contentions and reopening of the record on issues considered previously. . . . Such pleadings would be unacceptable even if they were properly before us. We will not be a party to the perpetuation of such pleadings by referring them to the Appeal Board.^{7/}

As to the proposed contentions which relate to the matters Del-Aware seeks to raise before the Appeal Board, the Licensing Board stated:

Finally, Del-Aware, again repetitively, argues that the Point Pleasant diversion project will not be completed due to various legal and political decisions, including action by the Bucks County Commissioners. As we have pointed out in rejecting late-filed Contention V-28, if the applicant were to materially change its proposed supplemental cooling water system because the Point Pleasant diversion is not permitted to operate by other opposing bodies, the NRC would have to consider the effect of any such changes on the previous assessment of

^{7/} Limerick, supra, "Memorandum and Order Denying Del-Aware's Motions to Reopen the Record to Admit Late-Filed Contentions V-30, V-31, V-32, V-33, V-35 and V-36" (April 19, 1984) (slip op. at 4-5). The Licensing Board emphasized its "strong feeling that Del-Aware's counsel has not acted responsibly in simply regurgitating a potpourri of previously presented points without the slightest attempt to discuss whether there is a new, material, significant attribute to those points in light of our many previous rulings." Id. at 9-10.

environmental impacts. See June 1, 1983 Order, supra at 9 n.3.8/

The Licensing Board's rulings and rationale are equally dispositive of the the same points which Del-Aware raises before this Board. Nothing alleged by Del-Aware demonstrates any litigable issue or any need to reevaluate environmental impacts previously assessed. The Licensing Board correctly found that it would be inappropriate under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4332 as well as the Commission's regulations under 10 C.F.R. Part 51 to reevaluate environmental impacts of the supplementary cooling water system on the basis of the speculation and contingencies described by Del-Aware in its various pleadings.^{9/}

II. Del-Aware has Failed to Satisfy the Requirements for Reopening the Record and Litigating Late Contentions.

Although Del-Aware's request for relief is without merit, the Appeal Board should determine as a preliminary matter that Del-Aware has completely failed to satisfy the Commission's requirements for reopening a closed evidentiary record and pursuing new contentions based upon evidence

8/ Id. at 9.

9/ It is well established that NEPA does not require an agency to engage in speculative and contingent assessment of environmental impacts, e.g., Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976), cert. denied, 430 U.S. 922 (1977).

which allegedly came into existence after the close of the record. Nowhere does Del-Aware specify the rule or procedure by which it has requested "that this Board set aside the PID and find that the Point Pleasant project is not a viable source of supplemental cooling water and direct the Licensing Board to direct the Applicant to file a revised plan."^{10/} If Del-Aware is attempting to amend its previously filed exceptions or file new exceptions to the PID, it is clearly out of time.^{11/}

On the other hand, if Del-Aware seeks to reopen the record, it has not even acknowledged the standards it must meet in order for this Board to do so and thereby a new contention or series of contentions. Having perpetrated what the Licensing Board accurately perceived as forum shopping,^{12/} Del-Aware now seeks to circumvent the Commission's procedural requirements for reopening a record to consider new contentions.

^{10/} Del-Aware letter dated May 15, 1984 at 3.

^{11/} See, e.g., Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-684, 16 NRC 162 (1982). See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), "ALAB Order" (November 29, 1983) (holding that a party may not "amend" its appeal).

^{12/} Limerick, supra, "Memorandum and Order Denying Del-Aware's Motions to Reopen the Record" (April 19, 1984) (slip op. at 3, 10).

Inasmuch as the Licensing Board has determined that it lacks jurisdiction to consider such matters,^{13/} it is now for this Appeal Board to determine whether Del-Aware has met the standards for reopening and litigating new contentions.^{14/} Addressing first the three reopening criteria, Del-Aware has failed to show (1) that its motion has been "timely presented"; (2) that it is "addressed to a significant safety or environmental issue"; and (3) that "a different result would have been reached initially had [the newly submitted evidence] been considered."^{15/} As to the first factor, it cannot be seriously contended that Del-Aware has "timely presented" its evidence. Del-Aware first sought to raise the matter with the Licensing Board (after the Appeal

^{13/} Id. at 3-4. See generally Limerick, supra, ALAB-726, 17 NRC 755 (1983).

^{14/} In Waterford, the Appeal Board agreed in principle that the Commission's decision in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), required it to consider the five criteria for admitting late contentions in addition to the three reopening criteria with regard to any "wholly new and previously uncontested issue in this proceeding." Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983).

^{15/} Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978), quoting Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974). The Wolf Creek test was approved by the Commission in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

Board had assumed jurisdiction) more than a year ago in seeking to litigate its proposed Contention V-28.^{16/}

As to the second and third factors for reopening, Del-Aware has wholly failed to demonstrate that its new arguments have any, let alone significant, environmental consequence, or that the result of the hearing would have changed. As noted, Del-Aware speculates that future contingencies may result in the noncompletion of the Point Pleasant project, but unless Applicant amends its application, there is no basis for the NRC or its adjudicatory boards to evaluate environmental impacts associated with other possible sources of supplementary cooling water. To do so would necessarily involve impermissible speculation.

^{16/} It is irrelevant that other events have occurred since that time which Del-Aware relies upon in support of its request. Timeliness is to be judged on the basis of an intervenor's ability to compile sufficient information to present a proposed contention in a timely manner. The Commission so stated in Catawba:

[The Commission's hearing] principles require intervenors to diligently uncover and apply all publicly available information to the prompt formulation of contentions. Accordingly, the institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.

Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

Turning to the standards for late contentions, Del-Aware has likewise not even addressed the applicable factors under 10 C.F.R. §2.714(a)(1)(i)-(v). Given Del-Aware's extreme tardiness and the fact that it is represented by counsel, "the absence of discussion of [the five factors] is not some minor defect in pleading that can be overlooked."^{17/} In any event, it is self-evident that, for the same reasons just discussed, Del-Aware has failed to show "good cause" for lateness. As in Midland, intervenor here has "offered no coherent or plausible excuse for the delay."^{18/} At this very advanced stage of the

^{17/} Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 331 (1983).

^{18/} Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-624, 12 NRC 680, 682 (1980). See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 615 (1977); Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 643 (1977).

proceeding,^{19/} the lack of "good cause" in asserting new contentions has special significance.^{20/}

When an intervenor is late without cause, he must make an especially "compelling showing" on the remaining four factors.^{21/} Del-Aware has clearly failed to do so. As to the second and fourth criteria, which are given relatively less weight in any event,^{22/} the record (including Del-Aware's May 15, 1984 letter) amply demonstrates that there are a variety of other agencies and forums before which Del-Aware has sought and continues to seek relief with regard to its claims. There is simply no reason to grant Del-Aware a hearing before the NRC on claims being adjudicated in other proceedings.

^{19/} It is noted that on May 9, 1984, Applicant filed a motion before the Licensing Board requesting the issuance of an expedited partial initial decision and a license authorizing fuel loading and low-power testing not to exceed five percent of full power. It is also noted that the Licensing Board has concluded its hearings on all contested issues except offsite emergency planning, i.e., all issues whose completion is necessary for issuance of a low-power license. See 10 C.F.R. §50.47(d).

^{20/} Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983).

^{21/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

^{22/} South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

On the third criterion, Del-Aware has also failed to comply with the requirement of Grand Gulf that "[w]hen a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."^{23/} Further, given the history of reprimands by the Licensing Board to Del-Aware and its counsel for improper or unprofessional conduct, culminating in the Board's recent decision rejecting these very issues,^{24/} it is extremely doubtful that Del-Aware would assist this Board in developing an appropriate record.

Finally, the fifth criterion weighs very heavily against any late contentions. The issues which Del-Aware seeks to litigate will of necessity broaden the issues and significantly delay the proceeding.^{25/} Considering the

^{23/} Grand Gulf, *supra*, ALAB-704, 16 NRC at 1730. See also WPPSS, *supra*, ALAB-747, 18 NRC at 1177; Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399-400 (1983).

^{24/} Limerick, *supra*, "Memorandum and Order Denying Del-Aware's Motions to Reopen the Record (April 19, 1984) (slip op. at 9-10).

^{25/} It is emphasized that this factor is governed by delay of the proceeding, not delay in the operation of the facility. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765-66 (1982); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1146 (1983). Even so, admission of Del-Aware's contention(s) at this extremely late hour would obviously delay issuance of low- and full-power licenses for Limerick.

possibility for delay in the specific context of the particular contention(s) proposed by Del-Aware,^{26/} it is clear that a whole new round of prehearing conferences, discovery, motions, evidentiary hearings and findings would be necessary if these issues were considered.^{27/} Such delay is absolutely unjustified.

Conclusion

For the reasons discussed more fully above, Del-Aware has failed to meet the Commission's requirements for reopening a closed record and litigating new, late contentions. In any event, the Licensing Board correctly determined that the matters which Del-Aware seeks to raise are not litigable because they address contingencies whose outcome is unknown. The Appeal Board should discourage Del-Aware's obvious forum shopping and summarily deny its request.

Respectfully submitted,

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May 30, 1984

^{26/} See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983).

^{27/} Fermi, supra, ALAB-707, 16 NRC at 1765-66.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Request by Del-Aware Unlimited, Inc. to Set Aside the Partial Initial Decision on Supplementary Cooling Water System Contention," dated May 30, 1984, in the captioned matter, have been served upon the following by deposit in the United States mail this 30th day of May, 1984:

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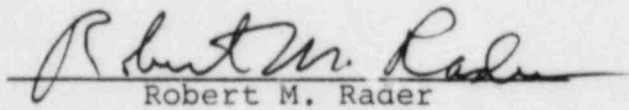
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