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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY  
DOCKETING & RECORDS  
MANAGEMENT

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

Docket Nos. 50-352  
50-353

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NRC STAFF RESPONSE TO DEL-AWARE'S MOTION TO SET ASIDE  
THE PARTIAL INITIAL DECISION ON THE ENVIRONMENTAL  
EFFECTS OF THE SUPPLEMENTARY COOLING WATER SYSTEM (SCWS)

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Michael N. Wilcove  
Counsel for NRC Staff

June 4, 1984

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I. INTRODUCTION

On May 15, 1984, Intervenor Del-Aware filed with the Atomic Safety and Licensing Appeal Board ("Appeal Board") a motion to set aside the Partial Initial Decision issued by the Atomic Safety and Licensing Board ("Licensing Board") in March 1983. For the following reasons, the Staff opposes Del-Aware's motion.

II. BACKGROUND

In March 1983 the Licensing Board issued a Partial Initial Decision ("PID") addressing contentions alleging that significant environmental impacts would arise from Limerick's proposed supplementary cooling water system, the Point Pleasant Diversion. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-11, 18 NRC 413 (1983).<sup>1/</sup>

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<sup>1/</sup> All of the admitted contentions alleging an environmental impact from the Point Pleasant Diversion were advanced by Del-Aware.

Hearings were held in October 1982. Subject to certain noise mitigation measures being imposed should they become necessary, the Licensing Board found that operation of the Point Pleasant Diversion would pose no significant adverse environmental impact (PID at 463-64). On March 21, 1983, Del-Aware filed exceptions to the PID. The Appeal Board heard oral argument on December 5, 1983, but has not yet rendered a decision.<sup>2/</sup>

On May 15, 1984, Del-Aware filed its motion to set aside the Partial Initial Decision based on indications that the Point Pleasant Diversion may be canceled.<sup>3/</sup>

### III. DISCUSSION

Del-Aware requests the Appeal Board to "set aside the PID and find that Point Pleasant is not a viable source of supplemental cooling water and direct the Licensing Board to direct the applicant to submit a revised plan." Implicit in Del-Aware's request is the assertion that the cancellation of the Point Pleasant Diversion renders the PID moot.

However, contrary to the premise behind Del-Aware's motion, it is not clear that the Diversion will be canceled. To be sure, Bucks County has acquired the projects of the Meshaminy Water Resources Authority (NWRA), and now has control over construction of the Point Pleasant

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<sup>2/</sup> The Appeal Board is also considering exceptions to the Licensing Board's denial of a motion filed by Del-Aware on March 8, 1983, to reopen the record to litigate a new contention. (Memorandum and Order, June 1, 1983).

<sup>3/</sup> Although Del-Aware's motions fails to conform to the Commission's Rules of Practice, the Appeal Board ordered that the motion be treated as if properly tendered. (Order, May 17, 1984).

Diversion. As Del-Aware also points out, Bucks County has indicated its intent not to honor its contractual obligations to construct the Diversion. Indeed, Bucks County has apparently suspended construction on the Diversion. Nonetheless, there appear to be significant legal obstacles that make it uncertain whether Bucks County will succeed in its attempts to cancel the Diversion. As can be discerned from the brief Del-Aware attaches to its motion, Philadelphia Electric has intervened in an equity suit to compel the NWRA and Bucks County to perform their contractual obligation to construct the Diversion. ("Point Pleasant contract"). In fact, on May 29, 1984, the court dismissed the claim by Bucks County that the Point Pleasant contract fails to confer a primary benefit to the public and is therefore void. Sullivan v. Bucks County, No. 83-8358-05-5 (C.P. Bucks County, Pa., May 29, 1984).<sup>4/</sup> Furthermore, in the S-3 Registration Statement attached to Del-Aware's motion, Philadelphia Electric states that it is "pursuing its legal remedies to protect or obtain appropriate permits and approvals and to enforce its rights under the contract [for the construction of the Diversion]." Under these circumstances, it is problematical whether the Diversion will be canceled.

As evidence that the Diversion will not be constructed, Del-Aware also offers the fact that Bucks County has applied on behalf of Philadelphia Electric for alternative water supplies for Limerick. However, there is

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<sup>4/</sup> While ruling that the Point Pleasant contract is valid, the court chose not to rule at this time on whether the contract is specifically enforceable or whether Philadelphia Electric is eligible for damages.

no indication (1) what the applications are, (2) whether they would be approved, or (3) that Philadelphia Electric acquiesces in them. As best as can be discerned from Del-Aware's motion, attempts by Bucks County to find another source of cooling water for Philadelphia Electric are steps Bucks County has taken in the hopes of being able to cancel the Diversion. They do not indicate that the Diversion has been canceled.

Del-Aware also refers to an affidavit in which Vincent Boyer, Senior Vice President, Philadelphia Electric, apparently indicates that if plans for the Diversion were scrapped, "the approval process for Limerick would be complicated."<sup>5/</sup> Assuming Mr. Boyer's statement has been accurately characterized by Del-Aware, the statement does not indicate that plans for the Diversion will be abandoned. Del-Aware also indicates that Philadelphia Electric has stated that in the event that the Diversion is unavailable, Philadelphia Electric hopes to temporarily use water from the Blue Marsh reservoir. The fact that Philadelphia Electric is planning for the contingency that the Diversion becomes unavailable does not indicate that the Diversion is no longer viable.

Del-Aware further asserts that the Public Utilities Commission (PUC) has referred to a special study group Philadelphia Electric's application to build the Bradshaw pumphouse. The fact that a special study group has been established does not support the conclusion that the Diversion will not go forward. At best, Del-Aware is asking the Appeal Board to speculate

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<sup>5/</sup> Contrary to the statement in Del-Aware's motion, a copy of the affidavit was not enclosed with the copy served on the Staff.

that the PUC will, after the special study group completes its analysis, deny permission to construct the pumps.<sup>6/</sup>

In short, Del-Aware has shown little more than that Bucks County hopes to successfully cancel the Diversion and is taking steps to do so. That being so, the relief being sought is inappropriate. Granting Del-Aware's motion on that basis would fly in the face of the Commission and the Appeal Board's determination that the licensing process should not be halted merely on the potential that a governmental entity will take a particular action. Kerr-McGee Corporation (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232, 269 (1982)<sup>7/</sup> Cleveland Electric Illuminating Company (Perry

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<sup>6/</sup> An Administrative Law Judge of the PUC has issued an Initial Decision with respect to Philadelphia Electric's application to construct the Bradshaw pumphouse. In Re: Application of Philadelphia Electric Company for finding of necessity for the situation of a pumphouse to contain pumping and accessory equipment on a site located at the intersection of Bradshaw and Moyer Roads in Plumstead Township, Bucks County. (December 12, 1983). The Initial Decision would permit construction to begin on one pump and would allow for construction of a second pump if, after one year of operation, Philadelphia Electric could show that operation of one pump did not give rise to significant environmental effects. (Id.) Although the Administrative Law Judge did not authorize construction of four pumps, as Philadelphia Electric requested, authorization to construct one pump is a step towards allowing the Diversion to operate, and not a step away from it.

<sup>7/</sup> In CLI-82-2, the Commission denied a contention on the grounds that it was based on the potential that a governmental entity, i.e. the City of West Chicago, might take a particular action. 15 NRC at 269. The Commission subsequently determined that the Office of Nuclear Material Safety and Safeguards (NMSS) rather than the Commission should dispose of the Intervenor's contentions and, therefore, delegated the Director, NMSS, to do so. Kerr-McGee Corporation (West Chicago Rare Earth Facility), CLI-82-21, 16 NRC 401 (1982). This Order does not, however, alter the Commission's assertion that the licensing process should not be halted on the potential that a governmental entity may take a particular action.

Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977), Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-189, 7 AEC 410 (1974), Southern California Edison Company, (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC, 37, 39 (1979).<sup>8/</sup>

Considering that extensive hearings were held on the environmental effects of the SCWS and the Licensing Board issued a comprehensive Partial Initial Decision, the Staff submits that the Appeal Board should not vacate that PID on the chance that Bucks County will overcome the obstacles blocking its attempts to cancel the Diversion. Rather, should cancellation of the Diversion become a reality while the Appeal Board still has jurisdiction over the matter, the Appeal Board could take appropriate steps at that time. See Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980); Rochester Gas and Electric Corporation (Sterling Power Project Nuclear Unit No. 1),

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<sup>8/</sup> In ALAB-171, the Appeal Board stayed its consideration of an initial decision because the California Coastal Zone Conservation Commission declined to issue to the utility a permit necessary to allow construction of the facility. The Appeal Board noted that it would treat the decision of the Coastal Commission as being in effect even though the Coastal Commission was reconsidering its decision and the decision might be declared invalid by a court. However, as discussed above, the circumstances surrounding the dispute between PECO and Bucks County make it uncertain whether the Diversion will actually be canceled. Furthermore, Del-Aware is asking the Appeal Board to take stronger action than what was taken in ALAB-171. Rather than requesting that consideration of the PID be stayed pending the outcome of the dispute between Philadelphia Electric and Bucks County, Del-Aware is asking that the PID be vacated.



ALAB-596, 11 NRC 867 (1980). At this point, however, Del-Aware's motion is based on conjecture.<sup>9/</sup>

#### IV. CONCLUSION

For the foregoing reasons, the Staff opposes Del-Aware's motion to set aside the Partial Initial Decision and urges that it be denied.<sup>10/</sup>

Respectfully submitted,



Michael N. Wilcove  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 4th day of June, 1984

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<sup>9/</sup> The crux of Del-Aware's motion is the assertion that actions taken by Bucks County render the Diversion no longer viable. That being so, it is Del-Aware's responsibility to offer a comprehensive description of the contractual dispute over the Diversion. However, Del-Aware merely offers bits and pieces of the story which force the Appeal Board and parties to extrapolate the rest of the details for themselves. For instance, Del-Aware provides no background information about Philadelphia Electric's suit to compel performance but simply attaches a brief filed by the NWRA. Similarly, instead of offering the entire S-3 statement filed by Philadelphia Electric, Del-Aware attaches two pages and leaves everyone to guess at the context from which those pages were taken. Finally, with respect to other actions which Del-Aware believes show the Diversion to be no longer viable, Del-Aware offers capsule summaries instead of affidavits, complete documents or other evidence which would permit a full understanding of what these events entail. In short, Del-Aware's motion offers little more than an incomplete, thumbnail sketch of the contractual dispute over the Diversion. This alone is reason for concluding that Del-Aware has not shown that the Diversion is no longer viable.

<sup>10/</sup> For the same reasons, the Staff opposes Del-Aware's request that the Licensing Board be instructed to require Philadelphia Electric to submit alternative plans for supplementary cooling water.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO DEL-AWARE'S MOTION TO SET ASIDE THE PARTIAL INITIAL DECISION ON THE ENVIRONMENTAL EFFECTS OF THE SUPPLEMENTARY COOLING WATER SYSTEM (SCWS)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of June, 1984:

Christine N. Kohl, Chairman  
Atomic Safety and Licensing Appeal  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Dr. Peter A. Morris  
Administrative Judge  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Gary J. Edles  
Atomic Safety and Licensing Appeal  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Mr. Frank R. Romano  
Air and Water Pollution Patrol  
61 Forest Avenue  
Ambler, PA 19002

Dr. Reginald L. Gotchy  
Atomic Safety and Licensing Appeal  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Phyllis Zitzer, President  
Limerick Ecology Action  
P.O. Box 761  
Pottstown, PA 19464

Lawrence Brenner, Esq., Chairman (2)  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Mr. Edward G. Bauer, Jr.  
Vice President & General Counsel  
Philadelphia Electric Company  
2301 Market Street  
Philadelphia, PA 19101

Dr. Richard F. Cole  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Troy B. Conner, Jr., Esq.  
Mark J. Wetterhahn, Esq.  
Conner and Wetterhahn  
1747 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Joseph H. White, III  
15 Ardmore Avenue  
Ardmore, PA 19003

Thomas Gerusky, Director  
Bureau of Radiation Protection  
Dept. of Environmental Resources  
5th Floor, Fulton Bank Building  
Third and Locust Streets  
Harrisburg, PA 17120

Director  
Pennsylvania Emergency Management  
Agency  
Basement, Transportation & Safety  
Building  
Harrisburg, PA 17120

Robert L. Anthony  
Friends of the Earth of the  
Delaware Valley  
103 Vernon Lane, Box 186  
Moylan, PA 19065

Mr. Marvin I. Lewis  
6504 Bradford Terrace  
Philadelphia, PA 19149

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

David Wersan  
Consumer Advocate  
Office of Attorney General  
1425 Strawberry Square  
Harrisburg, PA 17120

Spence W. Perry, Esq.  
Associate General Counsel  
Federal Emergency Management Agency  
Room 840  
500 C Street, S.W.  
Washington, D.C. 20472

James Wiggins  
Senior Resident Inspector  
U.S. Nuclear Regulatory Commission  
P.O. Box 47  
Sanatoga, PA 19464

Zori G. Ferkin  
Governor's Energy Council  
P.O. Box 8010  
1625 N. Front Street  
Harrisburg, PA 17105

Martha W. Bush, Esq.  
Kathryn Lewis, Esq.  
1500 Municipal Services Bldg.  
15th and JFK Blvd.  
Philadelphia, PA 19107

Robert J. Sugarman, Esq.  
Sugarman, Denworth & Hellegers  
16th Floor Center Plaza  
101 North Broad Street  
Philadelphia, PA 19107

Angus R. Love, Esq.  
Montgomery County Legal Aid  
107 East Main Street  
Norristown, PA 19401

Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Atomic Safety and Licensing  
Appeal Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

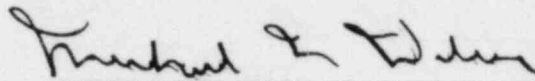
Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555\*

Jay Gutierrez  
Regional Counsel  
USNRC, Region I  
631 Park Avenue  
King of Prussia, PA 19406

Gregory Minor  
MHB Technical Associates  
1723 Hamilton Avenue  
San Jose, CA 95125

Steven P. Hershey, Esq.  
Community Legal Services, Inc.  
5219 Chestnut Street  
Philadelphia, PA 19139

Timothy R. S. Campbell, Director  
Department of Emergency Services  
14 East Biddle Street  
West Chester, PA 19380



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Michael N. Wilcove  
Counsel for NRC Staff