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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 ANSWER TO DEL-AWARE'S PROPOSED LATE
CONTENTIONS REGARDING APPLICANT'S MOTION FOR AN
EXPEDITED PID AND ISSUANCE OF A LOW-POWER LICENSE

Preliminary Statement

On May 9, 1984, Applicant Philadelphia Electric Company ("Applicant") filed a motion with the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") requesting the issuance of an expedited partial initial decision and an operating license authorizing Applicant to load fuel in the Limerick Generating Station ("Limerick"), Unit 1 reactor and to operate the facility at power levels not to exceed five percent of full power. Apparently in response to that motion, intervenor Del-Aware Unlimited, Inc. ("Del-Aware") served a letter dated May 17, 1984 upon the Board and parties,^{1/} requesting the admission of one of two alternative contentions.

^{1/} It is noted that the Licensing Board has previously admonished the parties, including those represented by
(Footnote Continued)

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The proposed contention submitted by Del-Aware is entirely without merit. As discussed below, the Licensing Board has previously denied practically the same contention asserting that Applicant will not have the necessary supplementary cooling water available for plant operation. Moreover, Del-Aware apparently does not understand that Applicant's motion for a low-power license is a routine request for relief which has been authorized by other licensing boards under similar circumstances and which is based upon the existing record of the application, not some "new" application. Nor has Del-Aware met the requirements for submitting new, late contentions and reopening the record of the partial initial decision on water issues.^{2/} The Board should therefore deny Del-Aware's proposed contention on the same grounds it has previously denied Del-Aware's similar, late contentions.

(Footnote Continued)

counsel, against the practice of addressing letters to the Board which deal with "important procedural and substantive matters." Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353, "Memorandum and Order Regarding Establishment of Hearing Schedule and Granting AWPP Motion to Compel Discovery" (September 13, 1983) (slip op. at 9). The Board requested that, except in cases of generic "Board Notifications" by the Staff, matters submitted to the Board "shall be in formal pleading form, usually a motion, an answer or a formal report of information." Id.

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

Argument

In a Memorandum and Order issued April 19, 1984, the Licensing Board denied a series of requests to reopen the record to consider six additional, late-filed supplementary cooling water contentions,^{3/} submitted after the issuance of the Board's PID on this subject matter.^{4/} In determining that it would have denied the contentions if it had jurisdiction, the Licensing Board chastised Del-Aware for continuing "an unfortunate trend" in submitting motions to admit late filed contentions "which are worded such that one must guess both what is being contested and what the bases are for the issues" or, to the extent comprehensible, which are "reformulations of contentions which have previously been advanced by Del-Aware and either rejected by or litigated before this Board."^{5/} The Licensing Board stated that the answers filed by Applicant and the NRC Staff to the latest round "demonstrate that Del-Aware's latest contentions are not new at all," and that the recent

^{3/} 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).

^{4/} See note 2, supra.

^{5/} Limerick, supra, "Memorandum and Order" (April 19, 1984) (slip op. at 4-5).

developments relied upon by Del-Aware beyond the scope of the NRC proceeding did not support its motion.^{6/}

Notwithstanding the Board's previous admonition to Del-Aware that it "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,"^{7/} Del-Aware has nonetheless brought these same matters once again before the Board by way of yet another request to admit a late contention. Its proposed Contention LP-1 states:

The Applicant has failed to provide reasonable assurances that it will be able to operate its plan in accordance with the terms of the application, as amended. Whereas the application as amended shows that the applicant will provide supplemental cooling water from the so called Point Pleasant Diversion, in fact the Point Pleasant Diversion is not constructed, and cannot be constructed in timely fashion to provide supplemental cooling water for low power testing. Therefore, the plant cannot and will not operate in accordance with the license. 8/

6/ Id. at 5-6.

7/ Id. at 9-10.

8/ Del-Aware pleads an alternative contention alleging a lack of commitments from other agencies for any arrangements other than the Point Pleasant diversion.

As such, the proposed contention is virtually indistinguishable from proposed Contention V-28, which Del-Aware submitted in a motion filed a year ago. It stated:

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, dissarray [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.^{9/}

It also appears that the newly proposed contention is a restatement of proposed Contention V-35, which stated in relevant part:

The applicant has a available and inadequate amount of water to operate the cooling water system for one unit Accordingly, an operating license cannot issue for Limerick Unit 1, since there is in adequate cooling water available [sic]. ^{10/}

Given the Board's strong admonition only recently against repetitive filings, it is incomprehensible that Del-Aware could now propose the same contention again without even discussing the relevance of its previous filings and the Board's rulings. Moreover, it is incredible

^{9/} See Del-Aware's Supplementary Motion to Reopen and/or to Admit New Contention V-27 and V-28 at 5 (May 25, 1983) (emphasis added).

^{10/} Del-Aware's Request to File Late Filed Contention or to Reopen at 1 (January 12, 1984).

that Del-Aware would assert that previous versions of its contentions "have been advanced repeatedly, but have been rejected as premature."^{11/}

To the contrary, the Board considered and rejected proposed Contention V-28 on the merits, holding:

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 could 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.^{12/}

In stating that it would have rejected proposed Contention V-35 for the same reason, if it had jurisdiction, the Licensing Board recently reiterated the same point.^{13/}

In reasserting this issue, Del-Aware continues to confuse the necessity for permits and authorizations from other agencies with the matters over which the NRC has regulatory jurisdiction. While Del-Aware correctly states as a general proposition that this Board hears contentions in determining "[w]hether the facility will operate in

^{11/} Del-Aware letter dated May 17, 1984 at 3.

^{12/} Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983) (slip op. at 9 n.3).

^{13/} Limerick, supra, "Memorandum and Order" (April 19, 1984) (slip op. at 9).

conformity with the application as amended, the provisions of the [Atomic Energy] Act, and the rules and regulations of the Commission,"^{14/} nothing cited by Del-Aware relates to the Act or the NRC's rules and regulations. That other permits or authorizations must be obtained for the operation of the Point Pleasant diversion presents no litigable issue. The Licensing Board has now so ruled on at least the two occasions indicated. Those decisions clearly constitute the law of the case and are dispositive here.

In addition to seeking to relitigate proposed contentions previously rejected, Del-Aware's recent submission fails to satisfy the Commission's requirements under 10 C.F.R. §2.714(a)(1)(i)-(v) and the requirements for specificity and bases under 10 C.F.R. §2.714(b). As the result of Commission guidance to its adjudicatory boards issued as an exercise of its inherent supervisory authority over pending adjudications in the Diablo Canyon proceeding, it is now firmly established that a request for a low-power license is predicated upon the existing record of the application and does not automatically give rise to the submission of additional contentions and requests for

^{14/} 10 C.F.R. Part 2, Appendix A, Section VIII(b)(2). This provision was relied upon but cited incorrectly by Del-Aware at page 2 of its May 17, 1984 letter.

hearings. In that case, the Commission stated:

1. The Board Should Rule Promptly on Motions for Fuel Loading and Low Power Testing

Pursuant to 10 CFR 50.57(c), the filing of a motion for a partial initial decision on fuel loading and low power testing requires an initial determination by the Licensing Board on whether the evidentiary record compiled to that point is adequate for such a partial decision. 10 CFR 50.57(c) does not generally contemplate that a new evidentiary record, based on litigation of new contentions, would be compiled on the motion for fuel loading and low power testing. When the record has been closed but motions to reopen have been filed, the Licensing Board should decide whether the record must be reopened for new evidence directly relevant to the fuel loading and low power licensing request. Decisions on full power issues associated with the motion to reopen could be postponed until later.^{15/}

The Commission reaffirmed its position on low-power license requests in a subsequent aspect of the same proceeding, where it similarly stated:

As the Commission has previously held, a request for a low-power license does not give rise to a proceeding separate and apart from a pending full-power operating license proceeding. It follows that this hearing request is subsumed within the scope of the continuing full-power proceeding, as was the request for a low-power license. Further operation at low power is within the scope of PG&E's application for a full-term, full-power license and is

^{15/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981).

controlled by the record developed to date in the operating license proceeding. Thus, there is no section 189a right to a separate hearing here and no need for any "significant hazards consideration" finding of the type that would be called for were this a separate proceeding on an application for a license amendment. For the same reason, Sholly v. U.S. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980) (per curiam), cert. granted, 451 U.S. 1016 (1981), does not require a hearing in this instance. This request for a hearing would ordinarily be treated as a motion to reopen the low-power record.^{16/}

Accordingly, Del-Aware is not entitled to a hearing on its contentions because it has not met the Commission's requirements for admitting late-filed contentions under 10 C.F.R. §2.714(a)(1)(i)-(v) and the separate criteria for reopening.^{17/} In the interest of brevity, having addressed

^{16/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982). More recently, the Licensing Board in Shoreham held that an intervenor seeking a hearing on new contentions by virtue of a request for a low-power license must satisfy the criteria for reopening the record and admission of late filed contentions. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 632 (1983).

^{17/} See Diablo Canyon, supra, CLI-82-39, 16 NRC at 1715. Del-Aware has not even addressed, much less satisfied the criteria for reopening: (1) that its contentions are "timely presented"; (2) that its contentions are "addressed to a significant safety or environmental issue"; (3) that litigating its contentions would have resulted in a different result in the outcome of the proceeding. See generally Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). The Wolf Creek test
(Footnote Continued)

Del-Aware's repetitive submissions before, Applicant hereby incorporates and respectfully refers the Licensing Board to its previous answers to the previous versions of the same contentions with regard to the application of the late contention standards.^{18/} Del-Aware's discussion of the five factors for admitting late contentions is frivolous on its face and does not warrant further comment.

Conclusion

For the reasons discussed more fully above, the Licensing Board should deny the proposed late contention submitted by Del-Aware. In consideration of Del-Aware's willful refusal to abide by the Licensing Board's earlier, repeated admonitions against "regurgitating" previously litigated or

(Footnote Continued)

was approved by the Commission in Diablo Canyon, supra, CLI-81-5, 13 NRC at 363.

^{18/} See Applicant's Answer to Request by Del-Aware Unlimited, Inc. for Admission of New, Late Filed Contentions V-30, V-31, V-32 and V-33 (December 29, 1983); Applicant's Answer to Request by Del-Aware Unlimited, Inc. to Reopen and Admit New, Late Filed Contentions V-35 and V-36 (January 25, 1984).

rejected issues, the Board should also take appropriate sanctions against Del-Aware or its counsel.

Respectfully submitted,

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