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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of
Philadelphia Electric Company
(Limerick Generating Station,
Units I and II)

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Docket No. 50-352-OL SECRETARY
50-353-OL SERVICE
84 DEC 28 AIO:23

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

I. INTRODUCTION

In its Decision of September 26, 1984 (ALAB-785), the Appeal Board remanded to the Licensing Board the latter's disallowance of two Del-Aware proposed contentions in the Limerick proceeding. Those contentions (V-14 and V-16) concerned the effect of the Point Pleasant Diversion (PPD) on salinity intrusion in the Delaware River, and the effect of the Point Pleasant Pumping Station and adjacent facilities on the integrity of the Point Pleasant Historic District. For reasons set forth in ALAB-785 at pp. 26-33 and 42-45, the Appeal Board found that the Licensing Board erred in rejecting those contentions, and ordered it to entertain revised contentions, subject to their conformance to certain general guidelines about specificity and relevance. Pursuant to this ruling, Del-Aware on October 19, 1984, submitted revised contentions on both issues. In a "Memorandum and Order" dated November 8, 1984, the Licensing Board again rejected both contentions, asserting that it did so in reliance on the Appeal Board's ALAB-785 requirements about the necessary "scope" and "specificity" of those contentions. On

November 26, 1984, Del-Aware served notice of its appeal from the latter action to the Appeal Board. This brief is submitted in support of that appeal.

II. ARGUMENT

The Licensing Board's general assertion that the revised Del-Aware contentions are "pleaded without adequate bases and specificity," is premised on a reading of ALAB-785 that is misconstrued in favor of its own already-expressed views as contained in the remanded decision themselves.

A. Salinity

The Licensing Board argues that the Appeal Board "ruled that a resubmitted V-16 would have to be tied to changes or new information that had come since the issuance of the construction permit for Limerick (emphasis added.). This inaccurate paraphrasation of the Appeal Board's actual language on the subject (that the revised contentions should be "based on the staff's now issued final environmental statement (FES)," evokes images of a massive array of presently uncontroverted data inimical to Del-Aware's case, and amounts to an expansion of the dictum that Del-Aware would "have a heavy burden of specifying why any NRC reliance on analysis by DRBC... was improper" [quoted in ALAB-785 at p. 32] from the proofs stage to the pleading stage. The carrying of such a burden is precisely the purpose of the litigation (rather than the assertion) of contentions. The relevant regulations (at 10 CFR §2.751b) only demand "reasonable specificity" for the admission of contentions.

Similarly, the Licensing Board misconstrues the guidance provided by ALAB-785 when it asserts that the Appeal

Board "noted that the Staff was permitted to rely on the data and inferences drawn by the ... (DRBC) on this issue (emphasis added. Reference to the actual language of ALAB-785 shows that, by context and by emphasis, the Appeal Board couched this "permission" in a conditional manner. It went on to note that "the Commission need not slavishly defer to the DRBC's findings or its conclusions about water quality (emphasis added)," and noted that the DRBC's principal expertise related to questions of water supply and allocation, rather than quality. [ALAB-785]. In fact, in finding that the Licensing Board erred legally in disallowing Contention V-16 in the first place, the Appeal Board implicitly raised the issue of the duty of other agencies (including the NRC) to substitute their own environmental conclusions, when appropriate, for those of the DRBC, provided that the effects of those conclusions fell within the envelope comprised by DRBC's "permissive, not mandatory" allocation decisions. In this context, it is patently unreasonable to expect intervenors, in effect, to litigate the potentially subtle distinctions between allowable "reliance" and "slavish deference" in the pleadings themselves. Again, the "reasonable specificity" standard set forth at 10 CFR § 2.751b should prevail.

This discussion defines the relevant question properly as one of whether or not Del-Aware's revised contentions meet that standard. Reference to the plain language of the revised contention V-16, and, more importantly, to that of the FES itself, shows convincingly that the salinity contention does

indeed meet that standard.^{1/} The Board apparently objects to the subjective character of the contention, i.e. its assertion that "contrary" to the DRBC's conclusion, the PPD will adversely affect Delaware salinity levels, or that the NRC Staff's "reliance" on those findings was "inappropriate".

The minimal attention accorded to the salinity issue in the FES itself is insufficient to justify (or even to permit) a more substantive response than a simple contradiction. Indeed, the Staff's bare assertion in the FES (at p. 9-21; DOI-12") that it "adopts" the DRBC response on the issue, without elaboration or argument, so compellingly suggests "slavish deference," as opposed to allowable "reliance," as to render argument on the matter largely redundant. In fact, the Staff's inattention to the substantive importance of the salinity issue, as suggested by its citation to the purported "response" found on "page 29 of Mr. Hansler's letter (Appendix "O")," (wherein is found only the preamble to a discussion of "Salinity over seed-oyster beds," a sub-issue of the salinity question) should embarrass the Staff, and dissuade the Licensing Board from disparaging Del-Aware's revised contention on the grounds of non-specificity.

The Licensing Board also purports to find implicit in ALAB-785 a requirement for "nexus" between the revised contention itself and the statement of its basis, and to find this undefined quality absent in Del-Aware V-16. It also objects to Del-AWARE's

1/ The dissolved oxygen issue was pending before this Board on reconsideration when the Contention deadline was about to run; hence its inclusion. Although the denial was dated earlier, it was received later.

reference to documents which are "not in the record," (a record that was defined and circumscribed by its own since-remanded decisions limiting the scope of the proceeding), but does not explain how Del-Aware might have met with its simultaneous demand that it must deal with "new information" in the absence of such reference. The purpose of the hearings which are sought by these revised contentions is precisely to place this evidence into the record, which could not have been done prior to the admission of these contentions.

In summary, the Licensing Board has construed the intent of ALAB-785 in a manner that is selectively supportive of its own previously expressed disinclination to preside over the substantive adjudication of the salinity issue. The heaviest "burden" borne at this point in this proceeding is borne by the Licensing Board itself, in avoiding the apparently clear meaning of the Appeal Board's unambiguous conclusion that "Del-Aware's original contention V-16 should have been admitted initially (emphasis added)." (ALAB-785 at 32 n70).

B. POINT PLEASANT HISTORIC DISTRICT

As with the salinity issue, it is difficult to comprehend what degree of "specificity" the Licensing Board can have thought requisite from an intervenor questioning the sufficiency of a perfunctory, one paragraph treatment, such as that which the NRC Staff accorded the issue of "Historic and Archeologic Impacts," (FES, Section 5.7 at p. 5-36). Indeed, neither that paragraph nor Appendix "F" even acknowledge the existence of any such entity as the "Point Pleasant Historic District," which was declared eligible for National Register status in 1981. As such,

the Licensing Board's characterization of the Staff's treatment of this subject in the FES as "analysis" can at best be described as charitable.

As with the salinity question, the Licensing Board avails itself selectively of the Appeal Board's authorization to the staff to "properly rely" on the historical impact findings of other agencies in reaching its own conclusions. It omits to observe, however, that in the cited footnote in ALAB-785 (note 110 at pp. 45-46) this Board referred the reader back to its parallel discussion of the salinity issue, and thereby presumably incorporated the critical distinction made there between allowable "reliance" and "slavish deference." The issue at hand in this instance is not one of mere reliance, but rather one of proper reliance. Del-Aware submits that its revised contention V-14 is reasonably specific in showing the insufficiency of the NRC's reliance on the 1982 "Memorandum of Agreement" between the Corps of Engineers, the Pennsylvania SHPO, and the Advisory Council on Historic Preservation.

As revised contention V-14 clearly and concisely sets forth, the historical review process culminating in the signing of the "Memorandum of Agreement," to which the Staff's FES deferred without elaboration or comment, considered only selective aspects of the full complex of historical resources which comprise the National Register-eligible Point Pleasant Historic District. Like the FES, the "Memorandum of Agreement" takes no explicit cognizance of the fact that the proposed project will impact on a comprehensive complex of resources

comprising a "historic district," rather than a cluster of discrete objects or entities. Thus it addresses the Pennsylvania Canal and potential subsurface (archeological) resources, but ignores such integral elements of the district as its basic setting and visual character (its "natural hillside frame,"), the generally wooded character of the river bank (c.f. "intrusions of cleared areas,") and the intrusion of specific non-conforming facilities and/or apparatus integral to the proposed project ("parking lots," "transformer pads," "possible walls,") in or adjacent to the district. Any or all of these elements, which Del-Aware specifically identified in its revised contention V-14, have adverse impact and/or mitigation implications different from those contemplated in the "Memorandum of Agreement," and the Staff FES "analysis" in reliance on that document.

C. SUMMARY

The Licensing Board, in its Special Prehearing Conference Order, dated June 1, 1984, acknowledged that its own treatment of the issue of allowable reliance contained therein "provides only general guidance (emphasis added)". Del-Aware hereby submits that neither the Licensing Board's own subsequent "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)", dated July 14, 1982, nor ALAB-785, significantly expands the specificity of that guidance. To the maximum extent sustainable by the contents of the documents to which it was required to respond, Del-Aware has identified, in the form of its revised contentions, legitimate issues which have not been adequately addressed by either the NRC Staff or the "other agencies" on whose judgements it has

purported to rely. It has not attempted to argue the detailed merits of those contentions in what would necessarily be the vacuum of its brief statements of the "bases" on which they are formulated. The proper forum for such argument is in the litigation of those contentions upon their admission. For the Board to use its and the Appeal Board's "general guidance" to arbitrarily exclude the revised contentions on the grounds of non-specificity would be to leave the record of this proceeding essentially incomplete. Far from Del-Aware expecting, as the Licensing Board asserts, the Board to "draft acceptable revisions of the contentions", it appears that the Board expects Del-Aware, in effect, to litigate those contentions as a precondition to their admission. The Appeal Board should reject the latter course, order the admission of Del-Aware's revised contentions V-14 and V-16, and direct that they be heard and adjudicated. Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the fore-
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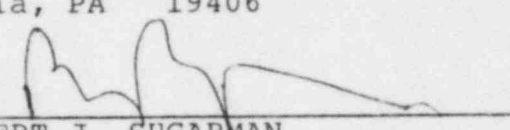
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