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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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

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Docket Nos. 50-352 OL
50-353 OL

NRC STAFF'S ANSWER IN OPPOSITION TO INTERVENOR
DELAWARE'S PETITION FOR REVIEW OF ALAB-785

Ann P. Hodgdon
Counsel for NRC Staff

October 25, 1984

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I. INTRODUCTION

On October 10, 1984, Intervenor Del-Aware filed with the Commission, pursuant to 10 C.F.R. § 2.786, a petition for review of ALAB-785. ^{1/} Del-Aware requests that the Commission review the Atomic Safety and Licensing Appeal Board's decision on a number of issues which Del-Aware asserts were erroneously decided. In ALAB-785, the Appeal Board for the most part affirmed the Atomic Safety and Licensing Board's Partial Initial Decision concerning environmental aspects of the Supplemental Cooling Water System (SCWS) for the Limerick facility. For the reasons discussed below, the NRC staff opposes Del-Aware's petition.

II. BACKGROUND

The Appeal Board in ALAB-785, issued September 26, 1984, affirmed in part the Licensing Board's decision concerning the environmental impacts

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) ALAB-785, Slip op., September 26, 1984, 20 NRC ____.

of the SCWS but reversed and remanded on two issues with instructions that Del-Aware be given an opportunity to reformulate and resubmit certain contentions.

Del-Aware first challenges the Appeal Board's affirmance of the Licensing Board's determination to conduct early hearings (i.e., in advance of issuance of the Draft Environmental Statement) on the environmental impacts of the SCWS. Second, Del-Aware challenges findings and conclusions of the Licensing Board as affirmed by the Appeal Board on the impact of the SCWS intake on shortnose sturgeon and American shad. Third, Del-Aware asserts that the Licensing Board and the Appeal Board erred in failing to consider alternatives to the SCWS. Fourth, Del-Aware seeks to expand the scope of the remanded issues to include (1) the effect of the operation of the SCWS on the East Branch Perkiomen Creek and on dissolved oxygen levels in the Delaware River downstream of the intake and (2) adverse impacts of the operation of the pumping station on the Delaware Canal, a National Historic Landmark. Fifth, Del-Aware asserts that it was error for the Appeal Board not to address the Licensing Board's denial of Del-Aware's motion to disqualify certain Staff witnesses.

III. DISCUSSION

A. Early Hearings

Del-Aware asserts that the Appeal Board erred in "determining that the Commission need not follow its own regulations requiring that the [environmental] hearings not be held until the draft environmental statement was issued." Petition at 4. Del-Aware incorrectly characterizes

the Appeal Board's conclusion. In fact, the Appeal Board determined that, while not in literal compliance with the Commission's regulations, the Licensing Board's ruling regarding the holding of early hearings should be sustained as no party was prejudiced and the National Environmental Policy Act (NEPA) was not violated. ALAB-785 at 19.

The Licensing Board's determination to hold early hearings reflected the following principal considerations: (1) the NRC's assertion of jurisdiction over the SCWS is limited to its responsibilities under NEPA; ^{2/} (2) construction of the SCWS had not begun at the time the Licensing Board determined to conduct expedited hearings; (3) the hearing was for the purpose of evaluating certain specific alleged impacts; (4) the early hearing would enable the Licensing Board to consider mitigative actions, if necessary, prior to construction; and (5) the Staff had not completed its environmental review of impacts related to changes since the issuance of the Final Environmental Statement prepared in connection with the Construction Permit application. In the Appeal Board's view the Licensing Board's determination to hold expedited hearings in these circumstances was "reasonably grounded in its legitimate desire to avoid the same potential adverse environmental impacts that prompted

^{2/} The SCWS, which constitutes a part of the Point Pleasant Diversion, a facility proposed to be built and operated by the Neshaminy Water Resources Authority (NWRA), will provide water for the Limerick facility when use of water from the Schuylkill River and Perkiomen Creek is precluded by flow and thermal restrictions imposed by the Delaware River Basin Commission. See ALAB-785 at 3, 20 NRC ____; Final Environmental Statement (NUREG-0974) April 1984, Section 4.3.1.3. The SCWS provides no safety related function. See the Licensing Board's Memorandum and Order, dated October 15, 1984, at 3-4.

Del-Aware's interest in the proceeding in the first place." ALAB-785 at 22.

The Staff does not believe that the Commission should take review of the determination of the Licensing and Appeal Boards that the circumstances in this proceeding warranted a relaxation of the requirement of 10 C.F.R. § 51.52(a) (as then in effect) ^{3/} that environmental hearings should not be held before issuance of the Staff's Draft Environmental Statement (DES) and that the position of the Staff on matters covered by Part 51 should not be presented until the Final Environmental Statement (FES) had been issued. The Licensing and Appeal Boards' rulings reflect a careful balancing of the reasons for conduct of an early hearing against the requirements of § 51.52(a). The early hearing was limited to litigation of those issues that the Licensing Board believed would become moot if not heard prior to commencement of construction of the Point Pleasant Diversion. ALAB-785 at 21-22. Resolution of these issues did not prejudice the ultimate cost/benefit balance which the Staff found in the FES. Id. The Appeal Board also correctly rejected Del-Aware's argument that NEPA independently required that hearings await the issuance of the FES. ALAB-785 at 25.

Thus, Del-Aware in raising this issue does not present an important matter that could significantly affect the environment, present an impor-

^{3/} Since the Licensing Board held the hearings in question and issued its partial initial decision, the Commission has substantially amended its environmental regulations, 10 C.F.R. Part 51. See 49 Fed. Reg. 9352 (March 12, 1984). Section 51.52(a) has been replaced by § 51.104(a), which retains the requirements of § 51.52(a) discussed above.

tant legal or procedural issue or otherwise raise important questions of public policy. As no important question of law or policy is raised by Del-Aware's challenge to the early hearings, the Commission should not take review of this aspect of ALAB-785. 10 C.F.R. § 2.786(b)(4)(i). While the action taken by the Licensing Board was not in literal compliance with the regulations, Del-Aware was not injured by the action and had an opportunity to present its position.

B. American Shad and Shortnose Sturgeon

Del-Aware asserts that the Commission should review the Appeal Board's determination to affirm the Licensing Board's findings on the impacts of the SCWS's intake on American shad and shortnose sturgeon. Petition at 3-4. As regards American shad, Del-Aware's complaint appears to be that the Licensing Board should have treated that species as endangered or threatened despite the fact that it is not so listed. No basis is offered for Del-Aware's assertion that the American shad population will be reduced by tens of thousands by the operation of the intake. Petition at 3. There is nothing in the record to support such a statement. Nor is support offered for the proposition that the intake is located in a spawning and nursery area for American shad. Petition at 3. The Appeal Board correctly noted that Del-Aware had not challenged on appeal the Licensing Board's detailed findings regarding the impact of the changed location of the intake on the fish species of concern, American shad and shortnose sturgeon. ALAB-785 at 50. As regards Del-Aware's legal arguments concerning the requirements of the Fish and Wildlife Coordination Act and the Endangered Species Act, the Appeal Board affirmed the Licensing Board's determination that there had been compliance

with those statutes. ALAB-785 at 50-57. Del-Aware's suggestions that the Appeal Board could and should have reversed a National Marine Fisheries Service (NMFS) finding of lack of jeopardy to shortnose sturgeon, an endangered species, misapprehends the relationship between this agency and the NMFS, the agency with responsibility for determining impacts on endangered species. Accordingly, Del-Aware's petition on this point does not raise an important matter of law that could significantly affect the environment. 10 C.F.R. § 2.786(b)(4)(i). Similarly, Del-Aware's charge of error concerning factual issues does not raise a matter on which Commission review would normally be granted under the Commission's regulations, since the Appeal Board upheld the Licensing Board's findings of fact on impacts of the intake on American shad and shortnose sturgeon. A petition for review of matters of fact will not be granted unless it appears that the Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Licensing Board. 10 C.F.R. § 2.786(b)(4)(ii).

C. Alternatives to the Point Pleasant Diversion in Light of Recent Developments

Del-Aware asserts that the Appeal Board erred in failing to hold that NEPA requires consideration of alternatives to the Supplemental Cooling Water System at Point Pleasant in light of the possible cancellation of the second unit at Limerick. ALAB-785 recites the history of Del-Aware's attempts to raise this issue both before the Licensing Board and before the Appeal Board. ALAB-785 at 58-62. In sustaining the Licensing Board's rejection of Del-Aware's proposed contentions raising this matter, the Appeal Board stated in ALAB-785 that there was no legal

basis for the NRC to order the Applicant to abandon Unit 2 and to seek a source of supplemental cooling water different from that proposed in the Application and previously approved by the Appeal Board in ALAB-262. ^{4/} ALAB-785 at 62. The basis for Del-Aware's rejected contentions regarding the need to consider alternatives has been found by both the Licensing Board and the Appeal Board to be speculative. ^{5/} The Commission should not grant Del-Aware's petition for review on this aspect of ALAB-785, as no important matter significantly affecting the environment is raised. See 10 C.F.R. 2.786(b)(4)(i).

D. Del-Aware's Attempt to Expand the Scope of the Remand

1. East Branch Perkiomen Creek and the Delaware Canal

In ALAB-785 the Appeal Board remanded with instructions to the Licensing Board that it give Del-Aware an opportunity to reformulate and resubmit two contentions whose earlier rejection was based at least in part on the Licensing Board's erroneous application of the law. Those contentions are V-16, regarding the adverse impact of increased salinity downstream in the Delaware River as a result of the operation of the SCWS, and V-14, regarding the adverse esthetic impacts of the pump sta-

^{4/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163 (1975).

^{5/} Also, the Licensing Board found in LPB-83-11, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), 17 NRC 413 (1983), that the environmental impacts associated with the operation of the Supplemental Cooling Water System would be insignificant. The Appeal Board found no basis to upset that finding. ALAB-785 at 60. Once the environmental impact of the SCWS was found to be insignificant, the cancellation of Unit 2 would not provide a basis for a contention calling for consideration of alternatives to the Supplemental Cooling Water System as proposed.

tion on the proposed historic district of Point Pleasant. On October 5, 1984, Del-Aware filed a motion for reconsideration in which it sought to expand V-16 to include consideration of the impact of the operation of the SCWS on the East Branch Perkiomen Creek. ^{6/} The Appeal Board denied Del-Aware's motion, ruling that the contention Del-Aware was seeking to have the Appeal Board address on reconsideration was a wholly separate contention. The Appeal Board also noted that such a contention (V-16c), concerning the effects of the Diversion on the East Branch Perkiomen Creek, had been previously raised by Del-Aware and rejected by the Licensing Board for lack of specificity and because the matter had been considered at the construction permit stage. Further, the Appeal Board noted that Del-Aware had not addressed the matter in its brief on appeal, but had raised the matter for the first time in its motion for reconsideration. See Appeal Board Order dated October 10, 1984 (unpublished) at 2. For the above reasons, Delaware's request that the Commission review this matter should not be granted.

Del-Aware states that the Appeal Board in ALAB-785 erroneously sustained the Licensing Board's refusal to allow intervenor Del-Aware to

^{6/} Del-Aware now seeks to raise this matter before the Commission. Petition at 1-2. Contrary to Del-Aware's assertion that the Appeal Board refused to consider the decisions of the Pennsylvania Public Utilities Commission and the Department of Environmental Resources' Environmental Hearing Board, the Appeal Board did consider those decisions. However, the Appeal Board's consideration of those decisions was in the context Del-Aware raised them, namely one unit operation. In denying Del-Aware's motion to set aside LBP-83-11 on the basis of new evidence, the Appeal Board noted that it need not be unduly influenced by the decision of others, i.e. other federal and state agencies, with different concerns and responsibilities. ALAB-785 at 63-64.

litigate the impact of the Point Pleasant Diversion on the Delaware Canal, a National Historic Landmark. Del-Aware points to its Contention V-16 as the place where the matter was raised before the Licensing Board. Petition at 5. However, Contention V-16 does not mention the Canal but rather concerns water quality impacts on the Delaware River downstream of the Diversion. Further, the Appeal Board correctly notes in ALAB-785 that the matter of an adverse effect on the Canal was raised by Del-Aware for the first time at the hearing in connection with possible impacts of sound barriers that might be required to mitigate transformer noise. See ALAB-785 at 46-49. Del-Aware's complaint concerns the Licensing Board's failure to consider a contention that was never proposed. Therefore, Del-Aware's petition on this point does not challenge any ruling made by the Licensing Board or by the Appeal Board and should not be granted. See 10 C.F.R. § 2.786(b)(4)(iii).

2. Dissolved Oxygen

Del-Aware now seeks to expand the scope of the remand to include consideration of decreased dissolved oxygen in the Delaware River downstream of the intake as an effect of the SCWS operation. Petition at 2. This matter was not briefed before the Appeal Board where Del-Aware's argument related to the issue of increased salinity not decreased dissolved oxygen. ^{7/} These are not interrelated but are discrete water

^{7/} The Appeal Board correctly noted in its Order denying Del-Aware's motion for reconsideration that Del-Aware's brief and oral argument on appeal focused on the salinity of the Delaware River and the Licensing Board's ruling that it was precluded by the Delaware River Basin Compact from considering the matter. Order of October 10, 1984 at 2.

quality characteristics. Del-Aware has not set forth any compelling reason why this issue, which could have been but was not previously raised, should be considered by the Commission.

10 C.F.R. § 2.786(b)(4)(iii).

E. Denial of Motions to Disqualify

Del-Aware asserts that the Appeal Board erred in not disqualifying Staff witnesses who had, in Del-Aware's words, "exhibited a predetermination and commitment prior to commencing their investigation of the subject matter." Petition at 4. Del-Aware fails to point out in what way the matter of the Licensing Board's denial of Del-Aware's motion to disqualify Staff witnesses, an evidentiary issue normally left to licensing boards, raises an important question of fact, law or policy decided in ALAB-785. Neither ALAB-785 nor Del-Aware's brief on appeal addresses the matter. For the above reasons, the Commission should not grant review on this matter.

IV. CONCLUSION

For the reasons discussed, the Commission should deny Del-Aware's petition for review.

Respectfully submitted,

Ann P. Hodgdon

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of October 1984.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO INTERVENOR DELAWARE'S PETITION FOR REVIEW OF ALAB-785" 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 25th day of October, 1984:

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