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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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Docket Nos. 50-352
50-353

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NRC STAFF'S RESPONSE IN OPPOSITION TO
THE APPEAL OF INTERVENOR DEL-AWARE FROM
LICENSING BOARD ORDER OF NOVEMBER 8, 1984

Ann P. Hodgdon
Counsel for NRC Staff

February 11, 1985

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LICENSING BOARD ORDER OF NOVEMBER 8, 1984

I. INTRODUCTION

This matter is before the Atomic Safety and Licensing Appeal Board (Appeal Board) on the appeal of Del-Aware Unlimited, Inc. (Del-Aware) from the Atomic Safety and Licensing Board's (Licensing Board) denial of Del-Aware's two revised contentions submitted pursuant to a remand ordered by the Appeal Board in ALAB-785. ^{1/}

II. STATEMENT OF THE CASE

In ALAB-785, the Appeal Board affirmed in part the Licensing Board's decisions regarding the environmental impact of the operation of the Limerick facility's Supplemental Cooling Water System. ^{2/} However, the

^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848 (1984).

^{2/} The decision appealed from was LBP-83-13, 17 NRC 413 (1983).

Appeal Board remanded two issues to the Licensing Board and directed it to afford Intervenor Del-Aware the opportunity to resubmit contentions on those issues. Subsequently, Del-Aware petitioned the Appeal Board for reconsideration, seeking to enlarge the scope of the remand. On October 10, 1984, the Appeal Board denied Del-Aware's petition, observing, among other things, that Del-Aware was seeking to include within the scope of the remand issues that had not been a part of Del-Aware's appeal of LBP-83-13. On October 16, 1984, pursuant to a Licensing Board Order, Del-Aware submitted two revised contentions on the remanded issues. ^{3/}

3/ Revised Contention V-14 reads:

V-14 Contrary to the FES, the project will permanently destroy the ambiance and integrity of a eligible National Historic District (Point Pleasant), by causing a permanent loss of the natural hillside frame, by intrusions of cleared areas, parking lots, transformer pads and possible walls not disclosed to, or considered by, the Advisory Council and not considered by the Corps, including a major impact on the National Historic Landmark (Delaware Canal) included in the District. Locational and functional alternatives to avoid the harm exist.

Basis: Studies of the Bucks County Conservancy; Court statement of U.S. Attorney in Del-AWARE v. Baldwin (neither the Corps nor the other parties to the Memorandum of Understanding considered or passed upon the hillside); actual scenery (which can be substantially restored if the project is dropped). Regarding alternatives; see V-16 and see PECo 1979 Assessment and other PECo documents.

Revised Contention V-16 reads:

V-16 The diversion will, contrary to the DRBC's contention adopted by the staff in the FES (Section 9 and Appendix O), adversely and unacceptably affect salinity levels and water quality (dissolved oxygen levels) in the Delaware River, and receiving waters, causing prob-

(FOOTNOTE CONTINUED ON NEXT PAGE)

Both the Applicant and the Staff objected to the admission of Del-Aware's contentions.^{4/} On November 8, 1984, the Licensing Board denied both of

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

tems with fish, drinking water and other uses, and requiring major construction, and could be reduced or eliminated to avoid that impact. The FES inappropriately gave DRBC, not DOI or NRC, the "last word", and failed to reflect NRC's independent judgment.

Basis: FES Section 9; DOI letter, July 1983; Interstate Water Management Agreement of 1983 and DRBC staff review of its Recommendations, including the review and staff comment of the Basinwide Drought Management Plans, (April 1984), the New Jersey studies pursuant to the Agreement, (Draft, Summer 1984) and the plans to reactivate Tocks Island show that there is a significant present and projected salinity intrusion caused by low flow and diversions of which Limerick is a significant part. Oyster bed problems documented by DOI, use of DRBC contentions over DOI studies and conclusions not justified or qualified. Blue Marsh flows planned to prevent salinity (FES, D-3) will be less effective than Delaware River flows would be. (See Merrill Creek EIS). Tocks Island and Merrill Creek studies show the extent of construction needed. (See FES Appendix O), showing DRBC reliance on future construction. Gky studies for Bucks County (April, June, 1984) show this can be avoided by eliminating or reducing Limerick, or taking water from the Schuylkill (with lesser impacts). Cancellation of Unit II is in the public interest, contrary to FES, in that only \$700 million spent, and no need for energy; cancellation will also reduce risks of accident. Re: receiving waters, see EHB Decision pp 26-27, 100-02, (6/18/84) regarding impact on receiving waters.

^{4/} Applicant's Answer to Intervenor Del-Aware Unlimited, Inc. Revised Contentions V-14 and V-16, November 2, 1984; NRC Staff Response to Del-Aware Unlimited, Inc.'s Revised Contentions, November 7, 1984.

the revised contentions. ^{5/} On November 26, 1984, Del-Aware filed its notice of appeal and on December 26th filed its brief.

The Licensing Board's rejection of Del-Aware's revised Contentions V-14 and V-16 was based on the Board's conclusions that the contentions exceeded the scope permitted in ALAB-785 and lacked adequate bases and specificity. See, Memorandum and Order, November 8, 1984, at 2. For the reasons discussed below, the Staff supports the conclusions reached by the Licensing Board and thus opposes Del-Aware's appeal.

III. ARGUMENT

A. V-16 (Salinity)

In ALAB-785, the Appeal Board ruled that the Licensing Board had erred in rejecting Del-Aware's proposed Contention V-16 regarding salinity. The Appeal Board found legally erroneous the Licensing Board's rationale for excluding the contention, namely, that the Delaware River Basin Compact precludes redetermination by the NRC of the Delaware River Basin Commission's (DRBC) decisions regarding allocation of water for Limerick. 20 NRC at 866-69. However, the Appeal Board did not order the admission of the contention per se but remanded to the Licensing Board "to afford Del-Aware (assuming that it is dissatisfied with the FES on this score) the opportunity to reformulate its Contention V-16 in light of the specific information included in the FES." Id. at 869. (Emphasis in original).

^{5/} "Memorandum and Order on Del-Aware's Remanded and Revised Environmental Contentions V-14 and V-16," November 8, 1984.

On remand, the Licensing Board determined that the permissible scope of Del-Aware's revised V-16 was limited by the specific instructions in ALAB-785 and the Appeal Board's Order denying Del-Aware's petition for reconsideration. Memorandum and Order at 2-3. One of those instructions was that "[t]he admission and litigation of any reformulated salinity contention must, of course, be tied to changes or new information that has come to light since the issuance of the construction permit for Limerick." ALAB-785, 20 NRC at 870 fn. 73. The Appeal Board's instruction reflects the distinction made in the Commission's environmental regulations in 10 C.F.R. Part 51 between environmental impact statements prepared in connection with construction permit applications and those prepared in connection with operating license applications.^{6/} In its argument (Brief at 2), Del-Aware confuses the Appeal Board's statement regarding changes or new information with the statement that Del-Aware had to identify specifically the ways in which the FES was inadequate. Del-Aware has not identified any changes or new information regarding the Point Pleasant Diversion since the issuance of the construction permits for Limerick that provide a basis for Contention V-16. The Licensing Board's rejection of the contention was therefore proper.

^{6/} The Appeal Board addressed this distinction in ALAB-785 at 870-71. 10 C.F.R. § 51.95 (Supplement to Final Environmental Statement - Operating License) states that the supplement prepared in connection with the issuance of an operating license will cover only matters that differ from or that reflect significant new information concerning matters discussed in the final environmental impact statement. 49 Fed. Reg. 9395 (March 12, 1984).

Del-Aware also argues that the Licensing Board held its contention to a higher standard than the "reasonable specificity" required by the Commission's regulations. ^{7/} (Brief at 2). "Reasonable specificity" at this stage of the proceeding requires that an environmental contention be focused on a perceived inadequacy in the Staff's Final Environmental Statement (FES). The Appeal Board's guidance in ALAB-785 is consistent with the guidance given by the Commission in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983) regarding the filing of contentions. What is reasonable specificity at the intervention stage of a proceeding is no longer reasonable after the Final Environmental Statement has been issued. ^{8/}

^{7/} 10 C.F.R. § 2.714(b) requires that petitioners for intervention set forth the bases for their contentions with reasonable specificity.

^{8/} The Commission stated in Catawba:
[T]he NRC has the burden of complying with NEPA. Thus, the adequacy of the NRC's environmental review as reflected in the adequacy of a DES or FES is an appropriate issue for litigation in a licensing proceeding. Because the adequacy of those documents cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the documents are available. But this does not mean that no environmental contentions can be formulated before the staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. As a practical matter, much of the information in an Applicant's ER is used in the DES. Just as the submission of a safety-related contention based on the FSAR is not to be deferred because the staff may issue an SER requiring a change in a safety matter, so too, the Commission expects that the filing of an environmental concern based on the ER will

Del-Aware also asserts that the Staff in its FES demonstrated "slavish deference" to DRBC and that the Licensing Board's order had the effect of requiring Del-Aware to litigate at this stage the "potentially subtle distinctions between allowable 'reliance' and 'slavish deference'" to the findings of other agencies. (Brief at 3, 4). There is nothing in ALAB-785 or in the Memorandum and Order of November 8th to support Del-Aware's suggestion. Rather, the Licensing Board was simply requiring Del-Aware to allege with specificity the inadequacies it perceived in the FES. To the extent Del-Aware argues that the FES is inadequate due to overreliance on DRBC findings, it had an obligation to set forth in its revised contention information tending to demonstrate that the DRBC and NRC were wrong about the nature and extent of the impact of the water diversion at Point Pleasant on salinity in the Delaware River. In failing to provide a basis for its assertion that the NRC staff's reliance on data generated by the DRBC was misplaced, Del-Aware failed to provide a basis for its contention and the Licensing Board correctly rejected it.

Del-Aware characterizes the Licensing Board's statement regarding lack of nexus between Del-Aware's statement of its Contention V-16 and the statement of basis as an implicit finding by the Licensing Board that ALAB-785 required that such a nexus be shown. (Brief at 3). However,

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

not be deferred because the staff may provide a different analysis in its DES. Should that circumstance transpire, there will be ample opportunity to either amend or dispose of the contention. 17 NRC at 1049.

the nexus requirement is implicit not in ALAB-785 (nor did the Licensing Board purport to find it there) but in § 2.714(b), which requires petitioners for intervention to file a list of contentions and the bases for each contention set forth with reasonable specificity. There must be a connection between the issue proposed for litigation and the specific basis for believing it litigable in the proceeding for which it is proposed.

Finally, Del-Aware argues that the Licensing Board "object[ed]" to Del-Aware's reference to documents not in the record of the proceeding and that such an "objection" is inconsistent with the Appeal Board's requirement that Del-Aware's revised V-16 be based on new information, i.e., information that had come to light since the construction permit was issued. (Brief at 4-5). However, the Licensing Board's discussion of the documents referenced in Del-Aware's basis for V-16 was not based on Del-Aware's reliance on extra-record documents but on the lack of precision with which the documents were identified. Del-Aware did not provide the specific information on which it was relying as basis but rather listed a string of documents in such a way that one cannot ascertain whether or not documents listed as basis are in the record and what portions are being relied upon. For example, Delaware references "DOI letter, July 1983"; however, Del-Aware does not say on what date in July 1983, DOI wrote a letter or to whom it was written or what information in it would tend to support Contention V-16. Also, it is not at all clear that even if one were to locate the letter it would tend to support that portion of revised V-16 that might be within the scope of the remand, i.e. that it would relate to salinity and not to dissolved oxygen

levels, receiving waters, problems with fish, major construction, all items specifically excluded by ALAB-785 and the Appeal Board's Order of October 10th.

In view of the foregoing, the Licensing Board was correct in denying Del-Aware's V-16 for exceeding the scope of the remand and for lack of basis and specificity.

B. V-14 (Point Pleasant Historic District)

In ALAB-785, the Appeal Board ruled that the Licensing Board had been correct in its initial determination to admit Del-Aware's Contention V-14 regarding adverse aesthetic effects of the Supplemental Cooling Water System on the proposed Point Pleasant Historic District and had correctly found that the determination of the District's eligibility for inclusion in the National Register of Historic Places was a significant change in circumstances since issuance of the construction permits, thus warranting consideration in an operating license proceeding. 20 NRC at 825. However, the Appeal Board held that the Licensing Board in response to a request for reconsideration had erred in rejecting the contention on the basis that it essentially concerned construction impacts. Id. The Appeal Board noted, as it had noted with regard to Contention V-16, that the Staff's Final Environmental Statement had been issued and that it addresses possible impacts on the Point Pleasant Historic District. The Appeal Board stated, "If it still chooses to pursue this issue, Del-Aware must do so with reference to the Staff's review, alleging specifically why that review might be inadequate under Section 106 of [the National Historic Preservation Act]." 20 NRC at 875-76. (Emphasis in original).

Contrary to Del-Aware's position on appeal that it cannot comprehend what degree of "specificity" the Licensing Board can have thought requisite from an intervenor questioning the sufficiency of a perfunctory one paragraph treatment of historic and archeologic impacts in the Staff's FES (Del-Aware's brief at 5), Del-Aware's resubmitted Contention V-14 does not directly challenge the Staff's FES, much less with specificity. Rather, the contention references the FES with a perfunctory introductory phrase, "Contrary to the FES," followed by a catalogue of items whose relationship to the FES and to one another is left to the reader's imagination. The Licensing Board correctly found that Del-Aware's basis for V-14 was thin, "even thinner than the Basis provided for V-16" (Memorandum and Order at 5) and that the scope of the contention exceeded the scope of the remand, including as it did matters specifically ruled out in ALAB-785 (Memorandum and Order at 4).

On appeal Del-Aware characterizes its Contention V-14 as clearly and concisely setting forth that the historical review process culminating in the signing of the Memorandum of Agreement "considered only selective aspects of the full complex of historical resources which comprise the National Register - eligible Point Pleasant Historic District." (Brief at 6). However, contrary to the representation now made by Del-Aware on appeal, it is still not clear what Del-Aware wishes to litigate in view of the Appeal Board's direction that Del-Aware identify with specificity the inadequacies it perceived in the FES. See, brief at 6. Del-Aware argues on appeal that it believes its V-14 is reasonably specific in showing the insufficiency of the NRC's reliance on the 1982 Memorandum of Agreement between the Corps, the State Historic Preservation Officer

(SHPO) and the Advisory Council (Brief at 6); however, Del-Aware's revised V-14 does not even mention Section 106 of the National Historic Preservation Act, much less point to any requirement of the NHPA not met by the Staff's FES. The Licensing Board was thus correct in rejecting revised V-14 because of Del-Aware's failure to conform the contention to the scope of the remand as defined in ALAB-785.

Del-Aware now complains on appeal that Appendix F of the FES fails to acknowledge the existence of the Point Pleasant Historic District. It is not surprising that the district is not mentioned in Appendix F as the list of properties there includes only those properties that are listed on or eligible for the National Register of Historic Places located within 15 km of the Limerick station or 2 km of the transmission lines. Point Pleasant does not fit within either of these two categories. Point Pleasant is, however, explicitly considered at Appendix G-39-40; G-89-90 of the FES. In any case, whatever point Del-Aware may be attempting to make on appeal by referencing the specific language of the FES was not made at the time the revised Contention was filed and is therefore untimely.

As with Contention V-16, the Licensing Board made clear that it had no intention of tracking down the documents identified by Del-Aware in the Basis for V-14 as "studies of the Bucks County Conservancy," "courtroom statement of U.S. Attorney in Del-Aware v. Baldwin" and "PECO 1979 Assessment and Other Peco Documents." Further, even if the Licensing Board had succeeded in locating Del-Aware's references, it still would have been faced with the formidable task of separating out information relating to any matters that might be within the scope of the remand from

information relating to matters specifically excluded from the scope of revised V-14 by the Appeal Board in ALAB-785, namely "transformer pads," "possible walls," and "the National Historic Landmark (Delaware Canal)".

As with V-16, Del-Aware's revised V-14 fails to state a contention with requisite basis and specificity within the scope of the remanded issue; therefore, the Licensing Board was correct in denying it.

IV. CONCLUSION

As demonstrated above, Del-Aware has failed to show any error in the Licensing Board's disposition of Del-Aware's revised contentions. Del-Aware's appeal should be denied and the Licensing Board's Order affirmed.

Respectfully submitted,

Ann P. Hodgdon

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of February, 1985

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NUCLEAR REGULATORY COMMISSION

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Units 1 and 2))

Docket Nos. 50-352
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO THE APPEAL OF INTERVENOR DEL-AWARE FROM LICENSING BOARD ORDER OF NOVEMBER 8, 1984" 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 11th day of February, 1985:

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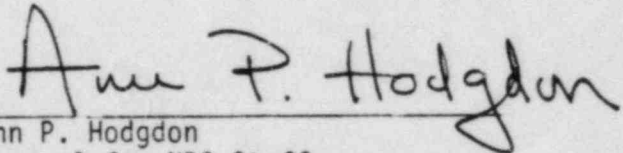
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