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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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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 06
50-353 06

OFFICE OF GENERAL
COUNSELING & SERVICE
BRANCH

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

Stephen H. Lewis
Deputy Assistant Chief
Hearing Counsel

November 1, 1984

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I. INTRODUCTION

On October 17, 1984, Philadelphia Electric Company (Applicant) filed with the Commission pursuant to 10 C.F.R. § 2.786 a petition for review of ALAB-785. ^{1/} In its petition the Applicant asserts that two issues arising from that decision present important questions of law and policy meriting Commission review. For the reasons discussed below, the NRC staff opposes the Applicant's petition.

II. BACKGROUND

The Appeal Board in ALAB-785, issued on September 26, 1984, affirmed in part and reversed in part the Licensing Board's Partial Initial Decision (On Supplementary Cooling Water System Contentions). ^{2/} The Appeal Board held that the Licensing Board had improperly denied admission of

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- ^{1/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, Slip. op. September 26, 1984, 20 NRC ____ (1984).
^{2/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) LBP-83-11, 17 NRC 413 (1983).

two of the contentions proposed by Intervenor Del-Aware Unlimited, Inc., one regarding alleged adverse impacts on Delaware River water quality downstream of the proposed Supplementary Cooling Water System (SCWS) and the other regarding alleged adverse impacts of the pumping station for the SCWS on the peace and tranquility of the proposed Point Pleasant Historic District. ALAB-785, slip op. at 26-27, 42-45, 20 NRC ____.

The Appeal Board remanded these issues to the Licensing Board with instructions that Del-Aware, be given the opportunity to reformulate and resubmit contentions in light of the specific information on these matters in the Final Environmental Statement (FES), issued in April 1984. ^{3/}

III. DISCUSSION

Although the Commission has the ultimate discretion to review any decision of its subordinate boards, a petition for Commission review "will not ordinarily be granted" unless important environmental, safety, procedural, common defense, antitrust, or public policy issues are involved. 10 C.F.R. § 2.786(b)(4). The Staff has considered the issues which have been raised by the Applicant and believes that, when measured against the standards set forth in § 2.786, they do not present matters of sufficient importance to warrant Commission review.

A. The Salinity Issue

The contention as originally proposed by Del-Aware asserted that "Operation of the SCWS will adversely affect the water quality and adequacy of water supplies in a critical reach of the Delaware River and

^{3/} NUREG-0974 (April 1984).

estuary...." ^{4/} The only impact specifically identified by Del-Aware was a change in the salinity levels in the Delaware, and the Licensing Board, therefore, read the contention as asserting that increases in salinity will occur as a result of water withdrawal from the Delaware for the purpose of condenser cooling at Limerick. ^{5/} The Licensing Board excluded the contention on the ground that any change in characteristics of Delaware River water, i.e., salinity, would be a function of the total quantity of water withdrawn from the Delaware for all purposes approved by the Delaware River Basin Commission (DRBC) and that NRC consideration of the contention would necessarily entail redetermination of the DRBC's decisions concerning the allocation of water for Limerick. Based upon its analysis of Section 15.1(s)1 of the Delaware River Basin Compact, the Licensing Board concluded that NRC redetermination of the allocation decision was precluded. ^{6/}

In ALAB-785 the Appeal Board held that the contention had been improperly excluded, reasoning that Section 15.1(s)(1) did not preclude the

^{4/} 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 at ____; 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.

^{5/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1484 (1982) (the "Special Prehearing Conference Order").

^{6/} See ALAB-785 at 26-27 and n.60, 20 NRC at ____.

Licensing Board's consideration of potential impacts of the SCWS on salinity in the Delaware River, and remanded with instructions that Del-Aware be provided an opportunity to resubmit a contention dealing with this-subject matter taking into consideration the Staff's analysis as set forth in the FES. ALAB-785 at 26-32, 65, 20 NRC at _____. The Applicant petitions for review of this ruling of the Appeal Board. Petition at 3-7.

The Applicant's position is that Section 15.1(s)(1) should be read to preclude the possibility of the NRC imposing any condition on the Limerick license different from the full allocation permitted by DRBC for the SCWS. Petition at 5-7. The Staff submits that the Applicant has posed the wrong question and that the proper question is whether Section 15.1(s)(1) ^{7/} precludes the NRC Staff's consideration of the environmental impacts of the SCWS as part of its review under the National Environmental Policy Act (NEPA) of operation of the Limerick plant. Although the Staff has argued in this proceeding that certain preclusions

^{7/} Section 15.1(s)(1) states:

Nothing contained in this Act or in the Compact shall impair or affect the constitutional authority of the United States or any of its powers, rights, functions or jurisdictions under other existing or future legislation in and over the area or waters which are the subject of the Compact including projects of the Commission: provided that whenever a comprehensive plan, or any part or revision thereof, has been adopted with the concurrence of the member appointed by the President of the United States, the exercise of any powers conferred by law on any officer, agency or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan

arise from the concurrence of the Federal member of the DRBC in the determination to include the Point Pleasant Diversion in the Comprehensive Plan, it has not taken the position that such concurrence precluded the Staff's consideration of the environmental impacts of the SCWS in the FES (See LBP-82-43A, 15 NRC at 1467-68) and the Limerick FES addresses the impacts of the SCWS on salinity and water quality. Neither the Licensing Board nor the Appeal Board disagree with the Staff's position on its environmental review responsibilities. LBP-82-43A, 15 NRC at 1467-69; ALAB-785 at 28-32, 20 NRC _____. The Staff submits, therefore, that Section 15.1(s)(1) does not preclude the NRC from performing its environmental review functions under NEPA.

Nothing in ALAB-785 would require the Staff to undertake actions which would substantially conflict with the DRBC's approval of the SCWS as part of its Comprehensive Plan. It is clear that in reaching its conclusion that the Licensing Board erred in its denial of Del-Aware's contention, the Appeal Board took into consideration the DRBC's role. Specifically, the Appeal Board agreed with the Licensing Board that the NRC may not reevaluate the DRBC's "allocation decision itself." ALAB-785 at 28. Furthermore, the Appeal Board suggests that with respect to the NRC's evaluation of the impact of the SCWS on the salinity levels of the Delaware River the Staff need not perform a wholly independent analysis, but may rely on the scientific data and inferences drawn by the DRBC in exercising its "independent judgment with regard to its ultimate conclusion about the environmental impacts of the [Limerick] project." ALAB-785 at 29-30 n.65, 20 NRC at _____. Such an approach clearly does not intrude into the province of another agency (i.e., DRBC).

Thus, the Staff does not believe that ALAB-785 has the effect asserted by the Applicant, namely that the NRC's review of the impacts of operation of the SCWS would "necessarily involve the agency's reevaluating the DRBC decision to allocate water to the Limerick facility operating on the river follower mode." Petition at 4, quoting LBP-82-43A, 15 NRC at 1469. Rather, the Appeal Board simply ruled that because the Licensing Board had improperly excluded Del-Aware's proposed Contention V-16, Del-Aware should be afforded an opportunity to reformulate its salinity contention in light of specific information in the FES on this subject. ALAB 785 at 32, 20 NRC at _____. ^{8/}

In sum, the Staff does not perceive the legal conflict asserted by Applicant in its petition. The Staff does not believe Applicant has identified as important issue of law or policy requiring Commission review.

B. National Historic Preservation Act

The Applicant asserts that the Appeal Board, by reversing the Licensing Board's exclusion of Del-Aware's proposed contention on the impact of the pumping station portion of the SCWS on the proposed Point Pleasant Historic District, has intruded upon the responsibilities of the Corps of Engineers and the Advisory Council on Historic Preservation under the National Historic Preservation Act (16 U.S.C. § 470 et seq.)

^{8/} Since specific information on the effects of the SCWS on salinity in the Delaware River is available in the FES (see pp. 9-27 to 9-28, Appendix O, pp. O-26 to O-29) which was not available at the early hearing phase on SCWS issues, Del-Aware's reformulated contention must allege specifically why the FES analysis is insufficient. ALAB-785 at 32, and see the related discussion at 45, 20 NRC at _____.

(NHPA). The Applicant asserts that the Appeal Board ignored the consultation which took place between the Corps and the Advisory Council, pursuant to § 106 of the NHPA (16 U.S.C. § 470f), regarding potential impacts of the Point Pleasant Diversion on the proposed Historic District of Point Pleasant. Petition at 7.

The Staff does not disagree with the Applicant's characterization of the roles of the Corps, the Advisory Council and the State Historic Preservation Officer (SHPO). Petition at 7-9. That is, pursuant to NHPA the Corps of Engineers, the Federal agency having the authority to issue the necessary permits for the Point Pleasant intake, consulted with the Advisory Council and the SHPO regarding the potential impacts of the intake project on the proposed Point Pleasant Historic District. Petition at 7-8, see also, LBP-83-11, 17 NRC at 434-35. The Staff does not read ALAB-785 as disagreeing with this characterization of the responsibilities of the involved governmental agencies. In holding that Del-Aware must be afforded the opportunity to litigate the contention regarding the proposed Historic District, the Appeal Board observed that the Staff, in discharging its responsibility to consider the potential historical and cultural impacts of the SCWS, may properly rely on the review undertaken by the Corps. ALAB-785, at 45-46 n.110, 20 NRC at _____. Thus, the Staff does not believe that the Appeal Board ignored the consultation undertaken by the Corps under the NHPA. We do not, therefore, believe that the Appeal Board's determination with respect to this contention presents an issue meriting Commission review.

C. The Remand

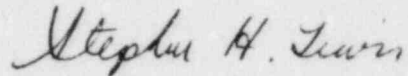
Applicant objects to the remand for consideration of reformulated and resubmitted contentions. Applicant states that even if the salinity and Historic District contentions should have been admitted when proposed in 1981, their denial constitutes harmless error at this point considering the state of the record reflected in the Limerick FES, including the findings of other agencies. Petition at 9. The Staff agrees that the Appeal Board could have made that determination; however, it did not and instead elected to remand to the Licensing Board. No important question of law or policy arises from a ruling remanding these contentions for reconsideration, even if the remand results in the admission and litigation of the contentions. ^{9/}

^{9/} Applicant's Petition, at 9-10, reflects its expectation that the remand will necessarily result in additional hearings. In the Staff's view, ALAB-785 is narrowly focused on the procedural requirements affecting the admissibility of contentions. It requires only that the Licensing Board consider reformulated contentions. Should hearings be found necessary, the Staff expects that their narrow focus would result in a limited hearing. In this regard, the Appeal Board in Barnwell quoted the Supreme Court as stating that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." Allied Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 684 (1975) citing Renegotiation Board v. Bannerkraft Clothing Co., Inc., 415 U.S. 1, 24 (1974). In the Staff's view, the Applicant has not shown how any harm that it might suffer as a result of the conduct of such narrowly focused hearings would rise to a question suitable for Commission review.

IV. CONCLUSION

For the reasons discussed, the Commission should deny Applicant's Petition for Review.

Respectfully submitted,



Stephen H. Lewis
Deputy Assistant Chief Hearing Counsel
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of November, 1984

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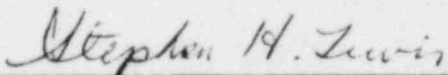
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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with § 2.713(b), 10 C.F.R., Part 2, the following information is provided:

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Stephen H. Lewis
Deputy Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland,
this 1st day of November, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER IN OPPOSITION TO APPLICANT'S PETITION FOR REVIEW OF ALAB-785" and "NOTICE OF APPEARANCE" 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 1st day of November, 1984:

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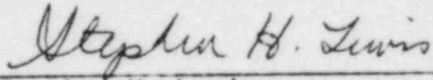
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