

## II. BACKGROUND

On March 15, 1985, Philadelphia Electric filed an application with the DRBC under Section 3.8 of the Delaware River Basin Compact for an interim supply of supplemental cooling water from the Blue Marsh Reservoir or other Basin water supply storage on or near the Schuylkill River. Philadelphia Electric requires interim supplemental cooling water because the Delaware River water previously allocated by the DRBC for the Limerick Nuclear Station is not yet available. Philadelphia Electric's request is limited to the remainder of the year 1985.

On May 7, 1985, the DRBC held a hearing on Philadelphia Electric's request in which Romano/AWPP made an appearance and commented on the request. The DRBC denied Philadelphia Electric's request on May 29, 1985 insofar as it pertained to interim supplemental cooling water. On May 21, 1985 Romano/AWPP filed the instant petition.

## III. DISCUSSION

- A. The Delaware River Basin Commission is the proper forum for AWPP's complaints.

AWPP's motion alleges that public harm will proceed from the licensing of Limerick because "[PECo] now seeks water to further threaten the public." Presumably, AWPP refers to Philadelphia Electric's application of March 15, 1985 to the DRBC for a temporary supply of water for 1985 to implement the ascent to power program leading to commercial operation of the Limerick station. See, letter from Edward G. Bauer, Jr., Vice President, Philadelphia Electric to Susan Weisman, Secretary, DRBC, dated March 15, 1985, forwarding

Philadelphia Electric's application. <sup>1/</sup> In the Staff's view, the matter raised by AWPP is squarely within the jurisdiction of the DRBC. In a related matter, the Appeal Board, in response to a petition filed by Intervenor Anthony/FOE asking the Appeal Board to order Philadelphia Electric to withdraw its March 15 application to the DRBC, noted that it lacked the authority to stay PECO's pursuit of its application before the DRBC and that the DRBC was the proper forum for Anthony/FOE's complaints concerning Philadelphia Electric's March 15 application. See, Memorandum and Order, May 2, 1985. The Appeal Board's analysis of Anthony/FOE's April 29, 1985 petition is equally applicable to the instant motion. <sup>2/</sup> For the reasons given in the Appeal Board's Memorandum and Order of May 2, 1985, the Licensing Board should dismiss AWPP's motion.

- B. AWPP's motion is moot in that the DRBC has denied the part of Philadelphia Electric's application to which AWPP objects.

On May 29, 1985, the DRBC denied Philadelphia Electric's March 15 application to use water on an interim basis from water supply storage on

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<sup>1/</sup> The application was sent to the Appeal Board with copies to parties to the Limerick proceeding by Philadelphia Electric's counsel on March 19, 1985.

<sup>2/</sup> In its Memorandum and Order the Appeal Board stated:

Although matters concerning PECO's use of the Delaware River in connection with the operation of Limerick have been the subject of earlier NRC adjudicatory hearings, this Commission has no legal authority to order PECO to withdraw a filing before another agency. See, generally ALAB-785, supra, note 1, 20 NRC 848. As we explained in that decision, we can rule on only the federal issues in connection with an application filed with the NRC for authority to conduct activities within this agency's

the Schuylkill River. <sup>3/</sup> Thus, AWPP's motion is moot in that the relief sought from the Licensing Board has been granted by the DRBC. Therefore, the Licensing Board should dismiss AWPP's motion for mootness.

C. AWPP's motion does not satisfy the Commission's criteria for opening a closed record.

In view of the foregoing, the Staff believes the Licensing Board should dismiss AWPP's motion for lack of jurisdiction and for mootness; however, in the event the Licensing Board determines that it has the requisite jurisdiction to reopen the record on the matters raised by AWPP, then the Staff submits that the Licensing Board should deny the motion on the basis that it fails to satisfy -- or even address -- the Commission's standards for reopening a closed record. The standards are well-established and the three-part test is:

- 1) Is the motion timely?
- 2) Does it address significant safety (or environmental) issues?
- 3) Might a different result have been reached had the newly proffered material been considered initially?

Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Metropolitan Edison Co. (Three Mile

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regulatory jurisdiction. Memorandum and Order at 2.  
(emphasis in Memorandum and Order).

<sup>3/</sup> Notice of Commission Action, Docket No. D-69-210 CP (Final) (Revised), issued June 3, 1985.

Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983). The Staff will discuss these standards in turn.

(1) Timeliness

Although AWPP has not addressed the criteria for reopening a closed record, it has briefly commented on the five factors to be considered pursuant to 10 C.F.R. §2.714(a)(1) in evaluating late-filed contentions. In addressing the first factor, good cause for late filing, AWPP states that its motion is timely in that DRBC's decision to declare a drought emergency took place on May 13, 1985. If AWPP's motion wholly depended on information in the DRBC decision to which reference is made, then the Staff might agree that the motion is timely. However, the motion seems to relate not to the declaration of a drought emergency but to Philadelphia Electric's March 15 application. Therefore, as it was filed more than two months after Philadelphia Electric filed its application with the DRBC, AWPP's motion should not be considered timely.

(2) Whether the motion raises a significant safety or environmental issue

The motion does not squarely raise any issue -- much less a significant environmental issue. AWPP seems to object to Philadelphia Electric's application to the DRBC for interim supplemental cooling water to be supplied from storage on the Schuylkill River. The basis for AWPP's objection seems to relate to competing needs for water, namely the needs of the customers of the Philadelphia Water Company and the Chester County water authority. Whatever may be the merit of AWPP's concerns, they do not relate to environmental concerns cognizable in NRC proceedings, but



rather to allocation decisions within the jurisdiction of the DRBC. AWPP has not satisfied the second criterion required of a party seeking reopening.

(3) Whether a different result might have been reached

The third criterion that a party requesting reopening must address is whether a different result might have been reached if the newly proffered material had been considered initially. The Licensing Board's first Partial Initial Decision <sup>4/</sup> decided contentions concerning the environmental impact of the operation of the Supplemental Cooling Water System located on the Delaware River at Point Pleasant, Pennsylvania. The Point Pleasant diversion when completed will provide a permanent source of supplemental cooling water for the Limerick Station. AWPP's motion to reopen concerns an interim source of supplemental cooling water to be used temporarily during the remainder of 1985 whenever the primary source, the Schuylkill River, is unavailable for cooling because of flow and temperature limitations imposed by the DRBC. <sup>5/</sup> Nothing AWPP has offered would change the result reached in the first PID.

In conclusion, AWPP's petition is untimely; it does not raise a significant environmental issue cognizable in NRC proceedings; and consideration of the matters raised would not change the results reached in the proceeding. Thus, the motion fails to satisfy the criteria for reopening and should be denied.

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<sup>4/</sup> LBP-83-11, 17 NRC 413 (1983).

<sup>5/</sup> In its decision of May 29, 1985, the DRBC granted Philadelphia Electric's request to substitute monitoring for dissolved oxygen for the

- D. AWPP has not satisfied the five criteria for admitting a late contention.

A party seeking to raise a new, previously uncontested issue through a motion to reopen the record must satisfy not only the standards for reopening but also the late-filed contention criteria set forth in 10 C.F.R. §2.714(a)(1), <sup>6/</sup> Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plants, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), including the Catawba Appeal Board's three part test for good cause. <sup>7/</sup>

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temperature limitation. However, AWPP's concern does not seem to relate to this feature of Philadelphia Electric's March 15 application.

- <sup>6/</sup> Section 2.714(a)(1) provides that nontimely petitions to intervene or requests for hearing will not be entertained absent a determination by the Licensing Board that the petition or request should be granted based upon a balancing of the following factors:
- (i) good cause, if any, for failure to file on time;
  - (ii) the availability of other means to protect petitioner's interest;
  - (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record;
  - (iv) the extent to which existing parties will represent the petitioner's interest; and
  - (v) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

- <sup>7/</sup> The Catawba Appeal Board's three part test for good cause requires a finding that the late-filed contention: "(1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into

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(1) Good Cause

As noted earlier, in addressing "good cause," AWPP states that its request is timely in that the DRBC's decision to declare a drought emergency took place on May 13, 1985. However, contrary to AWPP's assertion, the motion does not satisfy any of the Catawba criteria for determining whether there is good cause for the late filing of a contention. As discussed supra, AWPP's motion depends not on DRBC's declaration of a drought emergency on May 13, 1985, but on Philadelphia Electric's March 15 application for interim supplemental water. <sup>8/</sup> Because the motion is wholly dependent on the March 15 application, one must find lack of good cause, as the motion was filed more than two months after the application was made available.

(2) Availability of other means to protect the movant's interest

Not only do other means exist for the protection of the movant's interest but AWPP has availed itself of these other means in testifying before the DRBC in its May 7, 1985 hearing held on Philadelphia Electric's request for interim supplemental water. Thus, AWPP has not prevailed on this factor.

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existence and is accessible for public examination." Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982); affirmed in relevant part, 17 NRC 1041 at 1047 (1983).

<sup>8/</sup> In any case, AWPP has not included a copy of the document on which it purports to rely. Therefore, the Licensing Board is in no position to make a judgment about whether AWPP's proposed contention depends on information to be found there.

(3) Assistance in developing a sound record

Regarding Factor iii, assistance in developing a sound record, AWPP states that its representative, Mr. Romano, has over 20 years experience in environmental analyses, in particular water, and that he can supply facts relating to the effect of low flow <sup>9/</sup> and the danger to the public from increased toxic chemicals, viruses etc. The Board need not address the accuracy of these representations in considering AWPP's showing on this factor, as the issue on which AWPP claims expertise for its representative are not raised by Philadelphia Electric's application to the DRBC for interim supplemental water. Therefore, any assistance that AWPP's expert witness might provide with regard to low flow, <sup>10/</sup> etc. does not relate to the proposed contention, which, as noted above, would seem to relate to Philadelphia Electric's application to use Schuylkill River storage as a source of interim supplemental cooling water.

(4) Representation by existing parties

In addressing Factor iv, the extent to which another party will protect the movant's interest, AWPP states that no other party has the "contention coverage" that AWPP's representative, Mr. Romano, offers by

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<sup>9/</sup> The effects of low flow in the Delaware River were addressed in the Board's first Partial Initial Decision, in connection with the effect that low flow conditions might have on the fish species of concern, shortnose sturgeon and American shad. 17 NRC 413 at 449-50.

<sup>10/</sup> Although AWPP's motion seems to reflect a belief that the March 15 application to the DRBC would involve the use of Schuylkill River water at low flow, the fact is that Philadelphia Electric would have been permitted, if the DRBC had acted favorably on the application, to withdraw at Limerick only the amount of water released from upstream storage.



virtue of his being a biochemist-bacteriologist, understanding the biochemistry of the interactions of organic matter, dissolved oxygen and toxic chemicals. Although Mr. Romano may be, as AWPP represents, expert in these matters, they simply do not relate to the concern expressed in what the Staff takes to be AWPP's contention: that competing users, i.e., water customers -- not fish -- have a better claim to the water than Philadelphia Electric does. In addition to the fact that AWPP's expertise does not relate to its contention, the contention also suffers from not relating to an interest protectable in NRC proceedings. Therefore, this factor weighs against AWPP.

(5) Delay and broadening of the issues

AWPP states that any delay that resulted in a more complete record and weighed on the side of environmental protection would merit the time required for hearing. However, contrary to AWPP's assertion, the admission of any new contention at this juncture would delay the proceeding and broaden the issues. Therefore, this factor weighs against AWPP.

All five factors weigh against the admission of AWPP's late-filed contention. Therefore, AWPP's motion should be denied on the basis of its failure to satisfy the five factors set forth in 10 C.F.R. § 2.714(a)(1) of the Commission's regulations.

E. AWPP fails to state a contention with the requisite basis and specificity

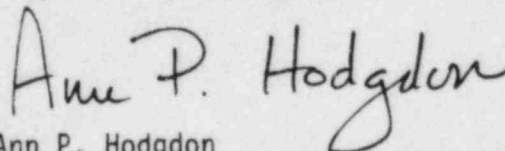
The Commission's regulations in 10 C.F.R. § 2.714(b) require that a petitioner set forth the basis for each proposed contention with reasonable specificity. As noted above, AWPP has not explicitly stated a contention, much less set forth a basis with reasonable specificity. AWPP's

concern seems to be that suppliers of finished water to water customers have a better claim to available water than Philadelphia Electric does. Such a contention is simply not cognizable in NRC proceedings as it raises no radiological health and safety or environmental issue. Therefore, AWPP's contention lacks reasonable basis and specificity and should be denied for that reason.

#### IV. CONCLUSION

As discussed above, AWPP's motion does not raise a concern over which this Commission has jurisdiction. Further, it is moot, in that the matter has been decided by the DRBC, the agency having such jurisdiction. For these reasons, the motion should be dismissed. In addition, AWPP has failed to make the showing required of a party seeking to reopen a closed record. AWPP has also failed to satisfy the five factors for admission of a late-filed contention and the basis and specificity requirements for the admission of a contention. Accordingly, the Licensing Board should, in the alternative, deny the motion for the reasons discussed above.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ann P. Hodgdon". The signature is written in dark ink and is positioned above the printed name and title.

Ann P. Hodgdon  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 10th day of June, 1985

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )

PHILADELPHIA ELECTRIC COMPANY )

(Limerick Generating Station,  
Units 1 and 2) )

Docket Nos. 50-352  
50-353

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO FRANK ROMANO/AIR AND WATER POLLUTION PATROL MOTION OF MAY 21, 1985 " 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 10th day of June, 1985:

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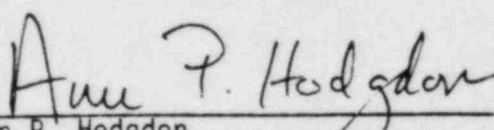
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