

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

SUPPLEMENTARY MOTION TO REOPEN
AND/OR TO ADMIT NEW CONTENTION V-27 AND V-28

DEL-AWARE by its counsel hereby supplements its petition pending motion to reopen, discharges its duty to advise the Board of new developments, and/or moves to admit new contentions, and avers as the basis thereof the following:

1. Recently, namely, on May 11 and May 16, respectively, the Chief Engineer of the Delaware River Basin Commission and Timothy Weston, the Chairman of the Delaware River Basin Commission (also the associate Deputy Secretary of Environmental Resources of Pennsylvania) testified before the Pennsylvania Public Utility Commission that there is water in Blue Marsh Reservoir which could be made available for Philadelphia Electric Company. Both men testified that they would not recommend making available to PECO more than 25% of the available capacity, which would equal about 25% of the needs of one unit in the drought of record, in worst case conditions, i.e. maximum possible operation and worst case meteorological conditions. However, both officials

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acknowledged the adequacy of the Blue Marsh water provide for one unit at Limerick, and also acknowledged that their calculations do not taken into account 6,600 acre feet of (approximately 3,300 cfs days not including additional inflow), or the potential for utilizing a portion of the minimum conservation release, previously used for storage in drought conditions.

2. In addition, Timothy Weston, the aforementioned chairman and associate deputy secretary, testified that he would be prepared to consider reduction of minimum flow restrictions on withdrawal in the Schuylkill River. Neither witness referred to or relied upon the temperature limitation presently contained in the DRBC order.

3. Testimony by Jonathan Phillippe on behalf of Del-AWARE Unlimited in the PUC on May 21, 1983, documents that the DRBC basis for the temperature limitation, a 1968 Federal Water Quality Administration study, has since been updated by 1978 computer model of the river and demonstrates that the temperature restriction is unnecessary for water quality purposes, as is the minimum flow limitation.

4. Based on the foregoing new information, it is suggested that the basis now exist for the determination that there is available water presently existing in Schuylkill for one unit at Limerick.

5. The Pennsylvania PUC decision that there is no need for the continued financing of Unit 2 is presently

before the Supreme Court, having been argued on April 23, 1983.

6. Additionally, on May 17, 1983, the voters of Bucks County voted to stop Bucks County's construction of the Point Pleasant diversion. Although under Pennsylvania law such referenda are nonbinding, the majority of the County Commissioners, which had supported the project (the minority commissioner had opposed it), had stated and since the election have reiterated their intention to accept the referendum as binding, and have informed PECO of their withdrawal from the project (Exhibit A).

7. Despite the foregoing, Philadelphia Electric Company continues to admit that it has never sought to discuss with DRBC or Pennsylvania DER the use of Blue Marsh water, or flow reductions in the Schuylkill River minimum flows, for one unit at Limerick.

8. In light of Bucks County's withdrawal from the project, the basis of the SPCO of June 1, 1982, as well as the Supplementary Order of July 14, 1982, namely that Bucks County would continue to build the project in the absence of Philadelphia Electric, no longer exist. This fundamental change in circumstance means that the entire environmental impact of the Point Pleasant diversion construction must now be considered attributable to Philadelphia Electric. Therefore it is now necessary for the Board and the Commission to determine whether the benefits of the Point Pleasant diversion in total exceed the detriments, or put

another way, whether it is responsible to proceed with the project, based upon a full NEPA review.

9. If the water treatment and distribution system is built, it will be solely because the Philadelphia Electric Company has evinced its intention to take over the project and proceed (see letter from Bernard Chanin to Sally Mrvos, Clerk of the Third Circuit Court of Appeals in response to her request for a statement from the parties as to the effect of the May 17 referendum on the Del-AWARE v. Baldwin appeal, attached as Exhibit B).

10. Conversely, in light of the Bucks County withdrawal from the project, if PECO is permitted to pursue its intention to develop the Point Pleasant on its own, it will require substantial litigation, and delay. Specifically, for example, the Philadelphia Electric would not be able to take advantage of the Water Authority's alleged right to override local zoning under Pennsylvania case law, and instead, in order to continue the pump station, a use contrary to the Township Zoning Ordinance, would have to proceed through the Pennsylvania Public Utility Commission for permission to override local zoning. The Commission already held a substantial hearing on the Bradshaw Reservoir pump station for a similar reason, and has indicated its concern about the potential impacts of the project on the East Branch of the Perkiomen Creek, and in light of the availability of alternatives, the Administrative Law Judge has disclosed the possibility that he may not recommend

approval of any or all of the proposed pumps at the Bradshaw Reservoir.

11. If such proceedings are instituted by PECO, they may be expected to consume a considerable period of time, as would litigation which would be instituted by Del-AWARE and others to prevent takeover by PECO of the county's land and other assets associated with the project.

12. It is further possible that the DRBC will reconsider its docket approvals, since the executive director advised the Commission on November 17, 1982 that decisions by any of the project sponsors not to implement the project would require consideration of reopening of the DRBC docket.

(Letter attached hereto as Exhibit C.)

13. The foregoing suggest the following additional contentions in addition to the pending Contention V-26:

V-27 The withdrawal of Bucks County from the project has altered the assumption upon which the impact of Limerick can be evaluated, and requires that this Commission both in the environmental impact statement and in the licensing procedure, treat the full Point Pleasant diversion as a facility of the plant, thus requiring permitting, as well as consider of its environmental effects in the overall context of reviewing the application for an operating license.

V-28 In passing upon the operating license, the Commission must consider the feasibility of providing water to Limerick in time for its projected start-up date, and in view of the complications, dissarray, and apparent legal obstacles to PECO's utilization of Point Pleasant, PECO must pursue alternative water sources in order for the NRC to continue processing its application, or to grant approval.

14. The disclosure dates of the information contained in the above and within the motion and supplemental motion make it clear that there is good cause for the late filing of this contention in that the facts averred have just become true and or have, through no unreasonable cause, just become available to the intervenor.


15. No other party will adequately or properly present the foregoing facts to the Board; the staff has repeatedly demonstrated its unwillingness to deal with any new developing or long existing concerns relating to the water system, in that although it promised the DRBC that it would review these effects it has consistently and totally refused to do so, and is likely to continue to refuse to respond to intervenor's concerns.

16. While consideration of these matters will undoubtedly involve some minor expansion of the record and issues in the proceeding now before the Board, in view of the state of development of this information, there is no reason why such consideration should delay the ultimate outcome of the proceedings and in any event, the failure to consider them presently is likely to result in substantial delay of the operation of the project, a far more serious concern than the length of these proceedings.

WHEREFORE, Intervenor moves that the Board grant

its pending motion, as supplemented herein.

Respectfully submitted,


ROBERT J. SUGARMAN
Counsel for Del-AWARE

Of Counsel:

SUGARMAN & DENWORTH
121 S. Broad Street
Suite 510
Philadelphia, PA 19107
(215) 546-0162

Dated: May 24, 1983

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COUNTY OF BUCKS

OFFICE OF THE COMMISSIONERS

Administration Building, Doylestown, Pa. 18901

215-348-2911

215-752-0281

County Commissioners

ELAINE PETUCH ZETTICK, *Chairman*

ANDREW L. WARREN, *Vice-Chairman*

CARL E. FONASH

May 18, 1983

Philadelphia Electric Company
21st and Market Streets
Philadelphia, PA 19103

Attention: Mr. Vincent Boyer
Vice President

Dear Mr. Boyer:

Please be advised that we, the Bucks County Commissioners, are hereby terminating our contract with you to operate the Point Pleasant Pumping Station pursuant to the Agreement between the Neshaminy Water Resources Authority and Philadelphia Electric Company dated February 12, 1980.

Very truly yours,


Elaine P. Zettick, Chairman


Andrew L. Warren

Exhibit A-

TWELFTH FLOOR PACKARD BUILDING

PHILADELPHIA, PA. 19102

(215) 977-2000

TELECOPIER: LOS-1069

TWX: 710-670-1927

WOLBLORR PHA

FLORIDA OFFICE

SUITE 1009

1655 PALM BEACH LAKES BOULEVARD

P.O. BOX 027516

WEST PALM BEACH, FLORIDA 33402

(305) 471-3400

TELECOPIER: (305) 684-4503

May 23, 1983

RECEIVED

MAY 27 1983

SL...

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JOHN S. ROBERTS, JR.
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STERNEN LEVIN
MICHAEL A. BUDIN
HOWARD FREEMAN
ROBERTA D. LIENBERG
MATTHEW M. KAHENS
LAURA A. FRIEDMAN
LEWIS I. GANTMAN
BARRY M. KATMAN
DIANE J. SIGMUND
JASON M. SHARGEL
BRIAN R. FLAHERTY
ALAN I. GOLDBERG
JEFFERY S. SALTZ
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JERE C. THOMPSON
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JIM L. PRANTZ
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*ADMITTED TO FLORIDA BAR ONLY
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DIRECT DIAL NUMBER:

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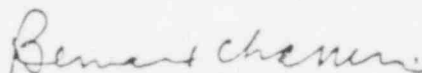
Re: Del-Aware Unlimited, Inc., et al. v.
Roger M. Baldwin, et al.
Civil Action 83-1010

Dear Ms. Mrvos:

This letter is responsive, on behalf of Philadelphia Electric Company, to your letter of May 18, 1983 in the above captioned appeal.

Philadelphia Electric Company does not regard the nonbinding referendum as impairing its contractual rights respecting the Point Pleasant Water Diversion Project and fully intends to seek judicial enforcement of those rights. Accordingly, Philadelphia Electric Company does not regard the referendum as affecting this case.

Very truly yours,



Bernard Chanin

For WOLF, BLOCK, SCHORR and SOLIS-COHEN

BC/mts

cc: All Counsel

Exhibit B



DELAWARE RIVER BASIN COMMISSION
P O BOX 7380
WEST TRENTON NEW JERSEY 08628
609.883.9500

GERALD M. HANSLER
EXECUTIVE DIRECTOR

HEADQUARTERS LOCATION
35 STATE POLICE DRIVE
WEST TRENTON, N.J.

November 17, 1982

Dear Commissioner Weston:

Re: Review and Response of Commission
Staff and Counsel to Amended Petition
to Reopen Delaware River Basin Commission
Docket Nos. D-65-76 CP(8), D-69-210 CP
and D-79-52 CP

Under date of September 2, 1982, Delaware Water Emergency Group, Del-AWARE, Unlimited, Inc., and certain other organizations and individuals (Petitioners), through their counsel, submitted to the Delaware River Basin Commission (DRBC) a document entitled "Petition to Reopen and for Reconsideration and, to Set Aside Prior Orders, and to Take Other Action as Appropriate." Petitioners described themselves therein as "objectors regarding the foregoing orders." In brief, Petitioners requested DRBC to reopen and, after hearing, to set aside and rescind the actions taken on February 18, 1981, in connection with the Neshaminy Water Resources Authority (NWRA) application as set forth in Docket No. D-65-76 CP(8) and related prior dockets and the Philadelphia Electric Company (PECO) application as set forth in Docket No. D-79-52 CP and related prior dockets.

Receipt of this submission was acknowledged by the Secretary of DRBC on September 7, 1982, and counsel for Petitioners was advised as follows:

"At the outset, it should be noted that the Rules of the Delaware River Basin Commission (DRBC) do not expressly provide for such a petition. Moreover, there is a question whether the groups and individuals you have included as petitioners have standing to make such a request at this time under the circumstances present. The Sections of the Compact and the Rules of DRBC cited in your letter do not necessarily constitute a sufficient basis for such a Petition. Moreover, the U.S. Administrative Procedure Act is not applicable to DRBC as a matter of law."

Petitioners were requested to provide, by September 20, 1982, an appropriate affidavit supporting and documenting the factual allegations set forth in the Petition and a brief setting forth any legal authority justifying consideration of the Petition.

Exhibit C

cautioned:

Finally, counsel for Petitioners was further

"It should be understood that the requests set forth in this letter do not constitute formal acceptance of this Petition, a determination that the Petition is properly before DRBC, or that the action requested of DRBC is in compliance with its Compact and Rules. Such determinations will be made after you have provided the additional material requested and responses have been filed by PECO and NWRA."

Copies of the materials submitted and DRBC's response were provided to PECO and NWRA with a request for any response from them by October 22, 1982.

Under date of September 13, 1982, counsel for Petitioners filed an Amended Petition which was essentially similar to the Petition as originally filed with minor adjustments in the text.

On September 13, 1982, Secretary Weisman confirmed an earlier telephone conversation extending the time for Petitioners to respond until Friday, September 24, 1982. Counsel for Petitioners also sought to shorten the time available for responses from PECO and NWRA. Petitioners were advised in the absence of agreement between counsel that the October 22, 1982 date for responses would not be changed, particularly since Petitioners had requested additional time to file their response. There were additional exchanges of correspondence concerning the filing of responses which are no longer considered pertinent to the issues before the Commission.

Petitioners submitted their response on September 24, 1982, which consisted of a 14-page document entitled "Documentation in Support of Factual Allegations." Attached to this documentation is an affidavit of Mr. Val Sigstedt, described as a Petitioner in the within action, which affidavit simply recites "that the facts set forth in the attached documentation in support of factual allegations are true to the best of his knowledge, information and belief." Referred to in this documentation and included therewith are a series of documents which are marked as Exhibits numbered from 1-57.

In the 14-page documentation, there is descriptive text referring to the factual allegations in the Amended Petition: The allegations set forth in each numbered paragraph of the Petition are discussed in order. The Exhibits are numbered, described and grouped and are discussed in the order of the numbered allegations set forth in the Amended Petition.

The materials submitted by Petitioners on September 24, contained a number of typographic and other errors and corrections had been made on DRBC's copy. Under date of September 28, 1982, Petitioners submitted a corrected "documentation" and requested that this revised material be substituted for the earlier filing.

2. J. Serant 3.
PC 2/11/82

Under date of September 30, 1982, counsel for Petitioners, in his capacity as counsel for Del-AWARE, submitted comments upon the DRBC Draft 18th Water Resources Program and the Merrill Creek Draft Environmental Impact Statement. Del-AWARE requested that these comments be incorporated also within the Amended Petition.

At the time that the Amended Petition was received, as above noted, DRBC questioned the standing of the Delaware Water Emergency Group and other Co-Petitioners to initiate a request to reopen the Dockets acted upon in February 1981. Petitioners were requested to submit legal authority to support such a request. The documentation filed September 24, and the corrected documentation filed September 28, however, was limited to materials which Petitioners contend support the various factual allegations set forth in the Amended Petition.

In correspondence with counsel for Petitioners, dated September 17, 1982, Miss Weisman stated:

"Finally, I would again caution you that it has not been determined that your 'Petition' is properly before the Commission. As previously indicated, appropriate determinations will be made after all counsel have submitted the material requested."

By letter dated September 27, 1982, counsel for Petitioners responded to DRBC's letter of September 17 stating:

"In regard to the last paragraph of your letter, I fully understand that it has not been determined that the Petition is properly before the Commission. In that connection, I would appreciate your advising me of any procedural or technical or other correctable inadequacy which might invalidate our Petition, or any rules applicable to such Petitions or governing the receipt or consideration of such Petitions, which we might correct in a timely fashion."

In response to Petitioners' letter of September 27, DRBC's General Counsel responded to the inquiry concerning compliance with the Commission's Rules and Procedures. This letter states in part:

"The Commission cannot undertake to advise you with regard to the adequacy or sufficiency of the motion you have filed. The Commission has requested all counsel to submit legal authority in support of or in opposition to this application. Based upon the information submitted, as well as my own review of the legal issues present, I will undertake to advise the Commission as to my conclusions concerning the sufficiency and legal appropriateness of the application you have filed. I have not yet completed this review."

"You may be assured, however, that the materials you have submitted, including the arguments in support thereof, as well as the opposing papers filed by PECO and NWRA, will also be provided to all commissioners. The commissioners, therefore, will have before them all available materials before undertaking to act upon and dispose of your application."

Petitioners, since receipt of this letter, have not submitted a memorandum which responds to DRBC's request for legal authority concerning the sufficiency and legal appropriateness of Petitioners' Application.

Under date of October 22, 1982, both PECO and NWRA submitted responses to the Amended Petition. The response on behalf of PECO included a 41-page memorandum and also enclosed copies of the unpublished decisions of the Nuclear Regulatory Commission referred to in the memorandum and a copy of a letter dated September 28, 1981 from the Pennsylvania Historical and Museum Commission. This letter had been sent by the Commission to Colonel Roger L. Baldwin, District Engineer, U.S. Army Corps of Engineers, in Philadelphia. Although not included therewith, the PECO memorandum makes reference to numerous documents related to the various proceedings concerning the Point Pleasant Project.

The response of NWRA consists of a 24-page memorandum which, by and large, organizes its response to the Amended Petition on a paragraph-by-paragraph basis. Reference is made throughout the NWRA submission to specific documents and 39 separate documents or excerpts were also submitted as part of the NWRA response.

In the absence of a memorandum as to legal issues, the only material supporting Petitioners' right to maintain the Amended Petition is that which is set forth within the Amended Petition itself.

The opening paragraph of the Amended Petition states that it is brought:

"... pursuant to Sections 3.8, 13.1 and 15.1(s)1 of the Compact and Sections 2-1.4, 2-1.7, 2-4.16 of the Rules, and the Administrative Procedure Act 5 U.S.C. Section 701 et seq...."

By contrast, the PECO memorandum deals specifically and extensively with the legal issues that DRBC requested all counsel to address. The legal contentions of PECO are set forth primarily on pages 2-12 of its memorandum. PECO contends that Petitioners have failed to show any legal basis for reopening the DRBC Dockets for Point Pleasant and specifically argue that the DRBC Compact and Rules of Practice and Procedure do not authorize reopening a final Docket decision. The absence of argument to the contrary on behalf of Petitioners is specifically noted by PECO. PECO also contends that Petitioners have failed to demonstrate their standing to seek a reopening

of this matter. Finally, as an extension of its legal arguments, PECO further contends in its memorandum, on pages 12-39, that Petitioners have not substantiated their factual allegations or contentions. This aspect of Petitioners' contentions will be addressed hereafter.

The response submitted on behalf of NWRA similarly notes Petitioners' failure "to submit a brief referencing legal authority to support the 'procedural aspects' and 'substantive issues' raised in the Amended Petition." Because of the overall structure of the NWRA response, its arguments concerning legal issues are set forth throughout its memorandum. Its comments on these issues, however, are basically set forth in its covering letter and in pages 1 and 2 and 20-24 thereof.

Opinion of General Counsel as to Standing and Legal Sufficiency.

As Executive Director, the undersigned requested DRBC's General Counsel to review the materials submitted by Petitioners and the responding materials submitted by PECO and NWRA with regard to the issues of standing and legal sufficiency. The full text of his Opinion is attached hereto. In summary, the General Counsel has concluded that Petitioners do not have standing to file and maintain their Amended Petition or to seek the relief demanded. Moreover, the General Counsel has concluded that even if Petitioners had standing, under DRBC's Rules of Practice and Procedure or otherwise, to initiate a Petition to Reopen, consideration of such a Petition could not be required as a matter of right but would fall within the discretion of the Commission.

Commission Counsel has concluded that separate and apart from the issues of standing and the right to Petition for Rehearing, the Commission itself has continuing control of its Dockets. DRBC, therefore, on its own motion, under appropriate circumstances, has the right to undertake a review of its prior Docket decisions even though it is not obligated as a matter of law to do so. Staff, therefore, has reviewed and considered each and every allegation set forth by Petitioners and has made its own independent determination as to whether a review and reconsideration of the February 1981 Docket decisions is appropriate now.

The DRBC staff response to Petitioners' allegations is also attached.

For the reasons that are set forth hereafter, it is the conclusion of staff that the reopening of these Docket decisions by the Commission is not justified at this time. Some further review of these Dockets could become necessary if there is a substantial change in the project as now approved, or if the extent to which the project sponsors are able to proceed is changed as a matter of law or fact. At this time, however, there is not justification for such action.

Sincerely,



Gerald M. Hansler

Commissioner R. Timothy Weston
Department of Environmental Resources
Post Office Box 1467
Harrisburg, Pennsylvania 17120

cc: Commissioner Thomas P. Eichler, w/enc.
Commissioner Robert E. Hughey, w/enc.
Mr. Dirk C. Hofman, w/enc.
Commissioner George J. Kanuck, Jr., w/enc.
Commissioner Russell C. Mt. Pleasant, w/enc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of :
:
Philadelphia Electric Company : Docket Nos. 50-352
: 50-353
(Limerick Generating Station, :
Units 1 and 2 :
:

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Supplementary Motion to Reopen and/or to admit New Contention V-27 and V-28 by mailing a copy of the same to the following persons this 25 day of May, 1983.

Lawrence Brenner, Esq., Chairman
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
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Secretary
U.S. Nuclear Regulatory Commission
Attn.: Chief, Docketing & Service Branch
Washington, DC 20555

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555


Robert J. Sugarman

Dated: May 25, 1983