

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))	

APPLICANT'S ANSWER TO REQUEST BY DEL-AWARE
UNLIMITED, INC. FOR ADMISSION OF NEW, LATE FILED
CONTENTIONS V-30, V-31, V-32, and V-33

Preliminary Statement

The presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") issued its Partial Initial Decision ("PID") on March 8, 1983, disposing of contentions filed by Del-Aware Unlimited, Inc. ("Del-Aware") as to the supplementary cooling water system for the Limerick Generating Station ("Limerick").^{1/} On the same day, Del-Aware requested a reopening of the record to consider a new late contention. Following resolution of the jurisdictional issue,^{2/} the Licensing Board issued an order on June 1, 1983 denying the request for a new Contention V-26 as well

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413 (1983).

2/ See Limerick, supra, LBP-83-25, 17 NRC 681, rev'd and remanded, ALAB-726, 17 NRC 755 (1983).

as proposed Contentions V-27 and V-28, which had been filed in the interim.^{3/}

Subsequently, after Del-Aware was afforded, but did not exercise, an opportunity to take exceptions from the June 1, 1983 order denying its late contentions, briefs were filed and oral argument before the Atomic Safety Licensing and Appeal Board ("Appeal Board") was heard on December 5, 1983. Notwithstanding the pendency of that appeal on all issues related to the supplementary cooling water system for Limerick, Del-Aware has filed four new, late contentions which it asks the Licensing Board to admit in a reopened proceeding.

Applicant Philadelphia Electric Company ("Applicant") opposes the admission of these late contentions and the reopening of the record on the supplementary cooling water system, which was closed over a year ago on October 26, 1982 (Tr. 4038). Preliminarily, the Licensing Board clearly lacks jurisdiction to entertain Del-Aware's request but, even assuming that the matter is referred to the Appeal Board for action, the request is wholly without merit.

First, the new proposed contentions are, in one form or another, merely a restatement of contentions previously

^{3/} Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983). Although the first of Del-Aware's newly proposed contentions is V-30, Applicant is unaware of any proposed Contention V-29.

disallowed by the Licensing Board. Del-Aware may not relitigate the validity of its denied contentions simply by raising them anew. If it disagreed with the Licensing Board's legal conclusions in rejecting its contentions, Del-Aware should have pursued the issue on appeal.

Second, Del-Aware has failed to meet the requirements for late contentions under 10 C.F.R. §2.714(a)(1)(i)-(v). To the extent the Board may find that a particular contention is not a restatement of an earlier denied contention, Del-Aware has failed to show "good cause" for waiting until now to raise such matters. Moreover, litigation of Del-Aware's new proposed contentions will unquestionably expand the issues in the hearing and result in considerable delay. Given the remaining contentions which must yet be litigated in this proceeding, admitting Del-Aware's late contentions even has the potential for impacting the start-up date for Limerick. Also, Del-Aware has not met its obligation to identify witnesses and summarize their testimony with regard to such late contentions.

Third, Del-Aware has not met and has not even addressed the separate requirements for reopening a closed record. While certain documents may themselves be newly issued, there has been no showing that the underlying issues are themselves new, that they raise any significant environmental concern, or that their litigation would have altered the outcome of the proceeding in the PID. In addition, the contentions themselves are deficient in lacking bases and

specificity. Accordingly, Del-Aware's request to admit its four late filed contentions and reopen the record should be denied.

Argument

I. The Licensing Board Lacks Jurisdiction to Admit Del-Aware's Late Contentions.

It is now clear that, once a party has filed exceptions to an initial decision, jurisdiction to rule on a motion to reopen the record related to an issue decided in the initial decision lies with the Appeal Board. See Limerick, supra, ALAB-726, 17 NRC 755, 757 n.3 (1983); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982).^{4/} Accordingly, the Licensing Board should dismiss Del-Aware's requests for lack of jurisdiction.

II. Del-Aware Improperly Seeks to Relitigate the Licensing Board's Legal Rulings on the Validity of its Rejected Contentions.

Each of the four contentions proposed by Del-Aware seeks, in effect, to reargue the validity of proposed contentions previously rejected by the Licensing Board on the basis of their deficiency as a matter of law. These prior rulings by the Board became appealable when the related PID

^{4/} A review of the transcript of oral argument before the Appeal Board on December 5, 1983 does not support Del-Aware's suggestion that the Appeal Board authorized the Licensing Board to hear its four late filed contentions. See Del-Aware's Request for Late Filed Contention at 3 (December 16, 1983).

was rendered. Having failed to appeal them, Del-Aware has waived any objection to their validity.^{5/}

Contention V-30. This proposed contentions challenges the validity of the Draft Environmental Statement for Limerick, NUREG-0974 (June 1983) ("Limerick DES") on the basis of an alleged inconsistency between findings by the Delaware River Basin Commission ("DRBC") in documents discussing the adequacy of water supplies in the Delaware River.^{6/} In essence, Del-Aware is again raising the issue of whether the NRC has statutory authority to override DRBC's water allocation decisions under its Compact. Such decisions necessarily require DRBC to consider adequate flow in the Delaware River, construction or enlargement of reservoirs in the system, salinity standards for the Delaware Estuary and other concerns related to management of Delaware River Basin water supply resources.

^{5/} As to the rulings it did appeal, i.e., those relevant to proposed Contention V-30, the Licensing Board no longer has jurisdiction to reconsider for the reasons discussed at page 4, supra.

^{6/} Preliminarily, Del-Aware cites no authority for challenging the Limerick DES as opposed to the Final Environmental Statement ("FES"). Only the FES is dispositive as to the adequacy of the NRC's compliance with the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 525-26 (1977); Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 792-94 (1978).

Time and again, the Licensing Board correctly held that litigating contentions such as V-30 would necessarily require the NRC to intrude upon DRBC's basic decision-making function under its Compact to allocate water for Limerick and other users.^{7/} The Licensing Board reaffirmed its ruling on several occasions, stated that "it is precluded from considering matters concerning the allocation of Delaware River water for cooling Limerick."^{8/} This issue is now on appeal in the context of Del-Aware's argument that the Licensing Board should have considered salinity and other water quality impacts in the Delaware River even though they were previously considered and resolved by DRBC in its decision to allocate water for the Point Pleasant diversion project.^{9/}

^{7/} Limerick, supra, LBP-82-43A, 15 NRC 1423, 1466-69, 1474 (1982). For convenience, the Board may wish to refer to Applicant's brief on appeal, which summarizes the Licensing Board's actions on these previously rejected contentions. See Applicant's Brief in Opposition to Exceptions by Del-Aware at 15-20 (October 3, 1983).

^{8/} Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)" (July 14, 1982) (slip op. at 18-19). See also Limerick, supra, LBP-82-72, 16 NRC 968, 969-70 (1982); Limerick, supra, "Memorandum and Order (Denying Del-Aware's Petition to Amend Contentions)" (January 24, 1983) (slip op. at 6-7). These and other pertinent orders are collected in Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983) (slip op. at 9 n.3).

^{9/} See Appellant's Brief in Support of Exceptions From Partial Initial Decision at 1-3 (August 23, 1983).

Contention V-3' This contention challenges the adequacy of the Staff's evaluation of Point Pleasant diversion impacts on the East Branch Perkiomen Creek. In its initial filing, Del-Aware proposed Contention V-16c as follows:

The discharge of the water into the Perkiomen, and into the Schuylkill will cause toxic pollution and thus substantially and adversely affect fishing and drinking water supplies. The discharge into the Perkiomen will also cause destabilization, flooding and otherwise adversely affect the Perkiomen.^{10/}

This contention was denied by the Licensing Board because, first, it lacked specificity, and second, because "the impacts on the Perkiomen and Schuylkill were considered at the construction permit stages," and no significant changes at the operating license stage had been alleged.^{11/} No basis exists for admitting essentially the same contention now.

Contention V-32. This proposed contention refers to a recent ordinance passed by the Bucks County Commissioners "implementing the results of the referendum of May 18, 1983,

^{10/} Supplemental Petition of Coordinated Intervenors at 69½ (November 24, 1981).

^{11/} Limerick, supra, LBP-82-43A, 15 NRC at 1486. The Licensing Board reaffirmed its ruling on Del-Aware's request for reconsideration. See Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)" (July 14, 1982) (slip op. at 9).

calling for a halt to the project,"^{12/} and recent litigation by PECO seeking to enforce its rights under its agreement with NWRA. From this, the proposed contention concludes that

. . . the applicant has no available supplemental cooling water system, and therefore no prospect of operating the plant properly. It further demonstrates that the operating impacts of the diversion as a whole should be regarded as attributable to the operation of the facility, and that construction impact[s] should be so attributable as well, since the applicant's motion makes it clear that there would be no pumping station facility were it not for the applicant's alleged damages.^{13/}

As to the possibility that actions by the Bucks County Commissioners might interfere with completion of the Point Pleasant project, the Licensing Board previously rejected the same argument as contained in proposed Contentions V-27 and V-28, which stated:

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 [sic], treat the full Point Pleasant diversion as a facility of the plant, thus requiring permitting, as well as consider [sic] of its environmental effects in the overall context of

^{12/} Del-Aware's Request for Late Filed Contentions at 1-2. The nonbinding referendum in fact occurred on May 17, 1983.

^{13/} Id. at 2.

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 times for its projected start-up date, and in view of the complications, disarray, 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/}

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- ^{14/} Del-Aware's Supplementary Motion to Reopen and/or to Admit New Contention V-27 and V-28 at 5 (May 25, 1983). Del-Aware asserted as follows in support of these contentions:

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.
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Conversely, in light of the Bucks County withdrawal from the project, if PECO is permitted to pursue its intention to develop the Point Pleasant [project] on its own, it will require substantial litigation, and delay. . . .

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.

Id. at 3-5.

The Licensing Board denied both proposed contentions, noting its prior rulings that all impacts attributable to components of the project used solely or jointly by PECO would be considered, and that NEPA did not require the NRC to consider those impacts attributable to components used solely by NWRA.^{15/} The Board added:

Moreover, we note with respect to proposed Contention V-27 that the impacts alleged in Del-Aware's litigated contentions were considered in the P.I.D. based on the combined water withdrawal rates for both PECO and NWRA because of the cumulative impact during times when water withdrawals by PECO would be permitted for Limerick. With respect to proposed Contention V-28, if and when PECO were to materially change its proposal to obtain supplementary cooling water in the event the Point Pleasant diversion not be allowed to operate due to "legal obstacles" involving other permitting authorities, the Nuclear Regulatory Commission at such time would have to reconsider its previous assessment of environmental impacts in light of changes proposed by PECO.^{16/}

Contention V-33. This proposed contentions asks that the proceeding with respect to Limerick Unit 2 be suspended or cancelled "due to the fact that the unit is in an indefinite time period, and the Commission staff and other organs

^{15/} Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983) (slip op. at 9 n.3).

^{16/} Id.

have themselves deferred further consideration."^{17/} The Licensing Board has already ruled, however, that such a contention is legally invalid because, under NEPA, the NRC need not "consider alternative cooling systems unless it can be shown that they are made possible only if Unit 2 is deleted, and there is a basis in support of a contention that they could have significantly smaller environmental impacts than the proposed Point Pleasant diversion river follower system."^{18/} This particular proposed contention

^{17/} Del-Aware's Application to Submit Late Filed Contention (December 16, 1983). This contention does not raise any litigable issue as such, but merely asks the Licensing Board to suspend or defer processing of the application for Unit 2. It is fundamental, however, that the responsibilities of the Commission's adjudicatory boards are independent of those of its regulatory Staff. See generally, Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 202 (1978). See also Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 737 (1975); New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279-80 (1978). As the Commission stated in Shearon Harris, it is "clear that the Boards do not direct the staff in performance of their administrative functions." Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980). The Commission noted that boards concerned about the conduct of the Staff's administrative functions should bring the matter to the Commission's attention rather than act beyond their own delegated authority. Id. at 517. Thus, a licensing board lacks authority to interfere with the Staff's processing of a reactor application. Neither may a board terminate a proceeding without issuing a final initial decision on all contested matters. See 10 C.F.R. §2.760a.

^{18/} Limerick, supra, "Memorandum and Order (Denying (Footnote Continued)

therefore attempts to reassert the invalid premise that deletion of Unit 2 would automatically result in an issue of different environmental impacts.^{19/}

Accordingly, Del-Aware's proposed four contentions constitute an improper, collateral challenge to the previous rulings by the Licensing Board denying somewhat differently worded versions of the same contentions. As such, the proposed contentions should have been pursued by way of a timely appeal. To the extent no appeal was taken, Del-Aware has waived any objection as to the validity of those rulings.

III. Del-Aware has not Satisfied the Requirements for Late Contentions.

In order for a licensing board to accept a proposed late contention, it must find that, on balance, the five factors enumerated in 10 C.F.R. §2.714(a)(1)(i)-(v) weigh in intervenor's favor. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983). Del-Aware has failed to meet these requirements for the reasons discussed more fully below.

1. Del-Aware Lacks Good Cause for Lateness. Although Del-Aware relies upon certain recent documents or

(Footnote Continued)

Del-Aware's Petition to Amend Contentions)" (January 24, 1983) (slip op. at 9).

^{19/} Additionally, the proposed contention fails to make the threshold showing required by the Board's ruling.

developments as a basis for its late contentions, it wrongly assumes that such documents or events excuse it from having filed its contentions at an earlier time when other publicly available documents should have alerted or did in fact alert Del-Aware to these issues. As the Commission held in Catawba, it is a "basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation" such that "an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material."^{20/}

To the extent that the Board may find that Del-Aware's proposed contentions are not encompassed by earlier versions not admitted, Del-Aware has completely failed to show "good cause" for not having acted upon publicly available documents sooner as required by Catawba. The DES for Limerick upon which Del-Aware relies for proposed Contention V-30,

^{20/} Catawba, supra, CLI-83-19, 17 NRC at 1048. Or, as the Appeal Board likewise stated below in Catawba, "an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention." Catawba, supra, ALAB-687, 16 NRC 460, 468 (1982), rev'd on other grounds, CLI-83-19, 17 NRC 1041 (1983). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC ____ (September 19, 1983).

for example, was issued in July 1983, more than five months ago. Del-Aware also alludes to other unspecified documents issued by DRBC and the U.S. Environmental Protection Agency since July 1983. Such vague statements are clearly insufficient to affirmatively establish Del-Aware's good cause in not having proposed its contention earlier. In any event, five months unexplained delay, especially where a PID has issued on the subject matter of the proposed contention, is simply too much.^{21/}

The lack of good cause for lateness on proposed Contention V-31 is even more apparent. Del-Aware relies upon the testimony of witnesses in two State proceedings initiated by appeals filed by Del-Aware and others in 1982. On July 19, 1982, Del-Aware filed the first of several appeals before the Pennsylvania Environmental Hearing Board ("EHB"), challenging actions taken by the Department of Environmental Resources on the permits requested by PECO and NWRA. The remaining appeals were filed in September 1982. On July 15, 1982, Del-Aware filed its Amended Petition to Intervene with

^{21/} As the Appeal Board recently restated in the WPPSS case, "the true importance of the tardiness will generally hinge upon the posture of the proceeding at the time the petition surfaces." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC _____ (November 15, 1983) (slip op. at 8). The Appeal Board stated that, in the less critical situation where the proceeding had just commenced, "even a four-month unjustified delay in seeking intervention is not to be ignored." Id. (emphasis in original).

regard to the application by PECO before the Pennsylvania Public Utility Commission ("PUC") for a finding of necessity for a pumphouse at the Bradshaw Reservoir. The Pennsylvania EHB evidentiary hearing commenced on March 29 and ended on May 17, 1983. The Pennsylvania PUC hearing commenced on March 17 and ended on May 19, 1983.^{22/}

As noted above, the matters pertaining to proposed Contention V-32 have long been publicly known and available, as Del-Aware itself acknowledges, at least since the non-binding voter referendum of May 18, 1983. The passage of the ordinance by the Bucks County Commissioner on November 18, 1983, therefore, does not establish good cause for lateness. Similarly, the October 1983 NRC correspondence cited by Del-Aware does not support a finding of good cause for lateness on proposed Contention V-33. Del-Aware itself raised the completion of Unit 2 as an issue more than a year ago.^{23/}

2. Other Means Exist to Protect Del-Aware's Interests.

There are clearly other and even more appropriate means by which Del-Aware may seek to protect its interests. In the past, Del-Aware has pursued its concerns regarding flow

^{22/} As discussed at pages 16-17, infra, Del-Aware is litigating the the subject matter of Contention V-31 in the EHB and PUC hearings.

^{23/} See Limerick, supra, "Memorandum and Order (Denying Del-Aware's Petition to Amend Contentions)" (January 24, 1983) (slip op. at 2, 7-14).

augmentation and salinity standards in the Delaware River (Contention V-30) directly with DRBC. For example, in a petition dated September 2, 1982, Del-Aware and others petitioned DRBC to reopen and set aside its docket decisions approving the Point Pleasant project, asserting, inter alia, that DRBC studies "specifically acknowledge that the proposed withdrawal [at Point Pleasant] will further expand depletive withdrawals beyond the capacity of Basin supplies to prevent salinity contamination, and to insure against excessive dissolved oxygen sags in drought and severe drought conditions, in violation of the present salinity and dissolved oxygen standards, in the absence of substantial additional storage capacity."^{24/}

As regards the potential for erosion in the East Branch Perkiomen (Contention V-31), Del-Aware itself acknowledges

^{24/} In re Neshaminy Water Resources Authority and Philadelphia Electric Company's Withdrawal from the Delaware River at Point Pleasant, Docket Nos. D-65-76-CP, D-69-210-CP and D-79-52-CP, "Petition to Reopen and for Reconsideration and, to Set Aside Prior Orders, and to Take Other Action as Appropriate" at 2 (September 2, 1982). A copy of this petition is provided for the convenience of the Board.

Additionally, to the extent it is dissatisfied with the Limerick DES, Del-Aware has had an opportunity to provide comments. By letter dated August 15, 1983, Del-Aware provided such comments to the NRC.

that it is pursuing this issue before the Pennsylvania EHB and PUC in separate proceedings.^{25/}

The reference in proposed Contention V-32 to the implementation of the voter referendum of May 18, 1983 and the resultant litigation demonstrates that there are other, adequate political and legal means by which Del-Aware can protect any interest raised by this contention. As for Contention V-33, the completion of Limerick Unit 2 is a matter which has been under consideration by the Pennsylvania PUC for some time.^{26/} The PUC proceeding provides Del-Aware with an adequate, more appropriate means to protect its interests.

3. Del-Aware Has Not Shown That It Can Assist In Developing A Sound Record. This factor also weighs against Del-Aware's late contentions. Specifically, Del-Aware has

^{25/} See pages 14-15, supra. On December 23, 1983, Applicant provided the Board with a copy of the PUC Administrative Law Judge's Initial Decision, granting the application for the Bradshaw Reservoir pumphouse in part and denying it in part. Despite findings to the contrary by DRBC and the Pennsylvania Department of Environmental Resources, the PUC found that operation of the diversion would create possible flooding and erosion in the East Branch. A review of the decision indicates that this concern was a major factor in the decision.

Here, too, Del-Aware has had an opportunity to comment upon the Staff's analysis in the Limerick DES.

^{26/} By letter dated December 29, 1983, Applicant provided the Board with a copy of the PUC decisions in which the Commissioners voted 2-1 against accepting the plan proposed by PECO for financing Unit 2.

not complied with the requirement of Grand Gulf that "[w]hen a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."^{27/} Del-Aware has wholly failed to particularize precise issues and to summarize proposed relevant testimony.^{28/}

4. Del-Aware's interests will be adequately represented by the Staff. The Appeal Board has recently indicated its disinclination to accept the Staff's activities, including remedies under 10 C.F.R. §2.206, in general satisfaction of the fourth criterion for late contentions.^{29/} The situation here, however, is different. Of the four proposed contentions, all but proposed Contention V-32 pertain to the Staff's processing of the Limerick applications, including its preparation of an environmental statement for the

^{27/} Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also WPPSS, supra, ALAB-747 (slip op. at 18); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC ____ (September 29, 1983) (slip op. at 22).

^{28/} Del-Aware has referred to the testimony of five witnesses before the Pennsylvania PUC and EHB as the basis for proposed Contention V-31, but has not indicated whether the same witnesses would testify in any reopened NRC proceeding.

^{29/} WPPSS, supra, ALAB-747 (slip op. at 10-17).

facility.^{30/} Del-Aware is pursuing the subject matter of proposed Contention V-32 with the Staff in a petition under Section 2.206.^{31/} As noted, Del-Aware has provided its comments on the Limerick DES. The Staff is therefore in a position to act upon any suggestion or problem which Del-Aware wishes to take up with it directly.

5. Del-Aware's Contentions Will Broaden The Issues And Delay The Proceeding. Del-Aware has not addressed this factor in any meaningful fashion, but merely criticizes the Staff and the Board because "intervenors have been required to expend valuable personal and private resources in trying to do the job of the Commission."^{32/} In Catawba, the Commission rejected this rationale for lateness, stating: "While we are sympathetic with the fact that a party may have personal or other obligations or possess fewer resources than others to devote to a proceeding, this fact does not relieve that party of its hearing obligations."^{33/}

It is incontestable that acceptance of Del-Aware's four proposed contentions will greatly broaden the issues and

^{30/} As noted in note 6, supra, Del-Aware has no litigable interest in the content of the Limerick DES in any event.

^{31/} See Application of Del-Aware Unlimited et al Under Section 2.206 (December 16, 1983).

^{32/} Del-Aware's Request for Late Filed Contentions at 4.

^{33/} Catawba, supra, CLI-83-19, 17 NRC at 1048.

delay the outcome of the proceeding. The same situation arose recently in the Fermi proceeding, where the Appeal Board affirmed a decision below denying an intervention petition filed after the close of the evidentiary record. The Appeal Board agreed with the Licensing Board's conclusion that acceptance of the late contentions would be tantamount to a new case, involving more discovery, an additional prehearing conference, another evidentiary hearing, and a new set of proposed findings.^{34/}

As regards Del-Aware's implicit assertion that delay will not affect Limerick Unit 2,^{35/} the Fermi decision rejected the same argument that delay would not impinge full power operation of Fermi-2, holding:

[It] ignores the words of the regulation, which refer to the delay of the proceeding, not to delay of operation of the facility. The Applicants and NRC Staff are entitled to assume, after the hearing has reached the stage this one has, that both the issues to be litigated and the parties to the hearing have been established with finality. This is simply a matter of fairness to them as parties.^{36/}

^{34/} Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765-66 (1982).

^{35/} See Del-Aware's Application to Submit Late Filed Contention at 2.

^{36/} Fermi, supra, ALAB-707, 16 NRC at 1766, citing, Fermi, supra, LBP-82-96, 16 NRC 1408, 1434 (1982). Similarly, the Licensing Board in Shoreham held that it was delay in the completion of the proceeding, not operation of the facility, which governs disposition of the fifth
(Footnote Continued)

In other words, "by filing late, [Del-Aware] has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely."^{37/}

IV. Del-Aware Has Not Met the
Requirements for Reopening.

In addition to satisfying the requirements for late contentions, Del-Aware must also meet the three requirements for reopening a closed record in order to pursue its proposed contentions. In Diablo Canyon, the Commission held that where a party moves to reopen the record on new contentions, it "must satisfy both the standards for admitting late-filed contentions, 10 CFR 2.714(a), and the criteria established by case law for reopening the record."^{38/}

The requirements for reopening were recently explained by the Appeal Board in Waterford, which explained the requirements as follows:

We recently reiterated the three-part test that a motion to reopen must satisfy:

(Footnote Continued)

factor. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1146 (1983).

^{37/} WPPSS, supra, ALAB-747 (slip op. at 23) (emphasis in original).

^{38/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), citing Diablo Canyon, supra, CLI-81-5, 13 NRC 361 (1981). See also Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3),
(Footnote Continued)

"(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?"

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983), and cases cited. The proponent of such a motion thus has a "heavy burden." Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). A successful movant must provide with its motion more than "bare allegations or simply submission of new contentions." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981). It is not enough merely to express a willingness to provide unspecified, additional information in support of the motion at some unknown date in the future. Any supporting material should be provided with the motion so that the test for reopening can be meaningfully applied.^{39/}

Because some of the criteria for reopening are no doubt subsumed in the consideration of the factors for admitting late contentions^{40/} already discussed above, it may be

(Footnote Continued)

ALAB-753, 18 NRC _____ (December 9, 1983) (slip op. at 4 n.3); Fermi, supra, ALAB-707, 16 NRC 1765.

39/ Waterford, supra, ALAB-753 (slip op. at 2-3).

40/ See, e.g., Shoreham, supra, LBP-83-30, 17 NRC at 1143; The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit 1), Docket No. 50-358-OL, "Memorandum and Order (Ruling on MVPP's Motion to Reopen the Record)" (September 15, 1983) (slip op. at 37).

easily demonstrated that Del-Aware has not satisfied the three reopening requirements. First, its four proposed contentions are late without good cause or, to the extent not "late," are merely restated versions of contentions previously rejected by the Licensing Board. Second, since the proposed contentions are in fact repetitious of previously denied contentions, the absence of any significant environmental issue has already been determined. Third, nothing in the proposed contentions or the statement of their bases even remotely shows that a different result would have been reached in the PID had these matters been considered.^{41/} Del-Aware has not even addressed the

^{41/} Additionally, it is noted that the contentions certainly do not meet the Commission's requirements for specificity and bases applicable to all contentions. 10 C.F.R. §2.714(b). See, e.g., Commonwealth Edison Company (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 193 (1982); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 75 (1981); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-77-48, 6 NRC 249 (1977). The specificity and bases requirements are particularly important when the contention is proffered as late as Del-Aware's four contentions.

For example, there is no indication how the Limerick DES contains "inadequate and inappropriate reliance on findings of the DRBC" or what statements are "totally inconsistent with that agency's 1983 statements," whatever they may be (Contention V-30); why the Staff's analysis of impacts on the East Branch Perkiomen Creek is "totally inadequate" or what "information that has become available since 1973" (Contention V-31); how the actions by the Bucks County Commissioners and related litigation demonstrate "that the applicant has no

(Footnote Continued)

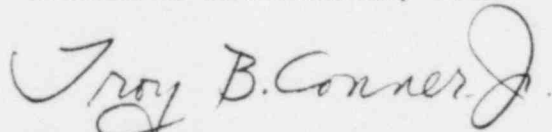
reopening criteria and it is certainly not the Board's responsibility to create strawman arguments on Del-Aware's behalf.

Conclusion

For the reasons discussed more fully above, the Licensing Board lacks jurisdiction to grant the relief requested by Del-Aware. Even if the matter were considered by the Appeal Board, Del-Aware's motion should be denied because Del-Aware may not raise anew reworded versions of contentions previously rejected. Additionally, Del-Aware has failed to meet the Commission's requirements for admitting late contentions, reopening a closed record, and providing contentions with adequate specificity and bases.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Troy B. Conner, Jr.
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Counsel for the Applicant

December 29, 1983

(Footnote Continued)

available supplemental cooling water system" or "that the operating impacts of the diversion as a whole should be regarded as attributable to the operation of the facility" (Contention V-32); or what is meant by the allegation that Unit 2 "is in an indefinite time period" or how Staff processing of the application has any relevance to any litigable issue (Contention V-33).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 copies of "Applicant's Answer to Request by Del-Aware Unlimited, Inc. for Admission of New, Late Filed Contentions V-30, V-31, V-32, and V-33" dated December 29, 1983 in the captioned matter, have been served upon the following by deposit in the United States mail this 29th day of December, 1983:

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Judge Richard F. Cole
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Judge Peter A. Morris
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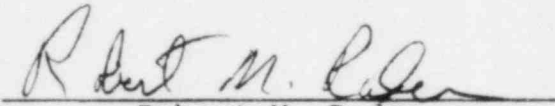
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