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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)

Philadelphia Electric Company)

(Limerick Generating Station,
Units 1 and 2))

Docket No. 50-352
50-353

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APPLICANT'S OPPOSITION TO PETITION FOR REVIEW
OF ALAB-785 BY DEL-AWARE UNLIMITED, INC.

Preliminary Statement

On October 10, 1984, intervenor Del-Aware Unlimited, Inc. ("Del-Aware") petitioned the Commission for review of ALAB-785, issued September 26, 1984.^{1/} Pursuant to 10 C.F.R. §2.786(b)(3), Applicant Philadelphia Electric Company ("Applicant") opposes Del-Aware's request on the grounds that, with respect to the alleged errors assigned, Del-Aware has failed to show that ALAB-785 is erroneous with respect to any important question of fact, law or Commission policy. Del-Aware enumerates several particular areas or findings which it wishes the Commission to review, but does not explain, as required by the rules, why each matter involves an important question which the Commission should consider. Instead, Del-Aware only raises issues which it

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC _____ (September 26, 1984). In an Order issued October 10, 1984, the Appeal Board denied Del-Aware's petition for reconsideration of two aspects of ALAB-785.

abandoned by its failure to brief them,^{2/} or on which the factual record overwhelmingly supports the findings of the Licensing Board and Appeal Board in favor of Applicant. Moreover, none of these matters involves any critical issue of importance to the Commission.

Argument

For convenience, each of Del-Aware's points will be addressed seriatim.

1. The Appeal Board did not, as alleged, fail to consider the decisions of the Pennsylvania Public Utility Commission ("PUC") and the Environmental Hearing Board ("EHB"). The Appeal Board stated:

Apart from the facts that, in many instances, these rulings are not final and that overall the situation is rather dynamic, we must decide only the federal questions before us, without being unduly influenced by the decisions of others with differing concerns and responsibilities.^{3/}

Further, Del-Aware fails to note that it sought to inject these matters into the proceeding well after the time for admitting timely contentions. Yet, Del-Aware made no showing below that it had satisfied the requirements for pleading late contentions and reopening a closed

^{2/} In its Order denying reconsideration of ALAB-785, the Appeal Board stressed that Del-Aware's briefing left much to be desired and in fact found itself "forced to conclude that Del-Aware has been either duplicitous in its petition for reconsideration or shockingly unfamiliar with the content and timing of its own filings over the course of this proceeding." ALAB Order at 3 (October 10, 1984). The Appeal Board also noted its previous caveat in ALAB-785 that Del-Aware must bear the risk of the poor quality of its briefing. Id.

^{3/} ALAB-785 at 64.

record to pursue the matters litigated before the two State agencies.^{4/} In any event, Del-Aware has failed to show that the NRC could, or should, take any additional action as a result of the potential for erosion in the East Branch Perkiomen Creek beyond that which has already been implemented by the two Pennsylvania agencies.

A separate aspect raised by Del-Aware pertains to an internal memorandum prepared by Applicant's representative at a December 12, 1972 meeting with Applicant's consultant. It similarly provides no basis for review. The memorandum merely states that channelization would have a far greater adverse impact on stream ecology than any erosion expected from increased flows. The memorandum stated that no further erosion or very little little erosion, however, was anticipated. This conclusion is consistent with the evaluation in the Environmental Report at Section 5.1.3.3 and the Final Environmental Statement at Section 5.5.2.3 that some minimal erosion might occur in the upper reaches of the East Branch during an initial period of stream channel stabilization.

2. Del-Aware's claims regarding dissolved oxygen levels in the Delaware River were abandoned on appeal. In ALAB-785, the Appeal Board remanded for further hearings on salinity impacts, not dissolved oxygen levels, in the Delaware River.^{5/} As the Appeal Board ruled in denying

^{4/} Thus, notwithstanding the fact that it litigated many issues before the Pennsylvania PUC and EHB, Del-Aware failed to bring its contentions before the NRC in a timely fashion. Rather, it waited until those agencies had rendered their respective decisions.

^{5/} On October 17, 1984, Applicant sought Commission review of this ruling as well as the ruling permitting further hearings on potential esthetic impacts to the Point Pleasant Historic District.

reconsideration, "Del-Aware's brief and oral argument before us focused on the salinity of the Delaware River and the Licensing Board's ruling that it was precluded by the Delaware River Basin Compact from considering this matter."^{6/} Del-Aware simply abandoned this issue as it relates to dissolved oxygen levels and has shown no reason why the Appeal Board should have addressed it, nor any reason why the Commission should itself take up the issue.^{7/} There is no allegation of error, for example, in the discussion of diversion impacts upon dissolved oxygen levels in the Section 5.3.2.3 of the Final Environmental Statement, which states that "there will be no significant effect on concentrations of dissolved oxygen . . . even during low flow and summertime flow conditions."

As regards alleged impacts of the Point Pleasant diversion upon American shad and shortnose sturgeon, the Appeal Board correctly found that Del-Aware had failed "to challenge any of the Licensing Board's extensive factual findings that undergird its conclusion of 'no significant adverse effect on the Delaware River populations of either American shad or shortnose sturgeon.'"^{8/} There is simply no basis in the record

^{6/} ALAB Order at 2 (October 10, 1984).

^{7/} Del-Aware has even failed to show that it squarely addressed the issue of dissolved oxygen before the Appeal Board. Additionally, for the reasons expressed separately in Applicant's Petition for Review of ALAB-785, filed October 17, 1984, Applicant believes that the entire issue of downriver water quality impacts associated with flow levels of the Delaware resulting from the allocation by the Delaware River Basin Commission for Limerick should be considered by DRBC rather than the NRC.

^{8/} ALAB-785 at 52-53.

for Del-Aware's vastly exaggerated claim that, as a result of Point Pleasant withdrawals for Limerick, these populations "will be reduced by tens of thousands."^{9/} Finally, the Appeal Board properly distinguished between the National Marine Fisheries Service's conclusion of no likely jeopardy to the shortnose sturgeon, based on the best available scientific and commercial data, and the Service's recommendation that further studies be conducted.^{10/}

3. There is no reason for the Commission to review the scheduling of expedited hearings on the issue of environmental impacts associated with the Point Pleasant diversion. As the Appeal Board correctly held, Del-Aware "did not even object to the Board's hearing schedule at the time it was announced," and later requested a postponement only a week prior to the hearing after trial briefs and written testimony had been filed.^{11/}

Moreover, the Appeal Board properly held that "no prejudice to Del-Aware [resulted] from the conduct of early hearings" and there was "no violation of NEPA."^{12/} First, the Licensing Board held early hearings only to evaluate specific impacts related to the Point Pleasant project, a small and discrete portion of the overall project reviewed in

^{9/} Del-Aware's Petition for Review of ALAB-785 at 3. The shad mortality rate by natural causes is quite high. As the Licensing Board found: "Less than one percent of these eggs would hatch even if they were not affected by the intake." Limerick, supra, LBP-83-11, 17 NRC at 455.

^{10/} ALAB-785 at 56.

^{11/} ALAB-785 at 24.

^{12/} Id. at 19.

the Limerick FES. The Board recognized that resolution of the ultimate cost/benefit balance for Limerick could not be determined prior to the issuance of the FES.^{13/} The Appeal Board therefore correctly determined that expedited hearings were "reasonably grounded in [the Licensing Board's] legitimate desire to avoid the same potential adverse environmental impacts that prompted Del-Aware's interest in the proceeding in the first place."^{14/} The scheduling of expedited hearings under the special circumstances of this case does not give rise to any significant issue of law or policy for the Commission to decide.

4. As a related matter, the Appeal Board also correctly found that early hearings "did not impermissibly interfere with the staff's role or compromise its objectivity" inasmuch as the "staff independently conducted its environmental review and prepared its own testimony for the hearing."^{15/} This evidentiary matter does not warrant Commission review.

5. With regard to whether a second unit at Limerick will ultimately be constructed and operated, the Licensing Board repeatedly ruled, and the Appeal Board agreed, that the issue is problematical at best. The Appeal Board stated:

What Del-Aware is seeking, in fact, is an order directing PECO to abandon Unit 2 and to rely on a source of supplementary cooling water for the remaining Unit 1 other than the Delaware River via the river-follower method. But we have no legal basis here for making such an order. There is no

^{13/} Id. at 21.

^{14/} Id. at 22.

^{15/} Id. at 23.

question that PECO has some formidable obstacles to surmount if it is to operate both Limerick Units 1 and 2 in the manner currently proposed. Whether PECO will change its plans to effect an easier resolution of the problems confronting it is a matter for PECO's management, and possibly its shareholders, to decide. But the fact is we now have before us PECO's application for a license to operate two units, using the river-follower method to supplement the plant's cooling water system. . . . [W]e are without the legal predicate to dictate to PECO that it must pursue other options.^{16/}

As the Director of Nuclear Reactor Regulations succinctly stated in denying a Section 2.206 petition by Del-Aware on the same point, "PECO has availed itself of its legal remedies to ensure that the [Point Pleasant] Project will go forward as currently configured. . . . [F]ar from proposing an alternative to the Point Pleasant Diversion Project, PECO's current actions appear clearly directed at ensuring that the PPD Project goes forward."^{17/} Both the Licensing Board and Appeal Board properly denied the admission of any contention seeking to raise the speculative assumption that Unit 2 might not be built. Even assuming only one unit is operated, the Boards correctly found that the supplementary cooling water needs for a single unit would not be substantially

^{16/} ALAB-785 at 62-63. Like the Licensing Board, the Appeal Board stated that Applicant would be obliged to modify its pending application and notify the boards and parties promptly if in fact its plans for a supply of supplementary cooling water were to change. Id. at 63 n.163.

^{17/} Limerick, supra, DD-84-13, 19 NRC 1137, 1141 (1984). On May 24, 1984, counsel for Del-Aware was notified that on May 21, 1984, the time for Commission review of that decision had expired.

different.^{18/} Accordingly, further exploration of alternatives at the operating license stage was unwarranted and properly rejected.

6. The Appeal Board correctly found that Del-Aware's claims regarding alleged esthetic impacts to the Delaware Canal were also late without good cause. In ALAB-785, the Appeal Board determined that Del-Aware should be permitted an opportunity to submit contentions relating to the impact of the Point Pleasant project on the Point Pleasant Historic District.^{19/} The Appeal Board properly held, nonetheless, that "Del-Aware is clearly injecting a new element into its contention" by raising a new concern "about the effect of the sound barriers on the Canal".^{20/} The Appeal Board held that Del-Aware should have raised this issue at the time its concern arose. Here again, Del-Aware has shown no error in this ruling, nor has it demonstrated its satisfaction of the test for admitting late contentions and reopening the record.

^{18/} ALAB-785 at 57-60. On reconsideration, the Appeal Board reaffirmed its determination that other alternatives (e.g., the Blue Marsh Reservoir) to the existing project would not be enhanced by the possibility that only one unit would be constructed. The Appeal Board stated: "Del-Aware provides no basis for reconsideration of our judgment. To the extent it raises new arguments not previously presented to either us or the Licensing Board, again Del-Aware is decidedly more than a day late and a dollar short." ALAB Order at 4 (October 10, 1984).

^{19/} ALAB-785 at 42-45. As noted in footnote 5, supra, Applicant disagrees and has sought Commission review on this point.

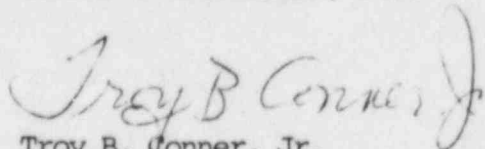
^{20/} ALAB-785 at 49. In the Partial Initial Decision on Del-Aware's contentions, the Licensing Board imposed a condition requiring Applicant to perform noise tests once the pumping station was operational, and to mitigate audible noise offsite (e.g., by sound barriers) if necessary. See ALAB-785 at 46-47.

Conclusion

For the reasons discussed more fully above, Del-Aware has shown no reason why the Commission should review issues which it failed to submit timely or properly brief before the Boards below. Moreover, no procedural or substantive error has been demonstrated. Finally, no significant issue of fact, law or policy requiring Commission review has even been asserted. Accordingly, the petition should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in cursive script that reads "Troy B. Conner, Jr.".

Troy B. Conner, Jr.
Robert M. Rader

Counsel for the Applicant

October 23, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Philadelphia Electric Company)	Docket Nos. 50-352
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Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Opposition to Petition for Review of ALAB-785 by Del-Aware Unlimited, Inc.," dated October 23, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 23rd day of October, 1984:

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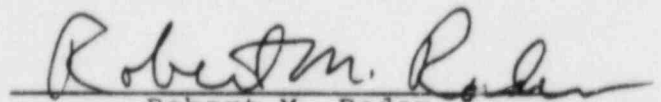
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