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Mr. Harold R. Denton
Director
Office of Nuclear Reactor
Regulation
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

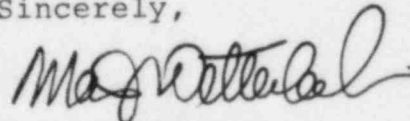
Dear Mr. Denton:

By letter dated January 15, 1985, Philadelphia Electric Company responded to the "Request for Action Under 10 C.F.R. Section 2.206 Regarding Supplemental Cooling Water for the Limerick Facility" submitted to you on November 21, 1984 by Del-Aware Unlimited, Inc. The Commission subsequently noticed its receipt of that petition and stated its intention to respond appropriately. 50 Fed. Reg. 1650 (January 11, 1985).

In two other letters dated February 11, 1985 and March 28, 1985, respectively, Del-Aware supplemented its previous request for relief pursuant to Section 2.206.

For the reasons stated in the attached comments of Philadelphia Electric Company, none of the matters subsequently raised by Del-Aware justifies initiation of a proceeding pursuant to Section 2.206 or any other relief requested in Del-Aware's petition. Accordingly, the petition should be denied.

Sincerely,



Troy B. Conner, Jr.
Counsel for the Licensee

TBC/dlf
Enclosure

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SUPPLEMENTAL COMMENTS OF PHILADELPHIA ELECTRIC
COMPANY ON DEL-AWARE'S LETTERS DATED FEBRUARY 11
AND MARCH 28, 1985 RELATING TO ITS REQUEST
UNDER 10 C.F.R. §2.206

The correspondence filed by Del-Aware Unlimited, Inc. ("Del-Aware") on February 11 and March 28, 1985 in support of its petition for relief under 10 C.F.R. §2.206, which are the subject of comments herein by Philadelphia Electric Company ("PECO"), constitute the latest in an apparently endless stream of requests by Del-Aware for relief from the Director of the Office of Nuclear Reactor Regulation pertaining to the supplemental cooling water system for the Limerick Generating Station ("Limerick").

As noted previously, both the Commission's adjudicatory boards as well as the Director have consistently denied relief to Del-Aware with regard to its allegations concerning the availability of supplemental cooling water supplies for Limerick from the Point Pleasant diversion.^{1/}

The thrust of Del-Aware's repetitive request for relief, despite the rejection of each successive petition, is that the Commission has an obligation to amend PECO's

^{1/} See generally Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848 (1984), aff'g in pertinent part, LBP-83-11, 17 NRC 413 (1983); ALAB-262, 1 NRC 163 (1975), aff'g in pertinent part, LBP-74-44, 7 AEC 1098 (1974); DD-84-13, 19 NRC 1137 (1984).

application for operating licenses for Limerick sua sponte and to assess, independent of any request by PECO, the environmental impacts associated with alternatives to the previously approved Point Pleasant diversion as a means of supplying supplemental cooling water for Limerick.

As PECO pointed out in its previous comments, it is the responsibility of an applicant for an NRC license to prepare and submit its application as prescribed by the applicable rules and regulations. Nothing in 10 C.F.R. Parts 2 or 50 on preparing and submitting an application, or in 10 C.F.R. Part 51 on the evaluation of environmental impacts, authorizes the Director to select or require an applicant to select any particular source of cooling water other than those designated in the application.^{2/}

On numerous occasions, the Commission's adjudicatory boards and the Director have restated the obligation imposed by the NRC regulations upon an applicant to inform the Commission in a timely manner of any significant new development which affects or potentially affects licensing actions.^{3/} In ALAB-785, the Appeal Board rejected attempts by Del-Aware to reopen the record on the basis of the Bucks County litigation concerning Point Pleasant and the related

^{2/} See generally Comments of Philadelphia Electric Company on Del-Aware's request under 10 C.F.R. §2.206 at 5-6 (August 21, 1984).

^{3/} Id. at 6-9.

work stoppage; the possible use of the Blue Marsh Reservoir on an interim basis; the decision of the Pennsylvania PUC approving, for the time being, the use of one pump for the Bradshaw Reservoir; and the decision of the Pennsylvania Environmental Hearing Board regarding water quality impacts of the supplemental cooling water system.^{4/}

The Appeal Board described Del-Aware's request to reopen the record as an assertion that "PECo will be unable to operate both units at Limerick or to rely on the Point Pleasant Diversion for supplementary cooling water."^{5/} The Appeal Board flatly rejected the validity of this argument, holding that the NRC has "no legal basis" to issue "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."^{6/}

It is in this context that the Commission should evaluate Del-Aware's supplemental requests under Section 2.206 by letters dated February 11 and March 28, 1985. The February 11 letter notes testimony by PECO's officers in judicial and administrative proceedings that the Company had

^{4/} Limerick, supra, ALAB-785, 20 NRC at 883-85.

^{5/} Id. at 884.

^{6/} Id. The Appeal Board noted the obligation of PECO to notify the Board and parties promptly "if PECO does change its plans and modify its pending application accordingly." Id. at 884 n.163.

planned to request an interim source of supplemental cooling water for 1985 from DRBC. This was confirmed by the application filed with DRBC on March 15, 1985, requesting, for 1985, a temporary modification of the 59°F temperature constraint on withdrawal of water from the Schuylkill River for consumptive use and, as necessary, release of varying amounts of water from water supply storage for Limerick.^{7/} In its March 28 letter, Del-Aware would have the NRC transform PECO's request for an interim supply of supplemental cooling water from sources other than Point Pleasant during 1985 into a permanent arrangement, which would encompass other sources of water not even contemplated in PECO's application before DRBC.

At this time, it is not known what action DRBC will take on PECO's application for an interim supplemental cooling water supply. Even if favorable action is taken, it is not known and cannot be predicted what conditions or modifications might be imposed by DRBC in granting the application. Accordingly, there is no action which PECO can responsibly take before the NRC at this time other than to have reported the filing of its application.

The relief requested by Del-Aware, in addition to greatly exceeding the authority of the NRC under its

^{7/} The application to DRBC, as amended, was served by Applicant's counsel upon the Boards and parties by letters dated March 19, 1985 and April 26, 1985.

regulations for preparation and review of an application for an operating license, is therefore rife with speculation as to what actions may or may not be taken by DRBC. For example, there is no conceivable way that the NRC could determine, as Del-Aware suggests, that "the terms of PECO's application [to DRBC] suggest that such measures [for an interim supplemental cooling water supply] may be implemented past 1985."^{8/} PECO has not even requested such relief from DRBC and Del-Aware has made no showing whatever that DRBC intends to reopen and modify its previous docket decisions on Point Pleasant unilaterally. The Director has previously ruled that highly problematical events such as this are not a proper basis for relief under 10 C.F.R. §2.206.^{9/}

In other instances, Del-Aware speculates as to the outcome of certain Pennsylvania administrative and judicial proceedings which it cites as a basis for a finding by the NRC that PECO will not be able to utilize the Point Pleasant

^{8/} Letter from Robert J. Sugarman, Counsel for Del-Aware, to Harold Denton, Director, Office of Nuclear Reactor Regulation, at 1 (March 28, 1985).

^{9/} See Limerick, supra, DD-84-13, 19 NRC at 1141; see also letter from Harold R. Denton, Director, Office of Nuclear Reactor Regulation to Robert J. Sugarman, Esq., at 1-2 (June 29, 1984). As noted in PECO's initial comments, the boards have similarly determined that such allegations do not warrant a reopening of the licensing proceeding. See generally Comments of Philadelphia Electric Company on Del-Aware's Request Under 10 C.F.R. §2.206 at 5-7 (January 22, 1985).

diversion in 1986 and thereafter. As noted, the Director has previously considered each of those proceedings in ruling that any attempt to assess the ultimate impact of those proceedings on the supplemental cooling water supply for Limerick would be premature and speculative.^{10/}

The short answer to such conjecture was provided by the Appeal Board in ALAB-785, where it rejected what Del-Aware essentially proposes now, to-wit, a reassessment of the viability of the river-follower method to provide supplemental cooling water for Limerick. In ALAB-785, the Appeal Board noted that it had previously approved the river-follower method in ALAB-262 and that Del-Aware had failed to persuade the Licensing Board that the impacts of any subsequent changes are significant.^{11/} Noting that obstacles to the completion of the Point Pleasant diversion remain, the Appeal Board nonetheless held that the NRC is "without the legal predicate to dictate to PECO that it must pursue other options."^{12/}

The decision in ALAB-785 is dispositive here. As the Director held in rejecting Del-Aware's other petitions, a party to a licensing proceeding may not resort to relief under 10 C.F.R. §2.206 on a matter within the jurisdiction

^{10/} See note 9, supra.

^{11/} Limerick, supra, ALAB-785, 20 NRC at 884.

^{12/} Id.

of the presiding officer in the adjudicatory proceeding,^{13/} and proceedings under Section 2.206 should not be initiated to reconsider issues decided in adjudicatory proceedings.^{14/}

In the Three Mile Island proceeding, the Commission recently reiterated the fundamental principle, which it quoted from Indian Point, "that parties must be prevented from using 10 CFR 2.206 as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented."^{15/} Citing the need for "finality to administrative decisionmaking," the Commission stated that "this principle also applies where those not parties to a proceeding seek to use 10 C.F.R. 2.206 as a means to reopen issues previously adjudicated."^{16/} A fortiori, the principle applies most strongly against a party which did litigate the issue, in this instance, Del-Aware.^{17/}

13/ Limerick, supra, DD-84-13, 19 NRC 1137, 1139-40.

14/ Id. at 1144; see also Limerick, supra, DD-82-13, 16 NRC 2115, 2119 n.6, 2127.

15/ General Public Utilities Nuclear Corporation (Three Mile Island Nuclear Station, Units 1 and 2), (Oyster Creek Nuclear Generating Station), CLI-85-04, 21 NRC (April 4, 1985) (slip op. at 3), citing Consolidated Edison Company of New York (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 177 (1975).

16/ Id. at 4.

17/ As the Commission stated in the Bailly proceeding, the procedures under Section 2.206 are inapposite where the
(Footnote Continued)

In addition to these significant legal infirmities, Del-Aware's theories as to what should be the components of a supplemental cooling water supply for Limerick do not amount to "new information regarding the issue under consideration" which identifies "a significant unresolved safety issue or a major change in facts material to the resolution of major environmental issues."^{18/}

Del-Aware's vague reference to certain desilting basins and an interstate energy pipeline, for example, are so lacking in focus and clarity as to warrant immediate dismissal from consideration.^{19/} Similarly, Del-Aware does not explain which "downstream impacts on the Delaware River . . . documented by the DRBC Level 3 [sic] study" it wishes

(Footnote Continued)

allegedly changed circumstances "do not include any actual or demonstrated impacts of construction activities on the environment, but rather petitioners' grounds for believing the Final Environmental Statement to be in error, out of date, or incomplete, and the Licensing Board decision authorizing issuance of the construction permit therefore to be void." Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 434 (1978).

^{18/} Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-21, 10 NRC 717, 719 (1979). Further, the allegations fall far short of satisfying legal standard under Section 2.206 requiring specification of "a major change in facts" as to "major environmental issues." Id.

^{19/} Letter from Robert J. Sugarman, counsel for Del-Aware, to Harold Denton, Director, Office of Nuclear Reactor Regulation, at 2 (March 28, 1985).

the NRC to consider.^{20/} In recently affirming the dismissal of Del-Aware as a party from the licensing proceeding, the Appeal Board criticized Del-Aware's failure to cite the specific documents or portions thereof relied upon for its proposed contentions related to the Point Pleasant diversion.^{21/}

Finally, the Pennsylvania administrative proceedings cited by Del-Aware provide no basis for relief under 10 C.F.R. §2.206. As Del-Aware acknowledges, these decisions have been long known to the NRC and the ultimate consequence of those rulings, if affirmed by the Pennsylvania courts, are still uncertain. The nonfinal result of a State proceeding in the trial or appellate stage is no reason for the NRC to stay or reconsider its own licensing actions.^{22/} As the Appeal Board held long ago in San Onofre, "it would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the

^{20/} Id.

^{21/} Limerick, supra, ALAB-804, 21 NRC _____ (April 10, 1985) (slip op. at 8-9).

^{22/} Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982); Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), Docket Nos. STN-50-528, STN-50-529, STN-50-530, "Memorandum and Order" (April 13, 1982) (slip op. at 2); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), Docket Nos. 50-387 and 50-388, "Memorandum and Order" (June 7, 1979) (slip op. at 2-3).

contingency that one of the others might eventually choose to withhold a necessary permit or approval."^{23/} As the Commission elsewhere stated, this is the "efficient, economical and expeditious course."^{24/}

For the reasons discussed above, the latest in this series of filings by Del-Aware constitutes yet another impermissible challenge to the river-follow method for supplying supplemental cooling water to Limerick, which was long ago approved by the NRC at the construction permit stage. Del-Aware has shown nothing new which constitutes a major change in facts material to the resolution of major environmental issues. Moreover, Del-Aware's theories have been thoroughly litigated before the Commission's adjudicatory boards and recourse to the procedures under 10 C.F.R. §2.206 does not lie as a vehicle for reconsidering those decisions. Accordingly, the petition should be denied.

^{23/} Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974). For example, Del-Aware's speculation that the NPDES permit to be issued by the Pennsylvania Department of Environmental Resources "may not be a valid permit" is utterly unavailing as a basis for action under Section 2.206. Letter from Robert J. Sugarman, counsel for Del-Aware, to Harold Denton, Director, Office of Nuclear Reactor Regulation, at 2 (March 28, 1985).

^{24/} Wisconsin Electric Power Company (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1974).