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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 REVISED PROPOSED CONTENTION  
V-24 SUBMITTED BY DEL-AWARE UNLIMITED, INC.

Preliminary Statement

On September 20, 1982, Del-Aware Unlimited, Inc. ("Del-Aware") sought permission from the Atomic Safety and Licensing Board ("Licensing Board" or "Board") to admit three new contentions to this proceeding. One of them, proposed Contention V-24, sought to relitigate the cost-benefit analysis for Limerick by reevaluating Schuylkill River alternatives for supplemental cooling water. Both the NRC Staff and Philadelphia Electric Company ("Applicant") opposed the admission of all three contentions, noting that the ultimate decision as to the construction of Limerick Unit 2, as that matter pertained to the latter contention, was as of yet uncertain.

At the hearing on the supplemental cooling water contentions on October 7, 1982, the Licensing Board requested the Staff to specifically address the issue of whether the elimination of Unit 2, assuming such to occur

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for the sake of argument, would "present a material change in circumstance such that there is a basis for admitting the contention, the proposition of the contention being because of this change the benefit/cost determination is no longer valid for further reasons given in the contention and in the supporting argument of Del-Aware?" <sup>1/</sup> The Board also permitted Del-Aware an opportunity to refine its proposed Contention V-24. <sup>2/</sup> The Board cautioned, however, that it would not permit any expansion of the contention "as distinguished from refining it." <sup>3/</sup> The Board permitted Applicant to answer the revised contention. <sup>4/</sup>

On the basis of Applicant's previously filed Answer to the three proposed amended contentions and the additional matters discussed below, Applicant opposes the admission of revised proposed Contention V-24. It is clear that, despite the various rulings and admonitions by the Licensing Board, Del-Aware persists in seeking to litigate matters previously rejected by the Board and irrelevant. The Board should not tolerate this practice, which is time consuming and vexatious. The latest version of proposed Contention V-24 should be denied.

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1/ Tr. 1715.

2/ Tr. 1724. Applicant's counsel received a revised version of this contention from counsel for Del-Aware on October 13, 1982.

3/ Id.

4/ Tr. 1723.

Argument

In its initial Answer, Applicant noted that the decision by the Pennsylvania Public Utilities Commission ("PUC") is still under review on appeal and would not, in any event, lead to a conclusion that supplemental cooling water via the Point Pleasant diversion is no longer needed. <sup>5/</sup> It must be emphasized that the PUC decision by its terms does not automatically require cancellation of Unit 2. Rather, the PUC stated that "it is proper to defer to Company management the decision as to whether construction on Unit 2 should be suspended or cancelled. This decision is properly within the domain of management and an area into which we do not desire to intrude." <sup>6/</sup> This decision has not yet been made by Applicant's management. Moreover, the Company has sought a stay before the PUC of its decision. <sup>7/</sup> In any event, the Point Pleasant diversion would be needed for Limerick Unit 1.

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<sup>5/</sup> See generally Applicant's Answer to "Application for Approval of Petition to Amend Contentions" submitted by Del-Aware Unlimited, Inc. at 6-9 (September 24, 1982).

<sup>6/</sup> In re Limerick Generating Station Investigation, PUC Docket No. I-80100341 (August 27, 1982) (slip op. at 25). The PUC required the Company to inform it within 120 days of the entry of its opinion as to its decision to suspend or cancel construction for Unit 2. Id. at 28.

<sup>7/</sup> A copy of the PUC decision has been served upon the Board and parties by the Staff. A copy of Applicant's Petition for Review and Petition for Order of Stay or Supersedeas, filed on September 23, 1982, are attached for the convenience of the Licensing Board.

Contrary to Del-Aware's arguments, the Pennsylvania Department of Environmental Resources ("PaDER") determined that "cooling water requirements for efficient operation of Limerick Unit 1 would still necessitate completion of the proposed Point Pleasant diversion." <sup>8/</sup> As further indicated by the information furnished by the Delaware River Basin Commission ("DRBC") at the request of the Board, the difference between the number of days the Point Pleasant diversion would be required for the operation of one as opposed to two Limerick units is insubstantial. <sup>9/</sup>

Although the revised version of proposed Contention V-24 mentions the PUC ruling in passing, the thrust of the revised contention is markedly different. Del-Aware has now switched its focus from the PUC order to DRBC's consideration of the application for the Merrill Creek Reservoir. Del-Aware asserts that an unspecified DRBC Staff "disclosure" in July and August, 1982 somehow leads to conclusions concerning adverse effects upon oyster spawning, water supply and dissolved oxygen levels. In effect, Del-Aware has simply borrowed material from proposed amended Contention V-22, which specifically deals with the operation of the Merrill Creek Reservoir and alleged potential impacts upon oyster production and public water supplies.

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<sup>8/</sup> PaDER Environmental Assessment Report and Findings - Point Pleasant Water Supply Project at 29 (August 1982) (Applicant's Exhibit 3).

<sup>9/</sup> See Letter dated October 6, 1982 from Gerald M. Hansler, Executive Director, DRBC, to Judge Lawrence Brenner, Atomic Safety and Licensing Board.

For the reasons previously discussed by Applicant in earlier pleadings, such matters are beyond the NRC's jurisdiction, as determined by the Licensing Board itself in prior rulings. <sup>10/</sup> And as discussed infra with regard to the Appeal Board's decision in ALAB-262, any further action with regard to changes in the supplemental cooling water system for Limerick will be taken by DRBC, not the NRC. Del-Aware's fixation upon alleged impacts associated with the Merrill Creek Reservoir is simply not a basis for admitting this very late contention and reevaluating the cost/benefit balance for Limerick. DRBC has expressly stated that the Point Pleasant diversion does not depend upon completion of the Merrill Creek project.

As to the Merrill Creek project, it is peripherally related to the Point Pleasant project only if the Merrill Creek project is approved by the Commission and releases from that proposed reservoir would be made to augment Delaware River flows to meet diversion requirements to serve Limerick as well as many other power plants in the basin. However, utilization of Delaware River water by the Limerick Generating Station has not been preconditioned with construction of the now apparently defunct Tocks Island project nor construction of the Merrill Creek project or any other project in the basin. The Philadelphia Electric Company has agreed that they will not take water from the Delaware River should it cause the flow at Trenton to fall below 3,000 cubic feet per second, unless releases are made from a non-mainstem reservoir to be constructed in the future at Merrill Creek or some other possible project

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<sup>10/</sup> See generally Applicant's Answer to "Application for Approval of Petition to Amend Contentions" submitted by Del-Aware Unlimited, Inc. at 2-5, (September 24, 1982).

site by a consortium of electric utilities in the basin. 11/

The federal court which reviewed DRBC's actions on appeal reached the same conclusion, stating that the "Merrill Creek Reservoir is ~~not~~ required under the present plans, nor is it an essential or necessary adjunct." 12/

Further, the addition of these arguments related to the Merrill Creek Reservoir very clearly expand the scope of the proposed contention, contrary to the express instructions of the Licensing Board in permitting Del-Aware only to refine it. 13/ This is but the latest example of Del-Aware's continuing refusal to accept the orders of the Licensing Board. The revised amended contention should be denied on this basis alone.

In any event, no basis is shown for making another cost/benefit analysis for Limerick. Contrary to the assertion by Del-Aware that the Appeal Board in ALAB-262 based its affirmance at the construction permit stage on a favorable cost/benefit ratio based upon different circumstances, the Appeal Board envisioned the possibility that a supplemental reservoir would subsequently be utilized for the Limerick facility. The Appeal Board ruled that "it

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11/ Final Environmental Assessment for the Point Pleasant Diversion Plan at Part II, p.16; Part IV, pp. 6-8.

12/ Delaware Water Emergency Group v. Hansler, 536 F. Supp. 16, 42 (E.D. Pa. 1981), aff'd mem., No. 81-2622 (3rd Cir., March 19, 1982).

13/ Tr. at 1724.

will now be for [DRBC] alone to determine whether the construction and utilization of a supplemental reservoir represents a better alternative" and that "its decision concerning the reservoir will not be subject to review by this Commission" except as to possible safety implications.<sup>14/</sup>

Based upon the Appeal Board's decision and the governing principles of law which limit review of environmental issues at the operating license stage to significant changes, this Licensing Board has already determined that the consideration of alternative water supplies desired by Del-Aware may not be permitted. Thus, the Board rejected Del-Aware's proposed Contention V-19 at the initial pleading stage, stating:

Alternatives to the proposed supplementary cooling water system were considered at the construction permit stage. Only if we were shown that the environmental impacts of the system had significantly increased would we reconsider the acceptability of this method of supplying cooling water. No such showing has been made. Indeed, there has not even been a showing of the availability of the alternatives. Use of a supplemental reservoir on the Schuylkill, for example, would require approval by the DRBC which has already approved the present system, apparently after considering the option of a reservoir on the Schuylkill. Nor is there any indication that dry cooling towers are presently a viable option.<sup>15/</sup>

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<sup>14/</sup> Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 206 (1975).

<sup>15/</sup> Special Prehearing Conference Order at 100 (June 1, 1982).

Del-Aware has still failed to make any such showing that the environmental costs associated with the Point Pleasant diversion have "significantly increased."

Nor has Del-Aware pointed to any specific information supporting its revised amended contention, which does not even begin to meet the Commission's requirements for specificity and bases under 10 C.F.R. §2.714(b). <sup>16/</sup> Some of the documents cited are not clearly identified or a part of the record. Others simply relate to a general discussion of water quality in the Delaware River. Neither the Licensing Board nor the other parties are obliged, particularly at this late date, to scour these documents in search of the particular information Del-Aware believes to be supportive of its proposed contention.

Aside from the lack of any substantive merit to the proposed contention, it is also worth repeating that the PUC decision and most of the other documents and/or information relied upon by Del-Aware were available at least several months ago. The belated attempt by Del-Aware to inject this newly proposed contention into the proceeding at the very midst of the hearing itself should be disallowed.

#### Conclusion

For the reasons discussed above and in Applicant's previously filed Answer, the proposed Contention V-24 is

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<sup>16/</sup> The Board is respectfully referred to Applicant's Answer to Supplemental Petition of Coordinated Intervenors at 4-6 (December 7, 1981) for a fuller discussion of the relevant case law on this point.



completely lacking in substance and specificity. Irrespective of the ultimate decision on continuing Limerick Unit 2, the Point Pleasant diversion would be required in any event.

No showing has been made that the environmental costs or benefits associated with the Point Pleasant diversion for the operation of Unit 1 alone would be significantly different than for both units. Nor has Del-Aware made any showing whatsoever that other alternatives, which it has not even defined, would be environmentally preferable or that the actions of DRBC and PaDER were incorrect. The request to admit this new contention should therefore be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

*Troy B. Conner, Jr. / RMR*

Troy B. Conner, Jr.  
Mark J. Wetterhahn  
Robert M. Rader

Counsel for Applicant

October 15, 1982

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 Revised Proposed Contention V-24 Submitted by Del-Aware Unlimited, Inc." dated October 15, 1982 in the captioned matter have been served upon the following by deposit in the United States mail this 15th day of October, 1982:

- |   |  |
|---|--|
| * Judge Lawrence Brenner (2)<br>Atomic Safety and Licensing<br>Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555 | Docketing and Service Section<br>Office of the Secretary<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555  |
| * Judge Richard F. Cole<br>Atomic Safety and Licensing<br>Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555      | * Ann P. Hodgdon, Esq. Elaine I.<br>Chan, Esq. Counsel for NRC<br>Staff Office of the Executive<br>Legal Director<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555 |
| * Judge Peter A. Morris<br>Atomic Safety and Licensing<br>Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555      | Atomic Safety and Licensing<br>Board Panel<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555  |
| Atomic Safety and Licensing<br>Appeal Panel<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                          | Philadelphia Electric Company<br>ATTN: Edward G. Bauer, Jr.<br>Vice President &<br>General Counsel<br>2301 Market Street<br>Philadelphia, PA 19101                                   |

- \* Hand Delivered  
\*\* Federal Express

Mr. Frank R. Romano  
61 Forest Avenue  
Ambler, Pennsylvania 19002

Mr. Robert L. Anthony  
Friends of the Earth of  
the Delaware Valley  
P. O. Box 186  
103 Vernon Lane  
Moylan, Pennsylvania 19065

Mr. Marvin I. Lewis  
6504 Bradford Terrace  
Philadelphia, PA 19149

Judith A. Dorsey, Esq.  
1315 Walnut Street  
Suite 1632  
Philadelphia, PA 19107

Charles W. Elliott, Esq.  
123 N. 5th Street  
Suite 101  
Allentown, PA 18102

Mr. Alan J. Nogee  
3700 Chestnut Street  
Philadelphia, PA 19104

Robert W. Adler, Esq.  
Assistant Counsel  
Commonwealth of Pennsylvania  
DER  
505 Executive House  
P.O. Box 2357  
Harrisburg, PA 17120

Thomas Gerusky, Director  
Bureau of Radiation  
Protection  
Department of Environmental  
Resources  
5th Floor, Fulton Bank Bldg.  
Third and Locust Streets  
Harrisburg, PA 17120

Walter W. Cohen, Esq.  
Consumer Advocate Office of  
Attorney General  
1425 Strawberry Square  
Harrisburg, PA 17120

W. Wilson Goode  
Managing Director  
City of Philadelphia  
Philadelphia, PA

Steven P. Hershey, Esq.  
Community Legal  
Services, Inc.  
Law Center  
North Central Beury Bldg.  
3701 North Broad Street  
Philadelphia, PA 19140

Donald S. Bronstein, Esq.  
1425 Walnut Street  
Philadelphia, PA 19102

Mr. Joseph H. White, III  
8 North Warner Avenue  
Bryn Mawr, PA 19010

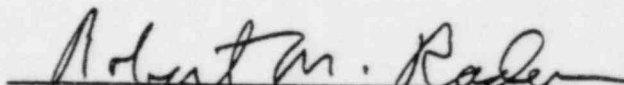
Dr. Judith H. Johnsrud  
Co-Director, ECNP 433  
Orlando Avenue State  
College, PA 16801

\*\* Robert J. Sugarman, Esq.  
Sugarman & Denworth  
Suite 510  
North American Building  
121 South Broad Street  
Philadelphia, PA 19107

James M. Neill, Esq.  
Box 217  
Plumsteadville, PA 18949

Director Pennsylvania  
Emergency Management Agency  
Basement, Transportation  
and Safety Building  
Harrisburg, PA 17120

\* Hand Delivered  
\*\* Federal Express

  
Robert M. Rader

OCT 13 1982

IN THE  
COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY, :  
Petitioner :  
 :  
 : No.  
 : Commonwealth Court  
 : Docket 1982  
v. :  
PENNSYLVANIA PUBLIC UTILITY :  
COMMISSION, :  
Respondent. :

PETITION FOR REVIEW

1. This Court has jurisdiction over this matter by reason of 42 Pa. C.S. §763(a)(1) (direct appeals from government agencies).

2. Petitioner, Philadelphia Electric Company ("PECO"), is a regulated public utility rendering electric, gas and steam service in a service territory of 2,255 square miles with a population of approximately 3.7 million. PECO renders electric service to a total of approximately 1.3 million retail customers in Philadelphia and surrounding territory in Bucks, Chester, Delaware, Montgomery and York Counties. PECO's main office is located at 2301 Market Street, Philadelphia, Pennsylvania (19101).

3. Respondent is the Pennsylvania Public Utility Commission which, under the Pennsylvania Public Utility Code (66 Pa. C.S. §101 et seq.), is empowered to regulate certain activities of PECO related to its utility service operations. Respondent's address is North Office Building, P. O. Box 3265, Harrisburg, Pennsylvania (17120).

4. The Limerick Nuclear Generating Station is a nuclear powered station for the generation of electricity being constructed by PECO at Limerick in Montgomery County, Pennsylvania. It has an anticipated capability of 2110 megawatts divided equally between Limerick Unit 1 scheduled for completion in 1985 and Limerick Unit 2 at present scheduled for completion in 1987. Construction of the Station began in 1974 after receipt of necessary licenses from the Atomic Energy Commission (i.e. Docket Nos. 50-352 and 50-353), and after approval from Respondent for the siting of various structures at the plant. See Application Docket No. 96108 (1971). Respondent has examined PECO's Limerick construction plans and activities on two occasions prior to the instant proceeding; i.e., in connection with PECO's 1977 and 1979 electric rate applications at Docket Nos. R.I.D. 438 and R-79060865. As of July 31, 1982, approximately \$1,007 million had been spent on Limerick 1 (approximately 78% complete), \$461 million on Limerick 2 (approximately 30% complete), and \$827 million on plant used jointly by the two units (i.e. "common plant").

5. On August 7, 1980, the Pennsylvania Consumer Advocate filed a Petition at Respondent's Docket No. P-80080236 requesting "the Commission to order PECO to show cause why continued construction of the Limerick Nuclear Generating Station is in the public interest" and "to order an investigation into the need for and economy" of the Station. By Order entered October 10, 1980, the Commission denied the request for a Rule to Show Cause, but initiated a fact-finding investigation directed at certain specified issues.

6. Respondent's Investigation was undertaken pursuant to 66 Pa. C.S. §331(a) which provides as follows:

The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of any public utility or any other person or corporation subject to this part. In conducting the investigation, the Commission may proceed, either with or without a hearing, as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. Any investigation, inquiry or hearing which the Commission has power to undertake or hold shall be conducted pursuant to the provisions of this chapter.

Pursuant to its authority under §331(b), Respondent assigned the matter to one of its Administrative Law Judges as an "on-the-record proceeding" for disposition under 66 Pa. C.S. §§332(g), (h) and 335.

7. Hearing and discovery procedures began December 10, 1980 and concluded on November 13, 1981. Initial and Reply Briefs were submitted in early 1982. On March 26, 1982, Respondent's Administrative Law Judge issued his Initial Decision concluding (at p. 245):

After reviewing the extensive record in this proceeding, I can come to but one conclusion--that at the present time there is no alternative available that can replace Limerick at a lower cost to the consumer. The record shows that the timely completion of Limerick Units I and II is in the best interest of PECO and its ratepayers. Since the generation produced at Limerick will replace expensive oil-fired generation either produced by the Company itself or purchased from the PJM system, these plants must be brought on line as soon as possible.

It is essential, therefore, that this project be completed as close to the 1985/1987 projected commercial operation dates as possible and as close to the company's projected costs as possible. While it must be recognized that licensing delays outside the control of the company or this Commission could affect these dates, this Commission must assure

itself, and the ratepayers it represents, that completion of this facility will be undertaken as expeditiously as possible and at the lowest possible cost.

Exceptions and Replies to Exceptions to the Initial Decision were filed with Respondent in April 1982. On May 7, 1982, Respondent adopted the "Second Revised Motion of Chairman Susan M. Shanaman" as the substance of its decision. On August 27, 1982, Respondent entered its Opinion and Order more fully setting forth that decision ("August 27 Order").

8. Respondent's decision is in substance as follows:

(a) That completion of Limerick 1 as rapidly as possible consistent with the public safety is in the public interest and within PECO's financial capabilities.

(b) That completion of Limerick 2 in 1987 as proposed by PECO is "not financially feasible" due to the "Commission's inability and unwillingness to provide the necessary revenues to complete both units ... as proposed" and is thus not "in the public interest".

(c) That to ensure the timely completion of Limerick 1 and the "continued maintenance of reliable and safe service to the public", PECO must "inform" the Commission within 120 days which of two defined alternatives it wishes to select; i.e., "the cancellation or suspension of construction at Limerick Unit 2".

(d) That to enforce PECO's selection of one of the two mandated options, the PUC (i) "shall not approve" any new security issues intended in whole or in part to finance construction at Limerick 2 and (ii) shall deny recovery from

ratepayers of Allowance for Funds Used During Construction ("AFUDC") on additional Limerick 2 investment (i.e., investment following entry of its Order) when sought in a future rate proceeding.

(e) That it is "in the public interest" and PECO is directed to pursue "an aggressive conservation program designed to substantially offset the suspension or cancellation of Limerick Unit 2", and is to submit a "conservation program plan" within 120 days of entry of Respondent's Order.

(f) That PECO in its 1976 and 1978 decisions to defer the completion of the Limerick Station "did not exercise judgment sufficient to meet our reasonable man standard" but that rate base or other penalties to be imposed upon the Company on this account cannot be quantified at this time.

9. Respondent's findings, conclusions and proposed enforcement actions are beyond its jurisdiction and/or authority under the Pennsylvania Constitution and the Public Utility Code (66 Pa. C.S. §101 et seq.) as follows:

(a) The Pennsylvania Public Utility Code does not provide for preconstruction approval or certification of utility plant by either Respondent or any other state agency. By seeking to impose a choice upon PECO to either cancel or suspend construction at Limerick 2, Respondent seeks to exercise a certification or approval jurisdiction over PECO's construction activities which is not granted to it by law. In its Order, Respondent states no claim that such a jurisdiction exists.



(b) Respondent has failed to provide an effective hearing process and a reasoned decision upon record evidence as mandated by law. Its Opinion and Order decide matters not properly noticed in its Order initiating its Investigation and not addressed at evidentiary hearings, and upon the basis of asserted facts not of record in the proceeding (See paragraph 12 infra). In addition, it rejects PECO's evidence and positions on virtually all matters of significance addressed in its Opinion and Order, and nearly all recommendations of its Administrative Law Judge, with no reasoned explanation for said rejection.

(c) The Public Utility Code does not confer upon Respondent the jurisdiction to disallow future rate requests not yet made, such as Respondent's determination to "deny recovery of AFUDC ... on any additional investment in Limerick 2 at such time as recovery is sought" or its determination that decisions made by PECO in 1976 and 1978 to defer completion of the Limerick plant were unreasonable and may warrant a future unquantified penalty. In its Order, Respondent fails to assert any statutory basis for such authority.

(d) The Public Utility Code does not confer upon Respondent the authority to "approve" or "not approve" utility security issues to enforce its preferences as to the construction of utility plant or other program alternatives. Code §§1901-1904 provide merely for the "registration" of securities and permit the Respondent to examine financial matters associated with the proposed issuance. Contrary to Respondent's assertion, these Code sections do not provide a "de facto" certification or plant approval jurisdiction.

(e) In its Order, Respondent asserts that its jurisdiction and authority derive principally from Code §§ 501, 1301 and 1501, which empower it to regulate public utilities to assure "just and reasonable" rates and "adequate, efficient, safe and reasonable service and facilities". It is apparently Respondent's theory that continued construction of Limerick 2 endangers present or future "service" or "rates" necessitating and empowering it under Code § 501 to take action to defer or discontinue construction of the plant to prevent this danger. Respondent's interpretation of its authority under Code §§ 501, 1301 and 1501 is an erroneous justification for its jurisdiction in conflict with established Pennsylvania law. Moreover, this asserted basis for Respondent's authority was never noticed, nor was PECO ever granted the opportunity to present argument as to the existence or non-existence of this asserted authority. The record contains no evidence whatsoever to support Respondent's conclusion as to PECO's present or future service or rate levels.

(f) Respondent lacks authority to direct PECO to "pursue an aggressive conservation program", especially as Respondent has failed to define the contents of the program which it directs that PECO pursue. Respondent states in its Order no basis for its asserted authority.

10. Respondent orders PECO to file an election within 120 days either to cancel or defer construction of Limerick 2. However, the August 27 Order renders informed decision-making by PECO an impossibility and increases the financial risk associated with PECO securities as follows:

(a) By directing that PECO must decide whether to cancel or defer construction of Limerick 2 without providing guidance as to whether and to what extent PECO will be permitted to recover from ratepayers the costs associated with these mandated alternatives.

(b) By finding that PECO's 1976 and 1978 decisions deferring Limerick completion did not "meet our reasonable man standard", without explaining what consequences or penalties it will attach to this conclusion. Said penalties may include denial of a return of or a return on a substantial portion of the investment in said plant as proposed in the record.

The failure to decide such issues, which were noticed, addressed in the evidence and fully argued, is an abuse of discretion and imposes upon PECO financial and regulatory risks which may prevent the attraction of capital as needed at reasonable cost. Said arbitrary and capricious action could well necessitate delay in completion of Limerick 1, which Respondent has found should be completed as quickly as possible in the public interest.

11. The August 27 Order is further erroneous and should be set aside because said Order is not supported by substantial evidence, is based upon errors of law and confiscates PECO's property in violation of due process of law as guaranteed by the Constitutions of the United States and of the Commonwealth of Pennsylvania as follows:

(a) Respondent's determination that "the completion of Limerick 2 by 1987 is not financially feasible" is in error and

should be rejected, not only because there is no evidence to support such a finding, but also because it is based upon the erroneous legal theory that Respondent is "unwilling and unable" to approve revenue sufficient to finance completion. If Limerick 2 completion in 1987 is the least cost alternative for both PECO and its ratepayers, as found by Respondent's Administrative Law Judge and not denied by Respondent, then it is an abuse of discretion, arbitrary and capricious and not in the public interest for Respondent to withhold the revenues required for such completion. Moreover, Respondent's approved additional revenues at Docket No. R-811626 of \$221.7 million (PECO's 1981 Electric Rate Application, Order entered May 21, 1982), would, in fact, be sufficient to permit the continued construction of both Limerick units, if further rate relief were granted as circumstances required for continued financing.

(b) Respondent's finding that completion of Limerick 2 on PECO's proposed 1987 schedule is not in the public interest is arbitrary, capricious, against the substantial weight of the evidence and is an error of law, being based solely on the unsupported "financial feasibility" theory discussed above. As found by Respondent's Administrative Law Judge and as shown by the evidence of all parties when corrected for obvious errors, completion of both Limerick 1 and 2 is substantially lower in cost and more beneficial to PECO, its ratepayers and shareholders than the alternatives imposed by Respondent; i.e., suspension or cancellation of Limerick 2.

(c) Respondent's "finding" that the 1976 and 1978 deferrals in Limerick completion fail to reflect reasonable management judgment is unsupported by record evidence and is an error of law for the following reasons:

(1) Respondent has made inconsistent determinations - i.e., that a "reasonable man" viewing the conditions and with the knowledge available in 1976 and 1978 would (1) have "compressed" Limerick's construction schedule (i.e. built the plant faster) or (2) would have cancelled the plant. In seeking to refute PECO arguments that decreased load growth or financial condition were proper bases or necessitated deferral decisions, Respondent asserts or implies that Unit 2 cancellation would have been the correct response under its "reasonable man" standard (August 27 Order, p. 16). However, while attempting to refute PECO evidence as to the economic benefits of deferred plant completion as compared to cancellation, Respondent asserts that the construction schedule should have been "compressed". Respondent should not be permitted to have it both ways - a reasonable man based on the specific facts and knowledge available at the time a decision had to be made, could have chosen but one course of action. In its Order, Respondent simply shifts its ground as needed to support its erroneous determination of unreasonable management judgment and provides no reasoned or careful analysis of the evidence bearing upon this matter.

(2) As evidenced by its general and non-specific discussion of PECO's 1976 and 1978 Limerick scheduling decisions (August 27 Order, pp. 15-17), Respondent has not properly applied

its "reasonable man standard". Said standard, as recognized by Respondent (August 27 Order, p. 14), requires that Respondent examine the reasonableness of each PECO scheduling decision individually against the facts and circumstances and knowledge of PECO at the time said decision was made. Respondent's failure to discuss said decisions individually, and its effort to apply the same generalizations to each decision, as well as the following evidence the arbitrary and capricious nature of this "finding":

i) Although Respondent finds that PECO was not "reasonable" in part because it did not "compress the construction schedule" of Limerick, Respondent has made no finding that PECO possessed in 1976 and 1978 the financial and technical capability to build Limerick to a more rapid schedule than that employed. In fact, the Order admits that financial constraints required the delay decisions.

ii) No evidence of any kind was offered in support of the proposition that a "reasonable man" would have terminated Limerick 2 construction in 1976, and such evidence as was offered relative to 1978 was demonstrated to be in error.

iii) Respondent does not even discuss in its decision the best and only true evidence of what a "reasonable man" would do when faced with the problems and pressures faced by PECO in 1976 and 1978, i.e., statistical evidence that a substantial majority of utility managers deferred nuclear plant construction at about the same time and for the same reasons as did PECO.

(3) Respondent's conclusion that PECO's 1976 and 1978 decisions deferring plant completion were not reasonable is in conflict with its own determination to impose an additional deferral now as being "in the public interest" as one alternative imposed on PECO.

(4) Respondent's conclusion that Limerick completion deferral in 1976 and 1978 was not reasonable is in conflict with

its failure to disapprove PECO's 1976 and 1978 deferral decisions at R.I.D. 438 and Docket No. R-79060865 and with its failure to order plant cancellation at Docket No. R-79060865 though requested to do so (See R.I.D. 438 ALJ Order, pp. 148-51; Docket No. R-79060865 Order, pp. 15-16). Further, its conclusion that a "reasonable man" would have compressed the Limerick construction schedule is inconsistent with its rejection of PECO's request at Docket No. R-79060865 to be granted additional revenues to permit the financing of a two year compression in said schedule.

12. Respondent's findings and conclusions as to matters not noticed by Respondent and as to which no specific evidence was presented deny PECO its right to notice and a fair hearing guaranteed by the Public Utility Code (66 Pa. C.S. § 331), the Pennsylvania Constitution (Art. 1, §§ 1 and 9), and the due process clause of the 14th Amendment of the U.S. Constitution. Said improper findings and conclusions are as follows:

(a) That "completion of Limerick Unit 2 by 1987 is not financially feasible". The investigation record is entirely silent as to the specific level of "necessary revenues" which would be sufficient to permit Limerick 2 completion in 1987. All probative and quantified financial analyses presented in the record establish that such completion is feasible. In its Order, the Commission fails entirely to discuss this evidence, but rather cites selected passages from PECO's testimony in support of its request for Limerick CWIP in rate base at Docket No. R-

811626. Said testimony does not analyze PECO's financial condition against Limerick 2 capital requirements in any manner to support Respondent's "financial infeasibility" conclusion.

(b) That "suspension of construction at Limerick Unit 2 would be in the public interest". Said finding is made without benefit of any record evidence as to the costs or other disadvantages of said delay, or as to the level of its purported benefits. Respondent's Investigation Order and Notice failed to list this matter as a subject of its Investigation, nor was plant deferral proposed as a viable alternative to Limerick 2 completion in 1987 by any expert witness or party to the Investigation.

WHEREFORE, Petitioner, Philadelphia Electric Company, respectfully requests that this Honorable Court:

1. find that Respondent has exceeded its jurisdiction or authority and has erred as described above:

(a) by seeking to exercise jurisdiction over PECO's plant construction activities, except to the limited extent provided by the Public Utility Code;

(b) by requiring PECO either to cancel Limerick 2 without knowing what disposition will be made of the \$461 million investment already made in Limerick 2 and the substantial investment in Unit 2 associated common plant or to defer completion of Limerick 2 without knowing whether and the extent to which resulting increased costs may be recovered through service rates;



(c) by seeking to impose delay or cancellation of construction of Limerick 2 by threatening future rate adjustments when PECO claims Limerick 2 in rate base;

(d) by disapproving the issuance of security certificates to prevent use of the proceeds derived from sale of securities for construction of Limerick 2; and

2. review and set aside the Order of the Pennsylvania Public Utility Commission entered August 27, 1982 at Docket No. I-80100341, direct that errors made in the said Order as noted above be corrected, and grant such further relief as may be just and reasonable, including if necessary the exercise of any equitable jurisdiction which your Honorable Court may deem appropriate.

Respectfully submitted,

*Walter R. Hall II*

Robert H. Young  
Walter R. Hall, II  
David B. MacGregor  
Counsel for the Philadelphia  
Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire  
Vice President & General Counsel  
Irene A. McKenna, Esquire  
PHILADELPHIA ELECTRIC COMPANY  
2301 Market Street  
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS  
2100 The Fidelity Building  
123 South Broad Street  
Philadelphia, PA 19109

Dated: September 23, 1982

OCT 13 1982

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: LIMERICK NUCLEAR : Docket No.  
GENERATING STATION : I-80100341  
INVESTIGATION : (1980)

PETITION FOR ORDER OF STAY  
OR SUPERSEDEAS

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

NOW COMES Philadelphia Electric Company ("PECO"), by its attorneys, and respectfully requests the Commission to enter an Order of Stay or Supersedeas of its final Order at the above-captioned docket pending review by the Commonwealth Court and states in support thereof as follows:

1. On August 27, 1982, the Commission entered its Opinion and Order (the "August 27 Order") concluding its investigation of PECO's Limerick Nuclear Generating Station construction program and stating certain "findings and conclusions". Based upon said findings and conclusions, the Commission directed that PECO should 1) complete Limerick 1 by its presently scheduled in-service date of April 1985, 2) defer or cancel Limerick 2 from its presently scheduled in-service date of 1987, and 3) implement an aggressive conservation program to replace the economic need for Limerick 2.

2. On September 23, 1982, PECO filed a Petition for Review of the August 27 Order in the Commonwealth Court. PECO is requesting that the Court review and set aside the said Order on the grounds that 1) the Commission acted beyond its jurisdiction and/or authority under the Pennsylvania Constitution and Public Utility Code, 2) said Order is not supported by substantial evidence, is based upon errors of law and confiscates PECO's property in violation of due process of law and 3) the Commission's Investigation and Order did not comport with statutory and due process hearing and notice requirements. Appended as Attachment A hereto is a true and correct copy of said Petition for Review.

3. Pa. R.A.P. Rule 1781(a) states:

"Application for a stay or supersedeas of an order or other determination of any government unit pending review in an appellate court on petition for review shall ordinarily be made in the first instance to the government unit."

The instant Petition is being filed with the Commission, in part, to comply with this requirement. The Company will file shortly an Application for Stay or Supersedeas with the Commonwealth Court. The Company respectfully requests that the Commission take action upon this Petition at its next scheduled public meeting on October 1, 1982. The Court will be requested to defer action upon the Application which will shortly be filed with it until immediately following this date. If the Commission grants the requested relief, the

Application then pending before the Commonwealth Court will be withdrawn.

4. The standard for granting a stay or supersedeas pending review in an appellate court, as enunciated by the Pennsylvania Commonwealth Court in Allets Inc. v. Penn Township Board of Supervisors, 447 A.2d 329 (Pa. Cmwlth. July 6, 1982) and Brink's Inc. v. Pa. P.U.C., 448 A.2d 709 (Pa. Cmwlth. April 28, 1982), is as follows:

- (a) The applicant has raised substantial issues of fact or law as to which there is a substantial likelihood that it will succeed upon the merits.
- (b) The applicant will be irreparably injured without a stay, and
- (c) A stay will not adversely affect other interested parties or the public interest.

5. PECO's Petition for Review presents substantial and novel legal and factual issues as to which there is a substantial likelihood that it will prevail on the merits. A more detailed description of these issues and the basis upon which reversal of the August 27 Order is viewed as likely is set forth in PECO's Petition for Review (Attachment A) and its "Memorandum in Support of Application" filed with the Commonwealth Court.

6. PECO will sustain substantial, immediate and irreparable injury as a result of the August 27 Order if the requested stay or supersedeas is not granted. A description of these injuries and the legal support for a finding of irreparable harm are set forth in the Company's Application and supporting Memorandum to the Commonwealth Court. To summarize, these injuries include:

(a) Inability to maintain construction activity at Limerick 2 of sufficient magnitude to complete the Unit on an optimum construction schedule if the completion option is ultimately selected.

By mid to late 1983, construction activities for Limerick 1 and common plant will begin to taper off and, absent construction activity at Limerick 2, the total work force at the site would be reduced. Since construction activity at Limerick 2 is prohibited by the August 27 Order with but limited exceptions, 1300 construction workers unneeded at Limerick 1 may have their employment terminated by the end of 1983. An additional approximately 2500 construction workers would be released in 1984. If the Commission were to supersede its Order, PECO would be able to continue engineering work on Limerick 2 over the next twelve months and to resume Limerick 2 direct construction in an efficient and cost-effective manner in the late summer and fall of 1983. Substantial costs could be saved for PECO, its ratepayers and shareholders if an efficient and cost-effective resumption of full construction at Limerick 2 were permitted in the late summer and fall of 1983.

Continuation of engineering work at the present time is critical to a Limerick 2 late 1983 restart since such engineering work must precede direct construction activity. Further, this proposed course permits maintenance of the experienced engineering and construction force working on the project and assures their availability for completion of Limerick 2. To disperse and reassemble that work force, as might be required under the terms of the August 27 Order, would be a substantial and unnecessary expense and result in a significant completion date deferral. The increase in Limerick 2 cost as the result of a significant completion delay, of approximately one year's duration as could be required in the absence of the requested supersedeas, would be approximately \$450 million.

(b) As the result of the August 27 Order, PECO may not be able to attract capital in required amounts and/or at reasonable cost to permit planned construction activity at either Limerick 1 or 2, thereby necessitating delayed completion and increased cost for each Unit. PECO must attract approximately \$1.5 billion of additional capital from investors over the next three years to permit completion of Limerick 1 (exclusive of Limerick 2), Limerick common plant and other essential capital projects. PECO's ability to attract such capital on a timely and adequate basis and at reasonable cost has been impaired by the financial uncertainties created by the August 27 Order.

First, the Commission has determined that PECO's

decisions in 1976 and 1978 to defer completion of Limerick "did not exercise judgment sufficient to meet our reasonable man standard." This treatment of past delays raises the substantial question, left unanswered by the Commission, of whether and to what extent recovery of additional costs of any deferral occasioned by its August 27 Order may be had. The costs attributable to this latter delay, and in addition costs which may be asserted as attributable to the 1976 and 1978 deferral decisions, are substantial.

Second, the Commission provides no assurance that the approximate \$1 billion of costs associated with Limerick 2 and associated common plant will be in whole or in part recoverable from ratepayers in the event that Limerick 2 is ultimately cancelled. The failure to provide such clarification imposes serious risks upon PECO investors. Similar risks have not been imposed on any other utility by any other Commission to PECO's knowledge.

(c) The August 27 Order requires PECO to make an election within 120 days to either cancel Limerick 2 or defer its construction until completion of Limerick 1. Clearly, a decision from the Commonwealth Court finally resolving PECO's appeal will not be forthcoming in that time period. As the Commission has not provided any guidance as to the treatment for rate purposes of the costs which could be imposed on either PECO, its ratepayers or shareholders as the result of selection of the Commission's mandated cancellation or suspension alternatives, PECO is unable to make an

informed decision between said options and other options until appellate review of the said Order has been completed.

7. In contrast to the immediate and irreparable injury inflicted upon PECO by the August 27 Order, no injury whatsoever will result to third parties or the public if the requested super-sedeas is granted. Indeed, all interested third parties and the public will be similarly benefitted and will avoid substantial and unnecessary injury as a result of the grant of super-sedeas.

8. The status quo which existed prior to adoption of the August 27 Order was that PECO sought to construct the Limerick Station on an optimum construction schedule within the confines of the financial resources provided by the Commission pursuant to its approval of PECO's rate levels. PECO sought and obtained security certificates which were not restricted to prevent Limerick 2 construction, and it was not subject to the Commission created uncertainty whether its recovery of costs associated with a substantial portion of its Limerick investment would be denied in an amount to be determined at some future date. Grant of the super-sedeas here requested will simply return PECO and the Commission to the status quo preceding the August 27 Order for the duration of PECO's appeal. During that time, the substantial and novel issues as to the legality of that Order raised in PECO's Petition for Review can be determined. Such of course is the principal purpose and function of a super-sedeas order. As the Limerick record amply demonstrates, PECO will not hesitate to defer Limerick 2 expenditures if required to maintain its financial integrity and the scheduled



completion of Limerick 1.

WHEREFORE, Philadelphia Electric Company, for the reasons set forth above, respectfully requests that the Commission grant its request for a stay or supersedeas of the Commission's Order entered August 27, 1982 at Docket No. I-80100341 pending the decision of the Commonwealth Court on the substantial questions raised by the Company's Petition for Review.

Respectfully submitted,

*Walter R. Hall II*

Robert H. Young  
Walter R. Hall, II  
David B. MacGregor

Attorneys for Philadelphia  
Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esq.  
Vice President ( General Counsel  
Irene A. McKenna, Esq.  
Philadelphia Electric Company  
2301 Market Street  
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS  
2100 The Fidelity Building  
123 South Broad Street  
Philadelphia, PA 19109

DATED: September 23, 1982