

Yellow

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

07/20/73

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
THE TOLEDO EDISON COMPANY)	
and THE CLEVELAND ELECTRIC)	Docket No. 50-346
ILLUMINATING COMPANY)	
)	
(Davis-Besse Nuclear Power Station))	

RESPONSE OF THE AEC REGULATORY STAFF TO
 THE APPLICANTS' MOTION TO STRIKE ISSUES AND TESTIMONY,
 TO THEIR MOTION TO STRIKE TESTIMONY
 OF DR. ERNEST STERNGLASS,
AND TO THEIR MOTION TO STRIKE ISSUE 8

On July 11, 1973, the testimony of Dr. Ernest Sternglass as a witness for Intervenors was sent to the members of the Board and to the parties in advance of the scheduled hearings in the captioned matter. By a motion of July 13, 1973, the Applicants moved to strike this testimony with respect to Issues 6 and 7 on the ground that it is irrelevant and immaterial to those issues, and moved to strike Issues 4, 5, 6 and 7. By a motion dated July 16, 1973, Applicants moved to strike Dr. Sternglass' testimony on the alternative ground that it should be rejected on the basis of res judicata (including collateral estoppel). On July 16, 1973, Applicants also moved to strike Issue 8.

The regulatory staff agrees with and joins in Applicants' motion to strike

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the testimony proffered in connection with Issues 6 and 7. The testimony that was submitted in response to Issue 6 deals at length with radioactive releases from Plum Brook Station and Shippingport Power Station and purports to show that "present methods of estimating the doses from [radioactive] releases . . . are grossly in error", (p. 7 of testimony), or that actual releases from Plum Brook were greater than those reported. As the Applicants have stated, these conclusions are irrelevant to Issue 6 in this proceeding which is the Intervenor's contention that the regulatory staff's Final Environmental Statement (FES) has not given consideration "to the fact that operating experiences at nuclear plants show that radioactive releases go up with aging of the reactor." Because the proffered testimony is irrelevant, the staff joins the Applicants' motion to strike it.

The proffered testimony of Dr. Sternglass in response to Issue 7 deals at length with his conclusions that low level radiation released from the Plum Brook and Shippingport Power Stations are connected with increased mortality and morbidity. Issue 7, however, alleges that the FES is inadequate because the location of the Davis-Besse Station in the presently largely agricultural area will probably stimulate the growth of industry and population, and that therefore population growth in the area has not been properly assessed. As the Applicants have stated, Dr. Sternglass' testimony is not relevant to this Issue. The staff therefore joins the Applicants in their

motion to strike the proffered testimony.

In the Applicants' Motion to Strike Testimony of Dr. Ernest Sternglass, dated July 16, 1973, they also moved to strike the Sternglass testimony on the basis of "res judicata" (including collateral estoppel) on the grounds that the methodology underlying such testimony has been repeatedly considered and regularly rejected in other proceedings, including the radiological phase of the Davis-Besse construction permit proceeding.

While it is not entirely clear that all the elements required for application of res judicata ^{1/} in this proceeding exist as a result of the other cited proceedings to a degree sufficient to warrant striking such testimony without regard to its relevance to an admitted contention, ^{2/} we do believe that as indicated above the Sternglass testimony on Issues 6 and 7 should be

1/ Davis' treatise on administrative law lists the following as requisites for the application of res judicata: identity of claims, identity of ultimate issues, identity of parties, final decision on the merits, and jurisdiction (2 Davis, Administrative Law § 18.01 (1958)).

2/ Applicants' motion to strike Sternglass' testimony is apparently not dependent on their earlier motion to strike such testimony as it relates to Issues 6 and 7 on the grounds of relevance, but is offered as an alternate grounds for such striking.

stricken as irrelevant to admitted issues. For the same substantive reasons given by Applicants in their motion of July 16 to strike Sternglass' testimony, we believe that the Sternglass testimony on issues 6 and 7 may not be admitted in this proceeding for any reason. ^{3/}

The substance of the Sternglass testimony on Issues 6 and 7 is the same basic allegation contained in Sternglass testimony (heard previously in this case and heard repeatedly in other cases cited by the Applicant) that releases from Commission operated or licensed facilities within the levels permitted by the Commission regulations (10 CFR Part 20) correlate with or result somehow in substantial increases in various forms of fatal diseases. The heart of this testimony, as with the earlier Sternglass testimony, is the fundamental allegation that releases from facilities within the levels permitted by Commission regulations are dangerous to public health and that such regulations do not adequately protect radiological health and safety. This fundamental challenge to the Commission's regulations is exactly the challenge previously heard in this proceeding as well as in many others.

In addition, such fundamental challenges are not within the focus

^{3/} For example: It should not be permitted as the basis for a motion to broaden contentions so as to embrace this testimony.

of the present phase of this proceeding and constitute a challenge to Commission regulations which, in any event, are governed by the provisions of 10 CFR § 2.758. The repetition of the unsubstantiated assertions and rejected methodology, reflected in the submitted Sternglass testimony in no way satisfies the requirements of 10 CFR § 2.758 which are prerequisites for consideration of challenges to Commission Regulations.

The Applicants also move in their Motion of July 13, 1973, to strike contentions 4, 5, 6 and 7. The basic rationale for their motion to strike Issues 4 and 5 is an assertion by the Applicants that intervenors must offer direct testimony in support of admitted contentions. Since no evidence has been offered by intervenors on such issues, the Applicants assert that they should be stricken.

Applicants' reasoning with respect to Issues 6 and 7 is similar. Having moved to strike the testimony in support of Issues 6 and 7 as irrelevant, the Applicants move to strike the contentions since no relevant evidence has been offered by intervenors in order to sustain the obligation of supporting their contentions by direct testimony which Applicants assert is required.

We do not believe that the Applicants' motion to strike these contentions are warranted, nor is the striking of such contentions required by the Commission's rules. (See In the Matter of Wisconsin Electric Power

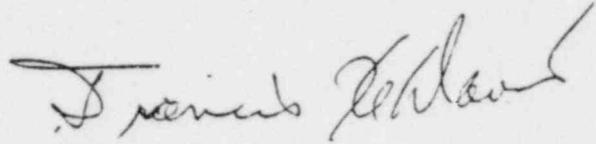
Company, et al. (Point Beach Nuclear Plant, Unit 2) Docket No. 50-301, ALAB-137, July 17, 1973 (slip opinion at p. 48).

In the present proceeding, especially with a rather extensive motion for summary disposition before the Board presenting significant, and thus far uncontroverted, facts on which summary disposition can be based, we believe that the contentions covered by the Applicants' motion for summary disposition are more properly disposed of under such rules, than by dismissal on pleadings as the Applicants' July 13 motion requests.

Applicants' motion of July 16, 1973, to dismiss Contention 8 is based upon an asserted restriction of the Contention by the testimony submitted by intervenors to matters of radiological effect and an assertion that consideration of such effects is res judicata, having been determined in the proceeding concerning continuation of construction during NEPA review. While it may be that such matters were covered by evidence received at the proceeding concerning continuation of construction, we believe that the basic ultimate issues before the Board in that proceeding were sufficiently different from those in this proceeding to warrant Board consideration of radiological effect on fish and

wildlife -- if otherwise properly part of an admitted contention -- during
the course of the present proceeding.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Francis X. Davis".

Francis X. Davis
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 20th day of July, 1973.

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ATOMIC ENERGY COMMISSION

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)
TOLEDO EDISON COMPANY AND THE)
CLEVELAND ELECTRIC ILLUMINATING) Docket No. 50-346
COMPANY)
)
(Davis-Besse Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Response of the AEC Regulatory Staff to the Applicants' Motion to Strike Issues and Testimony, to their Motion to Strike Testimony of Dr. Ernest Sternglass, and to their Motion to Strike Issue 8," dated July 20, 1973, in the captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 20th day of July, 1973:

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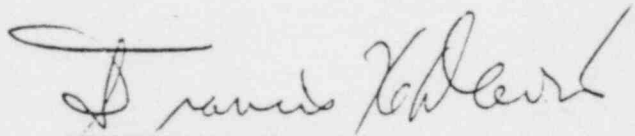
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