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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

04/30/73

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	)	

AEC REGULATORY STAFF'S ANSWER  
TO THE AMENDED PETITION TO INTERVENE  
OF THE COALITION FOR SAFE NUCLEAR POWER

On January 5, 1973, the Atomic Energy Commission (Commission) published a Notice of Hearing (Notice) regarding the captioned matter (38 F.R. 904), pursuant to Chapter 10, Code of Federal Regulations, Part 50 (10 CFR Part 50), Appendix D, Section B. In response to that Notice, the Coalition for Safe Nuclear Power (Coalition) sought to intervene by a letter and list of Contentions, dated February 2 and February 3, 1973, respectively, both of which were signed by Ms. Evelyn Stebbins, the Coalition's chairman. The Applicant and the Regulatory Staff filed answers on February 14 and 15, 1973, respectively.

The Atomic Safety and Licensing Board established to rule on any petitions to intervene in the proceeding ruled on the Coalition's petition in a

Memorandum and Order issued March 30, 1973. The Board stated, inter alia, that the petition failed to meet the requirements of section 2.714 of the Commission's Rules of Practice (10 CFR Part 2). However, the Board provided that Ms. Stebbins, for the Coalition, would be permitted an additional twenty days from March 30, 1973, to resubmit a petition in conformance with that section. The Board specifically noted that "the fact that the Coalition was a party to a previous proceeding involving this power facility does not automatically qualify it as a party here."

Ms. Stebbins, for the Coalition, essayed to cure these defects by an Amended Petition to Intervene and an accompanying Affidavit in Support of Petition, both dated April 16, 1973. Enclosed with the Amended Petition and Affidavit were copies of the previously submitted letter and Contentions dated February 2 and February 3, 1973, respectively.<sup>1/</sup>

It should be noted at the outset that the Staff has no objection to the

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<sup>1/</sup> The supporting affidavit submitted April 16, 1973, does not cure the defects in the original petition noted by the staff in its Response of February 15, 1973. With respect to the original petition the staff stands on its earlier Response and does not respond further to the original contentions resubmitted as an attachment to the Amended Petition. In reviewing the staff's February 15, 1973 response, it is noted that in the last paragraph on page 4, contentions "15" and "27" should be added to the nineteen enumerated contentions and in the first paragraph on page 7, reference to contention "3" should be changed to "13".

representation of the Coalition's member organizations and individuals by the Coalition, or in turn to the representation of the Coalition by its chairman, Ms. Stebbins.<sup>2/</sup> A reading in turn of §§ 2.713(a) and 2.4 of the Commission's Rules of Practice (10 CFR Part 2) and § 11.s. of the Atomic Energy Act of 1954, as amended, (Act) is necessary to reach this conclusion. Section 2.713 provides that: "A person may appear in an adjudication on his own behalf..." (emphasis added). Section 2.4 provides that: "Words or phrases which are defined in the Atomic Energy Act of 1954, as amended, and in this chapter have the same meaning when used in this part...." Section 2.4 does not define the meaning of the word "person"; however, § 11.s. of the Act provides that:

The term person means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, ...; and (2) any legal successor, representative, agent, or agency of the foregoing. (emphasis added)

This broad definition must certainly include in its ambit the individuals and organizations making up the Coalition.

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<sup>2/</sup> In this connection, the Coalition must, for the sake of completeness, submit "Certificates of Representation," or other similar documents, from its membership indicating their approval of the Coalition's actions on their behalf in this matter, as the Coalition did in the previous radiological hearing in December, 1970.

The Amended Petition consists of nine numbered paragraphs, the first two of which are apparently the Coalition's attempts to show the interests of its member organizations and individuals, as required by § 2.714 of the Commission's Rules of Practice.

As the Coalition states in the first paragraph of its Amended Petition, its membership organizations and individuals and their interests were "fully documented in the ASLB hearing record of December 8-10, 1970, and the original intervention petition filed in those initial proceedings".<sup>3/</sup> It is true that these references more clearly refer to the interests of the Coalition (the interests of its membership) than did the original letter and list of Contentions of February, 1973. They do not unequivocally meet the requirements of the Board's Memorandum and Order dated April 2, 1972, however, for it is not specifically stated that these earlier defined interests remain the same. But because the subject contention is pregnant with the implication that the basis for the earlier defined interests of the petitioner (interests of the membership) remain largely the same, we feel that the petitioner has largely met the requirements of the Board's Order and the

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<sup>3/</sup> See specifically, page 2 et seq. of Coalition's Amended Petition of Intervention dated December 5, 1970, and page 100 et seq. of the transcript of the proceedings of December 8, 1970.

submission of "Certificate of Representation" or similar documents should be adequate to rectify this matter.<sup>4/</sup>

The second numbered paragraph is apparently another attempt to show the interest of the petitioner. The statements are conclusional and without basis.

In paragraphs 3 through 9, the Coalition variously asserts, "its interest as a 'private attorney general'" or assumes that such an interest exists, and from that assumed interest, asserts its various contentions "as a 'private attorney general'." We believe that the Coalition misconceives its role in the present proceeding. Having established standing to participate as a party by adequately demonstrating its interest, the Coalition may, in accordance with the Commission's rules of practice, raise any relevant matter for which it sets forth its contentions and sets forth with particularity the basis for its contentions.

In so pursuing such contention, intervenor may, in the sense used in other

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<sup>4/</sup> We note the very general catch-all affidavit at the foot of the Amended Petition, and while such affidavit is not in strict compliance with the requirements of 10 CFR 2.714, we believe that the petitioner has made a good faith effort to comply with the Board's Order.

administrative proceedings, be acting as a private attorney general.<sup>5/</sup>  
However, it may pursue such matters in the proceeding in accordance with the Commission's rules without relying on such concept.

Although more broadly worded, the intended contentions in paragraph 3, taken together with the allegations in the first numbered paragraph of the Affidavit in Support of Petition, appear to be that the staff's NEPA review was inadequate for failure to consider the alternatives of: 1) not constructing and operating the facility because the projected demand for electricity was not accurate and 2) construction of the facility underground if the planned electrical output of the facility would be needed. Except as so limited, the contention in paragraph 3 is conclusional and without basis.

The contentions contained in paragraph 4 of the Amended Petition deal with the same subject matter contained in paragraphs 8 through 10, and 12 of the original list of contentions. The staff has the same objections to these

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<sup>5/</sup> See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1946); Scripps-Howard Radio v. FCC, 316 U.S. 4(1942); Sierra Club v. Morton 405 U.S. 727 (1972).

new contentions as it had to those original contentions, <sup>6/</sup> namely: (1) that they plainly deal with radiological health and safety issues - issues decided in earlier proceedings regarding this plant; (2) that in any event they appear to constitute a challenge to the Commission's Interim Acceptance Criteria for Emergency Core Cooling Systems and that they are improper in form for such a challenge under the requirements of 10 CFR § 758; and (3) finally, with respect to the Coalition rephrasing of its Class 9 accident contention, the staff notes that there has been some attempt to cast this in terms of the validity of the staff position, as expressed in the Final Environmental Statement, that the probability of Class 9 accidents is extremely low. While such an issue may be one which may be in controversy in this proceeding, we do not believe that these generalities and unsubstantiated allegations provide an adequate basis for this contention. In any event we note that this contention appears to be in large part directly taken from a similar contention in the Zion proceeding. <sup>7/</sup>

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<sup>6/</sup> The staff's response may be found on pages 4 and 5 of its February 15 filing.

<sup>7/</sup> See the Amended Contentions submitted to the ASLB on March 12, 1973 by Intervenor (BPI, et. al.), In the Matter of Commonwealth Edison Company (Zion Station, Units 1 and 2) Docket Nos. 50-295 and 50-304. See also the ASLB ruling dated March 27, 1973 on this contention.



In this respect, we note that a recent Atomic Safety and Licensing Appeal Board ruling on the subject provided:

that a carry-over contention must be subjected to especially careful scrutiny by the board at the prehearing stage. The board must satisfy itself not only that the contention applies to the facility at bar but, as well, that there has been sufficient foundation assigned for it to warrant its further exploration. If it appears to the board that the intervenor has no basis for offering the contention other than that it was advanced in some earlier proceeding, summary disposition of it will be mandated.<sup>8/</sup>

The staff cannot discern the exact meaning of the contention of the Coalition in its paragraph 5, although it appears to be an expansion of previous contention 13. The thrust of this contention seems to be, however, that an accident of sufficient magnitude can occur which will contaminate Lake Erie as a water supply. The description of the accident required for such a result is that of a Class 9 accident. Thus the staff would have the same objections to this contention as it expressed above in response to the contentions of paragraph 4 of the Coalition's Amended Petition.

With regard to paragraph 6, the Coalition's contentions are ambiguous. We cannot ascertain what damage petitioner intends to refer to. If they intend by this contention to assert that the direct environmental damage

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<sup>8/</sup> In the Matter of Duquesne Light Company, et. al. (Beaver Valley Power Station, Unit No. 1) (ALAB-109) (April 2, 1973).



caused by storms unrelated to the construction of the captioned facility should be considered (i.e., the effect of storms on food supplies, habitat, young, etc.), we believe that such contentions should be denied as not related to issues before this Board. If it is intended to assert the likelihood of storm damage to station structures and systems and resulting damages, this concern would have been more properly expressed in the earlier radiological health and safety proceedings regarding this plant. The staff therefore believes that the contention (if so interpreted) should be rejected. On the other hand, if the Coalition contends that the staff has failed to consider the damage to the environment which could result in turn from the damage to station structures and systems from storm damage, this contention should also be rejected because environmental effects of accidents were considered in section 7 of the Final Environmental Statement.

The contention in paragraph 7 of the Coalition's Amended Petition is defective in many respects; however, we believe that one aspect is conclusive of the fact that the contention should be dismissed. The use of recycled plutonium fuel for this reactor is not part of the application for the facility. To postulate such use or the consequences that may or may not be associated with such use are simply matters not before the Commission in this proceeding on the application for a construction permit for the captioned facility.

The contention contained in paragraph 8 is conclusional and without basis. It should therefore be rejected.

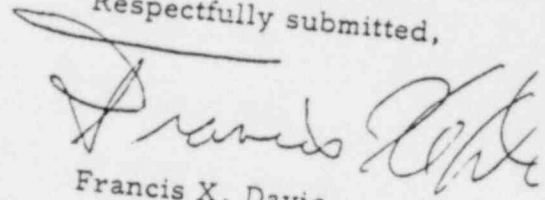
The staff admits the assertion of paragraph 9 of the Coalitions Amended petition "that sections 5.9.1 through 5.9.5 of the F.E.S. fail to evaluate the environmental consequences of a transportation accident causing the release of radiation from spent fuel elements." It asserts, however, that section 7.2.2 of the F.E.S. evaluates just such an event, and therefore that the contention drawn from the quotation above should be rejected as without basis.

For the foregoing reasons, the staff has no objections to the participation of the Coalition as intervenors with respect to the issues set forth in paragraph 3, to the extent discussed above. In all other respects, the contentions contained in the Amended Petition should be denied.

With respect to the letter and list of Contentions from the Coalition dated February 2 and 3, 1973, respectively, the staff has no objections to the participation of the Coalition as intervenors to the extent discussed in the

February 15, 1973 response from the staff. The contentions made in  
remaining paragraphs should be considered abandoned.

Respectfully submitted,

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

Francis X. Davis  
Counsel for AEC Regulatory Sta

Dated at Bethesda, Maryland  
this 30th day of April, 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 )  
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(Davis-Besse Nuclear Power Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "AEC Regulatory Staff's Answer to the Amended Petition to Intervene of the Coalition for Safe Nuclear Power," in the captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 30th day of April, 1973:

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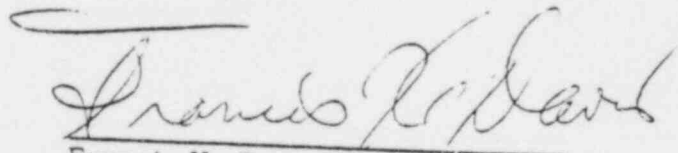
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A handwritten signature in cursive script, reading "Francis X. Davis". The signature is written in dark ink and is positioned above a horizontal line.

Francis X. Davis  
Counsel for AEC Regulatory Staff