

July 13, 1973

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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))

APPLICANTS' MOTION TO STRIKE
ISSUES AND TESTIMONY

1. Applicants hereby move to strike Intervenor's written testimony with respect to Issues 6 and 7 and to strike Issues 4, 5, 6 and 7.

MOTION TO STRIKE TESTIMONY

2. On July 11, 1973, Intervenor submitted written testimony with respect to several but not all, of the issues in this proceeding. Applicants move to strike the written testimony with respect to Issues 6 and 7 on the ground that it is irrelevant and immaterial to those issues.

3. Issue 6, as set forth in the Licensing Board's Special Prehearing Conference Order dated May 31, 1973, alleges that the AEC Regulatory Staff's environmental review is inadequate in that no consideration has been given to the fact that operating experiences at

nuclear plants show that radioactive releases go up with aging of the reactor.

Intervenor has submitted testimony by Dr. Ernest J. Stern-glass in support of Intervenor's position on this issue. The testimony has nothing to do with an increase in radioactive releases with aging of reactors.

4. Under AEC's Rules of Practice "[o]nly relevant, material and reliable evidence which is not unduly repetitious will be admitted ..." 10 CFR §2.743(c) (emphasis added). Dr. Sternglass' testimony does not meet these criteria and should therefore be stricken. The testimony deals with radioactive releases from two reactors, the Plum Brook Reactor Facility of the National Aeronautics and Space Administration and the Shippingport Power Station. The testimony does not, however, even purport to show that releases from these facilities have increased with the aging of the reactor. The testimony only claims to show either that monitoring techniques at Plum Brook and Shippingport are inadequate (or release information is being falsified), or that the dose calculation methods are in error. (Testimony, p.7) None of these claims is relevant to an issue which deals with an increase in radioactive releases as a reactor ages. This testimony therefore has no bearing on Issue 6 and should be stricken.

5. Issue 7 alleges that the Staff's environmental review

is inadequate in that population growth in this area has not been properly assessed inasmuch as the placing of this plant in this largely agricultural area will probably stimulate the growth of industry and population.

In support of its position on this issue, Intervenor submitted testimony by Dr. Sternglass. This testimony has nothing whatever to do with the stimulation of population or industrial growth by locating the Davis-Besse facility in an agricultural area. Instead, it presents Dr. Sternglass' arguments that radioactive releases from the Plum Brook, Shippingport and other reactors have caused increased mortality and disease. The testimony is therefore irrelevant and immaterial to Issue 7 and should be stricken.

MOTION TO STRIKE CONTENTIONS

6. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, RAI-73-5, at 345 (May 18, 1973), the Appeal Board ruled that, although an applicant has the ultimate burden of proof, an intervenor has the burden of going forward with evidence on a contention which he has raised.

The ultimate burden of proof on the question of whether the permit or license should be issued is, of course, upon the applicant. But where, as here, one of the other parties contends that, for a specific reason (in this instance alleged synergism) the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once he has introduced

sufficient evidence to establish a prima facie case, the burden then shifts to the applicant who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license. (original emphasis)

7. In the present proceeding, eight issues were identified as matters in controversy based upon Intervenor's petition and amended petition to intervene. Special Prehearing Conference Order, May 31, 1973. In this Order, p.2, the Licensing Board stated that it "expects the Intervenor to support, through direct testimony, the contentions made at the [Special Prehearing] Conference". Issue 3 was subsequently stricken as a challenge to AEC regulations without the showing required by 10 CFR §2.758. Prehearing Conference Order, July 10, 1973. On July 11, 1973, Intervenor submitted testimony on Issues 1, 2, 6, 7 and 8. No testimony was submitted on Issues 4 or 5. Having failed to submit any evidence on Issues 4 and 5, Intervenor has failed to meet its burden of going forward with evidence. Based on the Midland ruling, these issues should therefore be dismissed.

8. The failure to submit testimony on these issues should also be grounds for striking them in view of Intervenor's failure to respond to Applicants' interrogatories. After a full and complete opportunity for discovery, Inter-

venor answered many of Applicants' interrogatories relating to Issues 4 and 5 by stating: "This information will be provided in our testimony". See Intervenor's Answers to Applicants' Interrogatories and Request for Documents, dated July 9, 1973, p.3. Intervenor not only defaulted on its obligation to answer the interrogatories (even on the second attempt), it even based this default on a promise to submit the answers in its testimony. With no testimony on these issues forthcoming, the Board should properly dismiss these issues. See 10 CFR §2.707.

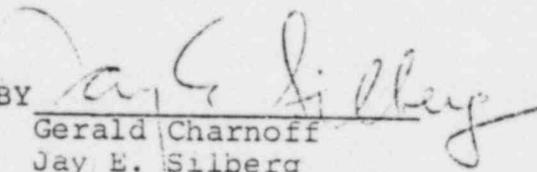
9. As set forth in paragraphs 2 - 5 above, the testimony submitted with respect to Issues 6 and 7 should be stricken. Having submitted no relevant or material testimony on these issues, Intervenor has not met its burden of going forward with evidence. As required by the Midland decision, these issues should therefore be dismissed. The propriety of striking Issues 6 and 7 is buttressed by Intervenor's failure to answer Applicants' interrogatories asked with respect to them. The interrogatories inquired into several aspects of the effects of reactor aging (Issue 6) and population and industrial growth (Issue 7). Intervenor's answers, submitted July 9, 1973, responded that "information will be provided in our testimony". As set forth in paragraphs 2 - 5 above, the testimony submitted with respect to

these issues was completely silent on the effects of reactor aging and population and industrial growth. Thus, Intervenor not only failed to properly respond to the interrogatories, but also failed to provide the answers in its testimony despite its promise to do so.

10. For the reasons set forth above, Applicants respectfully request that the Licensing Board strike Intervenor's testimony with respect to Issues 6 and 7 and strike Issues 4, 5, 6 and 7.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

BY 
Gerald Charnoff
Jay E. Silberg

Counsel for Applicants

Dated: July 13, 1973

July 13, 1973

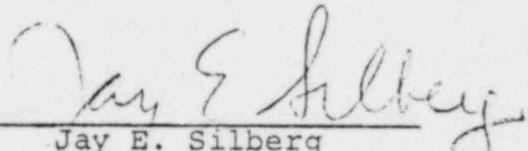
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Strike Issues and Testimony" were served according to the attached Service List this 13th day of July, 1973.


Jay E. Silberg
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