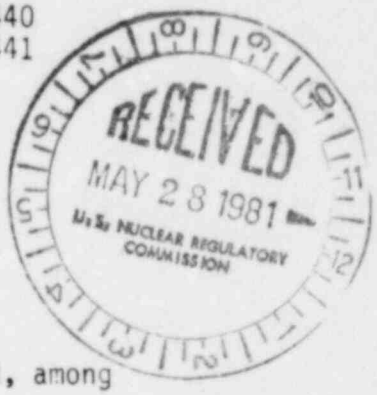
5/27/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket Nos. 50-440 50-441
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	



NRC STAFF POSITION ON
PARTIES AND CONTENTIONS

The Licensing Board's Order dated April 9, 1981 directed, among other things, that the intervenors shall file contentions and that the Staff shall comment thereon prior to the special prehearing conference. The Staff's comments, utilizing the intervenors' designations, follow:

(1) Sunflower, et al. petition.

Contention 8 - 10 C.F.R. § 2.714 requires that some basis for the contention shall be set forth and that the contention itself shall be set forth with particularity. This requirement has been upheld in BPI v. AEC, 520 F.2d 424 (D.C. Cir. 1974). See also Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973) and Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LPB-78-11, 7 NRC 381, 386-387, aff'd ALAB-470, 7 NRC 473 (1978) for basis and specificity. Here Sunflower alleges that the emergency plans are inadequate without providing a basis for their allegation and without specifying with particularity what the alleged inadequacy is. There is no way that the parties could now respond to the contention because of

its generality. Generalized assertions of injury or defectiveness are not acceptable. See Transnuclear, Inc., CLI-77-24, 6 NRC 531 (1977), Kansas City Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 575 (1975) and Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-554 (1978). The emergency plans for Perry are described in Appendix 13A of the FSAR. It is not an admissible contention for Sunflower simply to allege ipse dixit "...insufficient practical workability." The contention should not be admitted.

Contention 10: Sunflower alleges ipse dixit that applicants financially cannot construct, operate or decommission the facility. (a) No basis is given for such allegations; (b) specificity as to why applicants are financially unqualified is missing and (c) with regard to construction the Commission has previously found applicants qualified to design and construct the facility, 5 NRC 1121, 1133 paragraph (g) (1977). The Commission has held in Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), 8 AEC 7, 8 (1974):

> "...an operating license proceeding is not to be used to rehash issues already ventilated and resolved at the construction permit stage....The doctrines of res judicata and collateral estoppel apply to this type of proceeding."

In The Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1, 2, and 3), The Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), 5 NRC 557, 560, 561 (1977) where the Appeal Board stated "It is equally well settled that collateral estoppel is as applicable in administrative adjudicatory proceedings as it is in the judicial area," citing United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966), and further stated that the essential

ingredients of the doctrine of collateral estoppel are well established, having been summarized by the Licensing Board, 4 NRC 561, 565 (1976). See also Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 213, 224 (1974) when the Appeal Board stated:

> "For its part, collateral estoppel does not require an indentity between the two courses of action, demands or claims. It is enough that the issues of law or fact previously receiving final adjudication are the same as those being now asserted - and that the adjudication was by a tribunal empowered to consider and decide those issues."1/

The Farley Appeal Board also indicated that the doctrine of Res Judicata is applicable where (1) there has been a final adjudication of the merits and (2) one of the parties to that adjudication seeks to advance or defeat the same claim. (Id. at 212.)

The Commission having determined at the construction permit proceeding that Cleveland Electric, et al., were financially capable of constructing the Perry facility, the issue is precluded from being re-litigated at this operating license proceeding. Thus the part of the contention which alleges financial inability to construct should be denied. Since no basis for the remainder of the contention is given and since it lacks specificity, it should not be admitted. Specificity of course bears the same relation in an administrative proceeding that Rule 8(a)(2) of the Rules of Civil Procedure for the United States District Courts does to a law suit. The functions of a pleading is to give fair

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1/ It is noted that Evelyn Stebbins was an intervenor in the CP proceeding and thus Sunflower Alliance is in privity with her for purposes of collateral estoppel. The doctrine of Res Judicata applies since essentially the same cause of action against the applicant is sought.

notice to the other parties of the claim asserted so as to allow the adverse parties adequately to respond and to prepare for trial. Bloombury Woolen Co. v. Moosehead Woolen Mills (Main 1953), 107 F.Supp. 804. No one could meaningfully respond to Sunflower's allegations "they lack the financial capability of operating Units 1 and 2", and the contention should be denied.

Contentions 12, 13, 15, and 17 allege, again without basis or specificity, that the power to be produced will not be needed in fact or may be supplied by other methods. The contentions should be denied due to lack of basis and lack of specificity. Also, the Commission has found and determined that there is a need for the facility, 5 NRC 1121 and res judicata prohibits re-litigation of this issue here absent a showing - not present here - of substantial changed circumstances or new information. In addition, the Notice of Hearing, 46 Fed. Reg. 12372 (February 13, 1981) provides for consideration of those environmental matters which differ from those previously discussed in the FES for the construction permit. In that FES need for power was addressed. Contention 15, in part, is a non sequitor where it addresses "the draft environmental statement." There is no such document in existence for the Perry operating license application. The contention should be denied.

Contention 19 alleges "inadequate consideration [sic] impacts on the offsite emergency plans." No basis is given for such allegation: There is no specification relating to the plant or the site as to why the emergency plans are inadequate or what part of the plans are inadequate or what the "inadequate consideration" consists of. The contention should not be admitted.

Contention 21 alleges "insufficient documentation of the ability of the containment structures of said facilities to safely inhibit a hydrogen explosion" [as at TMI]. This is just a general allegation without basis or specificity and should not be admitted. To be a proper contention it needs to be plant specific to Perry. TMI-2 is a PWR - Perry is a BWR - the containment structures are designed differently. Contention 21 also alleges that licensing Perry to emit any radiation is wrong. This is a challenge to 10 C.F.R. Part 50, Appendix I and may not be litigated here (See 10 C.F.R. § 2.758). The contention should not be admitted.

Contention 23 alleges it is improper to consider licensing Units 1 and 2 at this time as Unit 2 will not be completed until 1987. Sunflower does not provide a legal or factual basis to support the allegation. The contention should not be admitted.

Contention 25 is a hodge-podge of loose ideas.

(a) Primary feedwater nozzle cracking is an alleged deficiency. However, no basis is given (1) that it does occur today or (2) that it could occur at Perry.

(b), (c), and (d) - earthquake standards, asbestos flaking and water table level have all been litigated at the construction permit stage, see 2 NRC 478 (1975), 3 NRC 671 (1976), 4 NRC 339 (1976) and 5 NRC 1128 (1977), and the doctrines of res judicata and collateral estoppel prohibit their being re-litigated again here. See the arguments and citations in response to Sunflower contention 10. Sunflower also alleges poor operation of Davis-Besse as a reason for Cleveland Electric operating Perry poorly. Cleveland Electric does not operate Davis-Besse.

There is no basis for the allegation. For these reasons contention 25 should not be admitted.

Contention 27 - Sunflower alleges that lack of a specific decommissioning plan at this time is a defect. 10 C.F.R. § 50.33(b) does not require the existence of a specific decommissioning plan as a precondition to an operating license. The contention is an impermissible challenge to the Commission's rules and should not be admitted.

Contention 11 (May 8 filing). Here Sunflower alleges need for certain testing of ECCS components. However, 10 C.F.R. § 50.46 and 10 C.F.R. Part 50, Appendix K do not require such testing. The contention is an impermissible challenge to the above-cited Commission rule and should not be admitted. See also Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 324 (1979) where a Licensing Board rejected the same contention.

Contention 12 (May 8 filing). Sunflower alleges GE BWR reactors cooling system could crack, leak, and result in overheating the core. 10 C.F.R. § 50.46 and 10 C.F.R. Part 50, Appendix K, require the ECCS as a remedy for pipe cracks, not an operator valving off a pipe as alleged by Sunflower. This contention is an impermissible challenge to the above-cited regulations. In addition no basis is provided for the allegation and it is not specific to Perry. The contention should not be admitted.

Contention 13 (May 8 filing). Sunflower alleges GE BWR scram system is ineffective - there is no basis disclosed for this ipse dixit statement nor is it made specific to the Perry facility. The contention should not be admitted.

Contention 14 (May 8 filing). Here Sunflower alleges inadequate analysis of airplane crash accident and proposes that the plant be moved. (a) No basis is given as to why Section 5.2.2.2 and 3.5.16 of the FSAR are in error, no error therein is cited, and no specifically identified defect is contained in the contention: The suggestion that the plant be moved is unsound. Further, the Commission amended 10 C.F.R. § 51.21 on May 11, 1981 to prohibit litigation of alternative sites at an operating license proceeding.

Contention 15 (May 8 filing). Sunflower alleges "the FSAR indicates that applicant is not sufficiently protected against ATWS." This totally lacks basis and specificity and should not be admitted.

Contention 16 (May 8 filing). Sunflower alleges "Electrical wiring for Perry is susceptible to fast flaming...." There is no basis for this beyond the ipse dixit of Sunflower. FSAR 9.5.1.2.10 states that electric cable will meet the flame requirements of IEEE 383 1974. There is no basis for the Sunflower allegation that the IEEE 383 cable will fast flame. The contention should not be admitted.

Contention 17 (May 8 filing). Sunflower alleges that "it has not been established that the Mark III containment structure accounts for buckling." Again no basis or specificity has been offered by Sunflower to support their allegation and the contention should not be admitted.

Contention 18 (May 8 filing). Sunflower alleges "Problems have occurred with control rod ejection..." No basis is given. No specificity or bill of particulars is given. And, control rod ejection could occur only in PWRs - Perry is a BWR. The contention should not be admitted.

Contention 19 (May 8 filing). Sunflower alleges impossibility of determining whether the cooling lake will comply with NEPA. Aside from lack of basis and specifity, there is no cooling lake at Perry. The contention should not be admitted.

Contention 20 (May 8 filing). Sunflower alleges that the ECCS sump pump may become blocked. Aside from lack of basis and specificity - there is no ECCS sump pump in Perry - see FSAR § 6.3. The contention should not be admitted.

Contention 21 (May 8 filing). Sunflower alleges that Perry's diesel generators are not reliable. No basis to support this assertion is given. No specific aspect of the Perry diesel generator system is identified as unreliable. The contention should not be admitted. Reliability of diesel generators was not addressed in NUREG-0660 which is cited by Sunflower as a reference.

Contention 22. Sunflower alleges, without basis or specificity, that "the modification of power operated relief valve and safety valve position to the reactor operators is ambiguous and unreliable, as demonstrated by TMI." Perry is a BWR. TMI is a PWR. No PORVs of the TMI type are in the Perry facility. The contention should not be admitted.

Contention 23. Sunflower alleges that the stainless steel components will be coated and cleaned with compounds that could contribute to intergranular stress corrosion cracking. This is only a Sunflower ipse dixit general conclusion for which no basis is given and no specifics of the Perry facility are identified. No specific coating

or cleaning components are identified - no description of their corrosive activity is given. The contention should not be admitted.

(2) OCRE Contentions.

Contention 1. OCRE alleges a 50 percent chance that asiatic clams exist in Lake Erie and that they could block the intake and condenser structures and thereby cause a LOCA. (1) No basis is provided to allege (even 50 percent) the asiatic clams exist in the area of Perry (the ER for the CP, Appendix B 2.7, did not disclose the existence of asiatic clams in the Lake sampling for the site survey) (2) No basis is given to support the allegation that the clams could so foul the two independent intake head structures which are 10 feet in diameter so as to cause a LOCA. OCRE has not specified how a LOCA could occur with a loss of lake intake structures. The Perry facility is closed cycle with two cooling towers and the lake is used for make-up water, not as a once-through-heat dissipator. The contention should be denied.

Contention 2. OCRE alleges "the plant's diesel generators for on-site electricity generation are not highly reliable." This is only OCRE's conclusory statement unsupported and without specifics. OCRE loosely cites St. Lucie, a PWR. However, the contention can be denied on other grounds OCRE wants at least 3 diesel generators with two manufacturers. Perry will have 6 diesel generators and two manufacturers. See FSAR § 8.3.1. Thus there is no issue to be litigated and the contention should not be admitted.

Contention 3. OCRE alleges that potassium iodine should be in every household within a 10 mile radius of the plant as a radiation blocking

agent. The Food and Drug Administration has not authorized such general public use. The contention should not be admitted.

Contention 4. OCRE alleges that applicants must demonstrate a maintenance program so that workers will not be burned by steam as at Sequoyah. No basis is provided to support the proposition that a Sequoyah steam accident could happen at Perry. No specific aspect of applicant's maintenance program is identified as being deficient. Sequoyah is a Westinghouse PWR, Perry is a GE BWR, and the accident was non-nuclear related. The contention should not be admitted as it lacks basis, specificity, and applies to PWR's.

Contention 5. OCRE alleges that the Perry containment could not sustain a hydrogen explosion such as occurred at TMI. Again there is no basis to allege that there could be a hydrogen explosion at Perry. TMI had no hydrogen control in the containment. Perry will have recombiners or igniters, or inerting. The contention has no relevance to Perry's design and should not be admitted.

Contention 6. OCRE alleges possible cracks in the reactor pressure vessel which could cause rupture and cites an article in Nature as a source-basis. The Nature article concerns a British PWR, not a BWR. Also FSAR 5.2.4 describes the inservice inspection program for Perry. OCRE does not identify any deficiencies in this program which is designed to disclose cracks in the pressure vessel. Again this contention has no basis other than the ipse dixit of OCRE and it should not be admitted.

Contention 7. OCRE alleges that applicants do not have the funds prematurely to decommission Perry should a TMI accident occur. No basis is given for the proposition that the applicants are financially

incapable of prematurely decommissioning Perry. Rather than being a contention, this is only the unsupported conclusion of OCRE. 10 C.F.R. § 50.33(f) does not require a demonstration that applicants are financially able to decommission Perry within a year of commencing operation. The contention is an impermissible challenge to the NRC regulations regarding financial qualification. It should also be noted that TMI Unit 2 is not being decommissioned at this time.

Contention 8. OCRE alleges, without stating why or in what respect, or upon what basis, that the applicants have not meet 10 C.F.R. Part 50, App. A, Criterion 32 - a material surveillance program for the reactor pressure vessel. OCRE cites an Oak Ridge publication which deals with controlling electric heating devices which simulate power reactor conditions and has nothing to do with a material surveillance program for Perry's pressure vessel. The contention should not be admitted.

Contention 9. OCRE alleges defects in the pressure vessel without providing a basis to support the allegation. The contention should not be admitted. The applicants will conduct further tests of the pressure vessel. Since OCRE requests these tests, and they will be performed, the contention is moot.

Contention 10. OCRE challenges the need for power. The Commission determined that there was a need for the power to be produced by Perry in the construction permit proceeding and the Commission's determination precludes re-litigating that issue here absent a showing - not present here - of substantial changed circumstances or new information. See Staff response to Sunflower contention 10.

Contention 11 alleges that the site is not suitable under 10 C.F.R. Part 100. The Commission found the site suitable at the construction

permit stage. Re-litigation of that issue is precluded here. See Staff response to Sunflower contention 10. The contention should be denied.

Contention 12. OCRE alleges that a CANDU reactor should be licensed rather than a GE BWR. This has already been adjudicated and the Commission has determined that the GE BWR is appropriate at the construction permit stage. Re-litigation of that issue should be precluded here. See Staff response to Sunflower contention 10. The contention should not be admitted.

Contention 13. OCRE alleges that upon a reactor trip reactor water going into the scram discharge could thermally shock the connecting pipes to the extent that fracture is possible. The Staff does not oppose this contention.

(3) Kenney contentions.

Tod J. Kenney's petition to intervene contained no contentions, i.e., disputed issues to be litigated. Mr. Kenney's petition "seeks to bring forth matters for consideration" such as "an evaluation of t environmental concerns...an evaluation of emergency plans....", etc. These general concerns do not constitute disputed issues which could be litigated. Mr. Kenney should be dismissed as a party to this proceeding.

(4) Toledo Coalition status: The Licensing Board found that to be a party, Toledo Coalition must amend its petition to demonstrate at least one member directly affected by Perry and to identify at least one aspect of the proceeding in which it has an interest. This has not been done and the Staff continues to oppose admission of Toledo Coalition as a party.

(5) Discovery: The Board requested the parties to disclose their discovery plans. If this matter is not dismissed, where issue has been joined, the Staff: (a) will seek the identity of all persons or graphics upon which the parties rely to substantiate their position; (b) seek from sources identified in response to (a) above, the basis and facts and analysis which support their position, either by interrogatories or deposition or both.

(6) Consolidation: If any person or contentions represented by or offered by the petition to intervene filed by Daniel D. Wilt are admitted to this proceeding, such parties should be consolidated and represented by a single person. The Staff further recommends that the Board's Order of April 9, 1981 be amended to admit Lake County Disaster Services Agency and Lake County Board of Commissions as a single interested government agency pursuant to 10 C.F.R. § 2.715 subject to the conditions subsequent that the Board determines that an administrative proceeding shall be held.

(7) The Board also solicited suggestions "for the fair and expeditious determination of the issues involved in this case." The only matters offered by any of the parties which the staff sees as a proper contention is OCRE's contention number 13 relating to scram discharge volume. Assuming that OCRE and its contention number 13 are admitted, the Staff suggests prompt discovery of the basis of OCRE's position. The results of such discovery are not now readily apparent and a plan for the resolution of the allegation must await disclosure of OCRE's basis. The Staff suggests an additional prehearing conference if intervenors and contentions are admitted to consider a schedule for discovery and summary

disposition. The Staff now projects May 1982 as the date of issuance of the SER, February 1982 as the date of issuance of the DES, and July 1982 as the date of issuance of the FES.

Respectfully submitted,

Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 27th day of May, 1981.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF POSITION ON PARTIES AND CONTENTIONS in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 27th day of May, 1981.

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