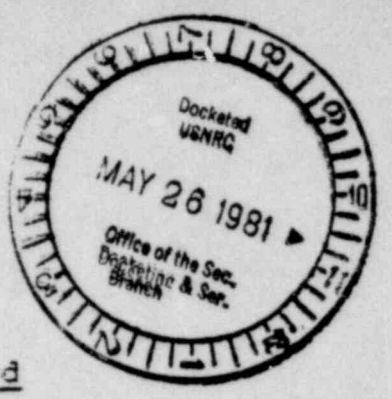
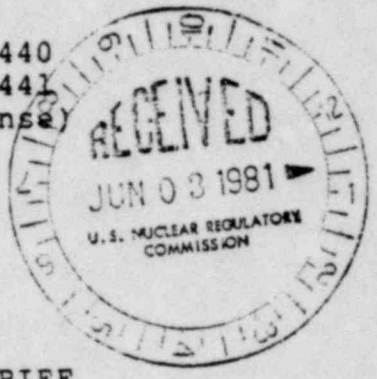


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,	)	Docket Nos. 50-440 50-441
DUQUESNE LIGHT COMPANY,	)	(Operating License)
PENNSYLVANIA POWER COMPANY,	)	
and THE TOLEDO EDISON COMPANY	)	
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	



APPLICANTS' SPECIAL PREHEARING CONFERENCE BRIEF

In its April 9, 1981 Memorandum and Order Scheduling Prehearing Conference Regarding Petitions for Intervention, the Licensing Board scheduled a prehearing conference to begin on June 2, 1981. Pursuant to the Memorandum and Order, each petitioner was to file an amended petition no later than 25 days prior to the special prehearing conference (i.e., May 8, 1981) which would "state the contentions with particularity" and cure those defects in the original petition which were identified in the Board's Memorandum and Order. The Board also directed each party and each petitioner to submit a brief dealing with the petitioners' contentions and certain procedural aspects of this proceeding. The brief is to be delivered to each person on the service list no later than seven days prior to the prehearing conference (i.e., May 26, 1981).

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Submitted herein, and in two companion briefs discussing the contentions in two of the petitions, are Applicants' views on the various petitions for leave to intervene and the matters identified by the Licensing Board.

I. PETITIONS FOR LEAVE TO INTERVENE

In its April 9, 1981 Memorandum and Order, the Board noted certain inadequacies in the intervention petitions of Sunflower Alliance, Inc., Citizens for Safe Energy, Northshore Alert, Toledo Coalition for Safe Energy, and Ohio Citizens for Responsible Energy ("OCRE"). The Board offered these organizations an opportunity to amend their petitions to establish standing by demonstrating the validity of their general assertions concerning the effect of the proceeding on their members. In particular, the Board ordered the petitioners to submit affidavits stating the place of residence of each member on whom each organization's standing was to be based, and expressly authorizing the organization to represent the affiant's interest. Order at 6. The purpose of these amendments was to "permit the Board and the other parties to determine '<u>for themselves</u>, by independent inquiry if thought warranted, whether a basis existed for a formal challenge to the truthfulness of the assertions in the . . . petition.'" Order at 5. The Board also indicated that the Toledo Coalition for Safe Energy should amend its petition to indicate at least one aspect of the proceeding in which it has an interest. The

Board stated that "Sunflower Alliance, Inc., Northshore Alert, Citizens for Safe Energy, the Toledo Coalition for Safe Energy, and OCRE must amend their petitions in compliance with this order before party status may be granted to any of them." Order at 5 (emphasis added).

In addition, the Board ordered petitioners to "state contentions with particularity" at least twenty-five days prior to the prehearing conference. Order at 6.

Each of the petitioners named above, and Tod J. Kenney, has failed to amend its petition to comply with the Board's Order. For this reason, their petitions for intervention should be denied.

A. Sunflower Alliance, Inc., Citizens for Safe Energy, and Northshore Alert

Sunflower Alliance, Inc., Citizens for Safe Energy, and Northshore Alert collectively filed an amended petition. However, the amendment filed by these parties failed to remedy the defects in the original petition and failed to comply with the Board's Memorandum and Order. Accordingly, these petitioners have failed to demonstrate standing, and should be denied leave to intervene.

Contrary to the requirements of the Board's Order, none of the three organizations has supported its allegations with affidavits from the members upon which the organization's standing is based. None has filed an affidavit stating the place of residence of members on whom standing is based, and

none has filed affidavits from members stating that the organization is authorized to represent the members' interest.[1]

In cases where an organization relies on the standing of one or more of its members to establish its own standing to intervene in a proceeding, the organization is required to submit affidavits from its members which state their interest in the proceeding and authorize the organization to represent them. In the absence of such a showing, the requirements of Section 2.714 have not been met. See Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422-423 (1976). Petitioners' response to the Board's order has been simply to amend their petition to allege an interest on the part of a single member of each organization. The signature of petitioners' attorneys at the bottom of the amended petitions[2] are insufficient to comply with the affidavit requirement. See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973) (affidavit must be submitted or petition verified by one or more persons with direct personal knowledge of the truth of its averments). As noted by the Appeal Board in Houston Lighting and Power Company (Allens

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1 In fact, the amended petition itself does not even state that the identified members have authorized their organizations to represent their individual interests in this proceeding.

2 The copy of the amended petition received by Applicants does not even appear to have been signed.

Creek Nuclear Generating Station, Unit 1), ALAB 535. 9 NRC 377, 396 (1979):

> Where an organization's standing hinges upon its being the representative of a member who has the requisite affected personal interest, it is obviously important that there be some concrete indication that, in fact, the member wishes to have that interest represented in the proceeding.

The failure of these organizations to submit the affidavits required by the Board compels denial of their petition for intervention.

B. Toledo Coalition for Safe Energy

The petition of the Toledo Coalition for Safe Energy must be denied because that organization has not filed an amended petition as required by the Board for the granting of party status. Order at 5.

The Board required the Toledo Coalition for Safe Energy to file affidavits stating the place of residence of members upon whom the organization's standing is based and affidavits from individual members stating that their organizations are authorized to represent the members' interests. Neither amended petitions nor accompanying affidavits have been forthcoming from the Toledo Coalition for Safe Energy.

C. Tod J. Kenney

Although Applicants have recognized that Tod J. Kenney's original petition alleged an interest sufficient to demonstrate standing for the purposes of this proceeding, Mr. Kenney has not completed his petition for intervention by submitting any

contentions that he wishes the Board to consider. Section 2.714(b) of the Commission's Rules of Procedure provide that

> the petitioners shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the basis for each contention set forth with reasonable specificity. A petitioner who fails to file such a supplement which satisfied the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party.

See also Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973); Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973). Because Mr. Kenney has failed to comply with the requirements of the Commission's rules and this Board's Order, his petition for intervention must be denied.

D. Ohio Citizens for Responsible Energy

If the Board determines that Ohio Citizens for Responsible Energy ("OCRE") has presented at least one contention which satisfies the requirements of 10 C.F.R. §2.714(b), Applicants do not object to OCRE's admission as a party to this proceeding. As noted in Section II below, Applicants have not objected to two of the contentions.

II. CONTENTIONS OF PETITIONERS

The contentions of OCRE and Sunflower Alliance, Inc. et al. are discussed in two accompanying briefs of this date. As stated in those briefs, Applicants do not object to two of

OCRE's contentions, while opposing admission of the remaining eleven, and object to all of the contentions of Sunflower Alliance, Inc. et al. Thus, the petition of Sunflower Alliance, Inc. et al. should be denied. 10 C.F.R. §2.714(b).

As discussed in Section I above, the petition of Ted J. Kenney contains no contentions, and Mr. Kenney failed to amend or supplement his petition to provide contentions as required by the Commission's Rules of Practice and the Board's Memorandum and Order.[3] Mr. Kenney must therefore be dismissed as a party to this proceeding. 10 C.F.R. §2.714(b).

The petition of the Lake County Board of Commissioners and the Lake County Disaster Services Agency has been granted by the Licensing Board. Their participation is governed by Section 2.715 of the Commission's Rules of Practice, and they have not been required to submit contentions.

III. DISCOVERY

After the contentions have been ruled on by the Board to establish the matters in controversy to be decided in this proceeding, Applicants intend to seek to discover specific information related to intervenors' allegations and the underlying bases for the allegations, as well as information

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3 While Mr. Kenney's March 16, 1981, Petition for Leave to Intervene does mention a number of "aspects of the subject matter of the proceeding" (as required by 10 C.F.R. §2.714(a)(2)), none of these meets the basis and specificity requirements for contentions, and none is stated "with particularity" as required by the Board's April 9, 1981 Memorandum and Order.

about intervenors' witnesses and evidentiary presentations. The information will be sought with the view of enabling Applicants to prepare their response to the allegations.

Although it is too early to finalize their discovery plans, Applicants intend to conduct their discovery primarily through the use of written interrogatories and document requests.

Applicants suggest that the schedule for discovery provide that discovery requests be filed within 45 days of the Board's issuance of the Special Prehearing Conference Order, with responses due 45 days thereafter.

IV. CONSOLIDATION OF PARTIES

Pending the final determination of issues, Applicants probably will not suggest the consolidation of intervenor parties who have filed separate petitions for leave to intervene. We would expect, as is customary, that all intervenors on a single petition would act in concert as a single, consolidated party. See §III(a)(4) of Appendix A, 10 C.F.R. Part 2.

V. DETERMINATION OF ISSUES

The Board has asked for suggestions for the fair and expeditious determination of the issues in this case. In general, Applicants would suggest the procedures customarily followed for the presentation of evidence as discussed in Appendix A to Part 2. All parties would serve direct testimony

in written form to all parties prior to the start of the hearing. 10 C.F.R. §2.743(b). The direct testimony would be presented by witnesses at the hearing who would be subject to cross-examination.

The parties should consider the use of the summary disposition procedure in 10 C.F.R. §2.749 to sharpen or dispose of issues. Applicants will also encourage discussions among the parties for purposes of eliminating or narrowing issues, and for the stipulation and settlement of issues.

While it is still too early to set a definitive hearing schedule in this proceeding, Applicants are aware that scheduling and completion of the hearing processes to avoid delay in the operation of a completed facility is a serious problem in many current operating license proceedings. Applicants would be seriously affected by such delays in this proceeding, and it may become appropriate from time to time for Applicants to suggest means for expediting various stages of the licensing process in a manner that would not prejudice the fair and expeditious determination of the issues. For example, it may be necessary to schedule hearing sessions in discrete stages so that issues ready to be litigated do not have to await those that are not. This is in accordance with the Commission's recent statement in its proposed rulemaking, "Expediting the NRC Hearing Process," 46 Fed. Reg. 17216 (March 18, 1981), that "[e]arly hearings on discrete issues addressed in SER's will be

required, unless segmentation of the hearing would clearly be counterproductive."

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By _____

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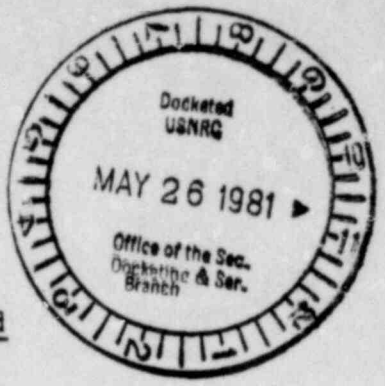
Dated: May 22, 1981



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(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' BRIEF ON CONTENTIONS
OF SUNFLOWER ALLIANCE, INC. ET AL.

In its April 9, 1981 Memorandum and Order Scheduling Prehearing Conference Regarding Petitions for Intervention, the Licensing Board directed that each party shall submit a brief on why issues included in petitions should be considered relevant to the proceedings in whole or part or should be considered irrelevant to the proceedings. Applicants herein present their analysis of the contentions proposed by Sunflower Alliance, Inc. et al. Those contentions are set forth in Petitioners' March 15, 1981 Petition for Leave to Intervene, and in Petitioners' May 8, 1981 Amended Petition.

Each of Petitioners' contentions, as will be discussed individually below, is defective in one or more significant respects. As a result, none should be admitted as matters in

controversy to be litigated in this proceeding. Some are inappropriate challenges to Commission regulations, some have been considered and litigated during the construction permit proceedings, and some should be excluded because they are the subject of generic rulemaking proceedings. Almost without exception, the contentions lack the bases required by 10 C.F.R. §2.714(b).

Section 2.714(b) of the Commission's Rules of Practice requires intervenors in Commission proceedings to set forth the bases for their contentions with reasonable specificity. See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 A.E.C. 188, 194 (1973); 43 Fed. Reg. 1779 (April 26, 1978) (contentions must be set forth with particularity and with the appropriate basis).

The purposes underlying the basis and specificity requirements of the Commission's rules are threefold:

> A purpose of the basis-for-contention requirement in Section 2.714 is to help assure at the pleading stage that the hearing process is not improperly invoked.* * * Another purpose is to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose. Still another purpose is to assure that the proposed issues are proper for adjudication in the particular proceeding.

Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 1 and 2) ALAB-216, 8 A.E.C. 13 (1974). The notice aspect of the requirement is a natural outgrowth of fundamental notions of fairness. Thus, the Appeal Board has noted that

> The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced* * *It should not be necessary to speculate about what a pleading is supposed to mean.

Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit 1) ALAB-279, 1 N.R.C. 559, 576 (1975). Moreover, the Licensing Board is entitled to adequate notice of Petitioner's specific contentions, to enable it to guard against the obstruction of its processes. As noted by the Supreme Court in upholding the Commission's requirements of a "threshold" showing of materiality for environmental contentions:

> [I]ntervenors who wish to participate [must] structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions...[A]dministrative proceedings should not be a game or forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered...

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-4 (1978).

Applicants do not invoke the Commission's bases requirement lightly. Before the operating licenses can issue there will have been an extensive, highly technical review of the application by the NRC Regulatory Staff, review by the Advisory Committee on Reactor Safeguards, and findings by the Director of Nuclear Reactor Regulation that the health and safety of the public will be adequately assured and environmental requirements will be met. There also have been extensive, mandatory hearings conducted prior to the issuance of the

construction permits. Beyond this, a hearing on the operating license is not required. If a hearing is held, it should be limited to those issues which a petitioner can show have some basis and relevance to the facility in question.

The NRC hearing process is formal, complex, extremely expensive for all concerned, including government agencies, and time consuming. It is not in the public interest to invoke or prolong the hearing process by litigating matters introduced by conclusory statements unsupported by the bases required under Commission regulations. For the most part, that is the type of contention presented by Petitioners.

Contention 1 (Emergency and Evacuation Plans)

This contention alleges several defects in the "emergency and evacuation plans," but gives no basis for any of the alleged defects. For example, Petitioners allege "inadequacy of notification plans," but fail to explain what is inadequate, or why. Applicants object to this contention on the grounds that it fails to meet the requirements of 10 C.F.R. §2.714(b) that the bases for each contention must be stated, and that they must be stated with reasonable specificity.

Contention 2 (Financial Capability)

This contention asserts that Applicants have not demonstrated the financial capability to complete the Perry facilities, and that they lack the financial capability to operate

and decommission the facilities. The allegations are conclusory statements with no basis stated for why Petitioners feel Applicants lack the requisite financial capability. They must therefore be rejected for failure to meet the requirements of 10 C.F.R. §2.714.

The part of the contention related to the financial qualifications of the Applicants to complete construction of the facilities also fails on the grounds that it is beyond the scope of an operating license hearing. 10 C.F.R. §50.33(f). The issue of Applicants' financial capability to construct the facilities was considered during the construction permit proceedings and is irrelevant to the issuance of operating licenses.

Contentions 3, 4 and 5 (Need for Power)

Petitioners allege that Applicants have underestimated the need for the energy from the Perry units (Contention 3), and that industrial cogeneration, conservation, and energy management options have been inadequately considered as alternatives to the Perry units (Contentions 4 and 5). These proposed alternatives to the Perry plant are clearly unreasonable in the context of the present proceeding, which involves the request for operation of a completed nuclear facility.

Petitioners have failed to provide an explanation of why or how its proposed alternatives have been inadequately considered, or how any of the allegations would upset the

cost-benefit analysis to the extent that licensing the operation of the facilities would be inappropriate. This lack of basis for the contentions is reason alone for rejecting the contentions pursuant to 10 C.F.R. §2.714(b).

There is, however, a more fundamental reason why Contentions 3, 4 and 5 should not be admitted. It is not credible to suggest that the proposed alternatives to the completed facility, for which the capital investment has already been made or committed, can now be considered reasonable alternatives, particularly where a full NEPA review has already been carried out at the construction permit stage. Such an alternative is unreasonable and, as such, is not required to be considered.

Applicants' opposition to the consideration of these alternatives to the existing plant is based on the principle, now well established both in the courts and before the Commission, that the National Environmental Policy Act (NEPA) is applied with a "rule of reason" for the range of alternatives that must be considered. This principle was established in Natural Resources Defense Council v. Morton, 458 F.2d 827, 834-36 (D. C. Cir. 1972), and has been consistently applied since then. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Concerned About Trident v. Rumsfeld, 555 F.2d 817, 825 (D.C. Cir. 1977); Carolina Environmental Study Group v. U. S., 510 F.2d 796, 798 (D. C. Cir. 1975); Scientists' Institute for

Public Information, Inc. v. AEC, 481 F.2d 1079, 1092 (D. C. Cir. 1973); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) and Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-455, 7 NRC 41 (1978).

At the operating license stage, the rule of reason precludes consideration of an alternative that requires the abandonment of already constructed facilities. Applicants have already been authorized, under the construction permits, to complete the construction of the two nuclear power units. A shift at this time to the alternatives proposed by Petitioners is unreasonable.

NEPA case law supports the proposition that alternatives to completed projects need not be considered under the rule of reason. In Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), one of the issues before the court was whether NEPA required an environmental impact statement to be prepared prior to the operation of a dam and reservoir. Holding that no EIS was required, the court noted:

> . . .[t]he courts have consistently interpreted NEPA to require a consideration of alternatives which are reasonable and do not demand what is not meaningfully possible. (citations omitted)

455 F. Supp. at 649. Similarly, the Federal District Court for the Southern District of New York considered the application of NEPA to a substantially completed Federal housing project and stated:

> In reviewing HUD's weighing of the advantages and disadvantages of the appropriate alternatives, we will not turn the clock back and compel the agency to disregard present realities or require HUD to pivot its decision on facts that no longer exist.

Trinity Episcopal School v. Harris, 445 F. Supp. 204, 220 (S.D.N.Y. 1978), rev'd, 590 F.2d 39 (2d Cir.), rev'd, 444 U.S. 223 (1980).

As noted by the United States Court of Appeals for the District of Columbia Circuit in Maryland National Capital Park and Planning Commission v. U. S. Postal Service, 487 F.2d 1029 (D. C. Cir. 1973), in declining to reverse the denial of an injunction against construction of a substantially completed facility, notwithstanding the absence of any NEPA review:

> . . . [w]e must face the reality that the building was substantially complete as of May 1973.

487 F.2d at 1041.

The appropriate time to raise the question of whether the Perry plant, rather than some alternative, should have been built, was before construction was authorized. In fact, that issue was litigated and relitigated during the construction permit proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-74-69, 8 AEC 538, 543-556 (1974); LBP-74-76, 8 AEC 701, 710-711 (1974); LBP-75-53, 2 NRC 478, 492-494 (1975); LBP-75-73, 2 NRC 946, 965-968 (1975); ALAB-443, 6 NRC 741, 748-751 (1977). If the facility has already been completed, NEPA does not require

reassessment of the project. See, e.g., Save Our Wetlands v. U.S. Army Corps of Engineers, 549 F.2d 1021 (5th Cir.) cert. de'd, 434 U.S. 836 (1977); Ogunquit Village Corp. v. R. M. Davis, 553 F.2d 243 (1st Cir. 1977).

In this proceeding, environmental review of the plant itself was completed at the construction permit stage. Reopening that decision at this time would be, in Applicant's view, inappropriate. The National Environmental Policy Act "is not an authorization to undo what has already been done . . .." Jones v. Lynn, 477 F.2d 885, 890 (1st Cir. 1973), quoted in National Wildlife Federal v. Appalachian Regional Commission, __ F.2d _____, 15 E.R.C. 1945 (D.C. Cir. 1981). The effort "would be a vain attempt to reform past decisionmaking". Id. at 1952 (programming EIS not required where program substantially completed). Such "vain attempts" should not be entertained as contentions.

Contention 6 (Off-Site Emergency Plans)

Petitioners here claim that Applicants' inadequate consideration of the effects of a "possible major radiation release accident in the spent fuel storage pond. . . impacts on the off-site emergency plans and preparations" and "endangers the health and safety of residents for a very large radius around the plant." Not only is the contention lacking in basis, it does not provide sufficient explanation of what is being alleged to enable Applicants to form a meaningful response. It fails to identify or quantify the "major radiation release accident," provides no hint of how that

unspecified accident impacts emergency plans, and does not indicate the ways in which the health and safety of residents are endangered.

All emergency plans must be in conformance with NRC regulatory requirements, including the standards and criteria identified in 10 C.F.R. §§50.33(g) and 50.47, and Appendix E to Part 50. The contention fails to point out how Applicants are not complying with the requisite NRC requirements, and must therefore be excluded for failure to meet the basis requirements of 10 C.F.R. §2.714(b).

Contention 7 (Hydrogen Control)

Contention 7 consists of two apparently unrelated allegations. In the first, which will be referred to as Contention 7.A, Petitioners allege that there is insufficient documentation of the ability of the Perry containment structures to "safely inhibit" the magnitude and type of "hydrogen explosion" experienced in the TMI-2 accident. Applicants oppose the admission of Contention 7.A on the grounds that it is the subject matter of a pending rulemaking proceeding.

On October 2, 1980, the Commission published in the Federal Register a Notice of Proposed Rule entitled "Interim Requirements Related to Hydrogen Control and Certain Degraded Core Considerations". 45 Fed. Reg. 65466. The proposed rule recognizes the magnitude of hydrogen generated during the course of the Three Mile Island accident and proposes a series of measures involving hydrogen management, hydrogen control

penetrations, hydrogen recombiner capacity, and reactor coolant system venting. In addition, the Commission published an Advance Notice of Proposed Ruelmaking entitled "Consideration of Degraded or Melted Cores in Safety Regulation", 45 Fed. Reg. 65474 (October 2, 1980). At least one of the issues to be considered focussed on the issue of hydrogen generation:

> 7. Should the NRC require incorporation into containment design, systems for controlling combustion of hydrogen? Do you favor methods of control that suppress combustion or do you favor controlled burning? If you favor suppression of combustion, what techniques would you recommend and should they vary as a function of the design capability of current containments? If you favor controlled burning, do you recommend open flames, spark plugs, catalytic combustors, or some other means? What percent of zirconium oxidation in the core and at what rate would you design for? Would you respond differently for different reactor or containment types? If so, what differences would you recommend?

Commission precedent establishes that "licensing boards should not accept in individual licensing proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). From the standpoint of consistency and administrative economy, generic consideration of such generic issues is clearly the sensible approach. Ecology Action v. U. S. Atomic Energy Commission, 492 F.2d 998, 1002 (D. C. Cir. 1974); Union of Concerned Scientists v. Atomic Energy Commission, 499 F.2d 1069, 1081-82 (D. C. Cir. 1974).

This doctrine has been applied with respect to the same rulemaking proceedings cited above. In the TMI Restart proceeding, the licensee sought to exclude testimony on the subject of controlled filtered venting of the containment, pointing out that this was one of the issues in the Advance Notice of Proposed Rulemaking. The Licensing Board ruled that the venting system discussed in the rulemaking

> is the very system proposed by [the witness'] testimony. Consistent with the Commission's order, we may not permit litigation of it in this proceeding. Rather it will be addressed in the rulemaking proceeding. In that forum, [the witness and the intervenor] may present their views. If the Commission finds, as [the witness], members of the ACRS and others have urged, that a controlled filtered containment venting system should be required, the results of the rulemaking will reflect this.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), Memorandum and Order Denying Admission of Testimony of Beyea in Support of ANGRY Contention V(D)", slip op. at 6 (March 12, 1981). The TMI licensing board relied upon the Douglas Point decision, ALAB-218 supra, as support for its action.

The last sentence of the contention, which will be referred to as Contention 7.B, relates to the emission of "certair minimal amounts of radiation" during normal operation of the Perry plant. The contention is vague, but it seems to be a challenge to the provisions of Appendix I of 10 C.F.R. Part 50 and 10 C.F.R. Part 20. As such, it must be disallowed

pursuant to the provisions of 10 C.F.R. §2.758. In any event, Petitioners have not identified the amounts or types of radiation of concern, nor have they provided any explanation of why or how such radiation would be released in violation of NRC requirements, Contention 7.B therefore fails to meet the basis requirements of 10 C.F.R. §2.714(b).

Contention 8 (Licensing of Two Units)

In this contention, Petitioners object to the "tandem licensing" of Units 1 and 2, and argue that Unit 2 should not be "licensed for facility operation at this time." This contention may arise from a misconception by Petitioners of the licensing process, for the units will not be licensed in tandem. The license for each unit is issued separately, and neither will be issued until the particular unit is completed and ready for fuel loading.

If, contrary to the wording of their contention, Petitioners are concerned about considering both units in the current proceeding, it is a groundless concern. The purpose of the proceeding before this Licensing Board is to adjudicate specific issues raised with respect to the two-unit Perry plant. Positive findings by the Licensing Board on these specific issues do not in and of themselves guarantee that a license will ultimately issue. That cannot occur until the Commission has determined that the plant has been properly constructed and completed, and that all current safety and

environmental requirements have been met. In addition, the Commission has procedural safeguards toward this end. See, for example, the "backfitting" provisions of 10 C.F.R. §50.109, and the provision of 10 C.F.R. §2.206 for requesting the NRC to modify, suspend, or revoke an existing license.

Moreover, Petitioners have provided no basis for an allegation that consideration of Unit 2 in this proceeding would be either "improper" or "contrary to [Congressional] safety considerations." The alleged improprieties and safety considerations are not identified. Nor have Petitioners identified the "safety considerations and economic policy considerations" of the Atomic Energy Act and NEPA with which they are concerned, or explained how this proceeding will "run afoul" of them.

In any event, if the consideration of Unit 2 in this proceeding is, in fact, their concern, Petitioners are asking the Licensing Board to act contrary to the Commission's directives to the Board, 46 Fed. Reg. 20340 (April 3, 1981), to preside over the proceeding for the two-unit Perry facility described in the notice of opportunity for hearing at 46 Fed. Reg. 12372 (February 13, 1981).

For all of the above reasons, this contention should not be admitted.

Contention 9 (Miscellaneous)

This contention contains a loose conglomeration of ideas which bear little or no relation to each other. It purports to

challenge Applicants' compliance with the quality assurance program for construction, yet the reasons given, i.e., four alleged "deficiencies," do not relate to quality assurance. Therefore, Applicants will treat each of Petitioners' alleged deficiencies as a separate contention:

A. In this contention Petitioners allege that "primary coolant nozzles" have developed cracking, and therefore the "safety of these reactors are [sic] currently undergoing investigation." The contention lacks basis, and must therefore be rejected.

Cracking in feedwater nozzles of BWR reactor vessels has been addressed and solved generically some years ago. The solution, which included nozzle clad removal and thermal sleeve redesign, is discussed in Section 5.3.3.1.4.5 of the FSAR. Also included in that section of the FSAR are references to documents which describe the modifications and safety analyses. Petitioners have provided no basis for alleging that the solution is inadequate and that a problem exists for the Perry facility.

B. Petitioners allege that the plant has been "built on a geologic fault" and has not been "built to earthquake standards." This contention should be rejected for failure to provide adquate basis, and for the additional reason that it is an attempt to rehash issues already litigated at the construction permit stage.

The seismic criteria and design of the Perry facilities are described in Sections 2.5, 3.2, 3.7, and 3.10 of

the FSAR. Petitioners have not identified the "earthquake standards" which they allege are not being met, nor have they explained how the plant fails to meet those standards. This alone is grounds for dismissal under 10 C.F.R. §2.714(b).

The question of site suitability is a matter to be decided at the construction permit stage. Congress long ago pointed out that "the critical point in reactor licensing [is] the construction permit stage--where the suitability of the site is to be judged." S. Rep. No. 1677, 87th Cong., 2d Sess., 2-7 (1962), quoted in Union of Concerned Scientists v. Atomic Energy Commission, 499 F.2d 1069, 1076 (D. C. Cir. 1974). In this case, the "geological fault" was specifically examined during the construction permit proceeding. Both the licensing board and the appeal board examined the geologic anomalies at the site in great detail and resolved the issue. LBP- 75-53, 2 NRC 478; ALAB-294, 2 NRC 663; ALAB-298, 2 NRC 730; LBP-75-73, 2 NRC 946; ALAB-443, 6 NRC 741; ALAB-449, 6 NRC 884. In ALAB-449, the Appeal Board found that:

1. The faults and other irregularities in the shale at the site (a) are nontectonic in origin, (b) are the result of glacial activity and (c) cannot be expected to cause earthquakes.

2. There is no reason to alter the seismic design of the plant.

3. As a result of applicants' removal of the degraded shale and replacement of it with suitable fill material, the foundation for the plant is adequate.

4. The anomalies in the shale at the site will not interfere with the proper functioning of the underdrain system.

5. The site is a suitable location for the Perry plant.

6 NRC at 885. With this background, something more than a naked allegation is required before a relitigation of the seismology of the site is allowed.

C. This contention asserts that asbestos will flake from the cooling tower baffles, "causing asbestos to leak into the air or otherwise interfere with the safe operation of the plant." Applicants object to this contention both because it was extensively litigated during the construction permit hearings, and for lack of basis.

The Commission's regulations implementing NEPA requirements clearly limit consideration of environmental issues at the operating license stage to matters which differ from those considered at the construction permit stage, or which reflect new information. 10 C.F.R. §§51.21 and 51.23(e). Loss of asbestos from cooling tower components was a contested environmental issue litigated at the construction permit hearings. The Licensing Board found that the type of asbestos used in the Perry towers "exhibited no measurable erosion and no reduction of strength," and that any asbestos fibers discharged from the tower would not constitute a health hazard. Partial Initial Decision--Environmental and Site Suitability, LBP-74-69, 8 AEC 538, 561-4 (1974). Petitioners have provided no new information warranting a relitigation of this issue.

In any event, Petitioners have neither identified the harm they believe will occur, nor provided a basis for their assertions.

D. In this contention, Petitioners make allegations regarding the use of porous concrete under the containment. This particular issue was also litigated extensively at the construction permit stage, and the contention sets out no basis for the allegations. It must therefore be rejected.

The only porous concrete to which the contention could be referring is the porous concrete blanket which is part of the pressure relief underdrain system. This type of concrete is not used in the construction of the containment structures. In LBP-75-53, 2 NRC 478, 483-90, and LBP-75-73, 2 NRC 946, 957-61, the Licensing Board at the construction permit hearings considered evidence on the permeability and strength of the porous concrete blanket, including protection against clogging of the porous concrete, and set out requirements for permeability and compressive strength. The Licensing Board found that "there are no unresolved environmental concerns or safety issues associated with the proposed pressure relief underdrain system, LBP-75-53, 2 NRC 478, 490, and that the Perry plant "can be safely constructed and operated using the [pressure relief underdrain system]." LBP-75-73, 2 NRC 946, 961. Because this issue was considered in detail at the construction permit hearings, and in view of the complete lack of basis for any of the allegations in this contention, the contention should not be admitted.

Petitioners also allege that "Applicants have wholly failed to operate Davis-Besse in a professional, economic and

efficient manner" and that therefore "there is no reason to believe that Applicants will operate Perry in the public interest either." This is vague and unsupported rhetoric and cannot stand as a contention for several reasons.

Perry will be operated by The Cleveland Electric Illuminating Company (CEI). While CEI owns a portion of the Davis-Besse facility, it does not operate that unit and indeed is not licensed to operate it. Even if the allegations concerning Davis-Besse operations had some foundation, operation of the Davis-Besse facility would be clearly outside the scope of this proceeding, since this proceeding involves the operation of a different facility by a different company. A mere allegation that Petitioners do not believe Applicants will "operate Perry in the public interest" falls far short of the Commission's basis and specificity requirements in 10 C.F.R. §2.714(b).

Contention 10 (Decommissioning)

Here Petitioners argue that Applicants have failed to adequately address and describe the decommissioning process, and have failed to "establish satisfactory financial protection to protect the public during the decommissioning process."

The decommissioning issues raised by this contention are challenges to the Commission's regulations and are outside the scope of this proceeding. Commission regulations do not require submission of a decommissioning plan as part of the

application for an operating license. 10 C.F.R. §50.34(b). Section 50.82, on the other hand, provides that information on the methods of decommissioning is to be submitted in connection with an application to dismantle the facility. Thus, to litigate Petitioners' decommissioning issues would be in direct conflict with Commission regulations and beyond the scope of this proceeding.

That Petitioners' assertions go beyond what Commission regulations currently require is pointed out most clearly by the Commission's consideration of changes in existing rules. On March 13, 1978, the Commission published in the Federal Register an Advance Notice of Proposed Rulemaking on decommissioning criteria for nuclear facilities. 43 Fed. Reg. 10370 (1978). This notice stated:

> The Commission is considering development of a more explicit overall policy for decommissioning nuclear facilities and amending its regulations in 10 C.F.R. Parts 30, 40, 50 and 70 to include more specific guidance on decommissioning criteria for production and utilization facility licensees . . .

The questions to which the Commission invited comment included

1. Is it desirable to develop more definitive decommissioning criteria for production and utilization facility licensees . . . ?

2. Should detailed decommissioning plans be required prior to issuance of licenses?

Thus, the very questions which Petitioners seek to litigate in this proceeding are, in the Commission's view, beyond the scope of present regulations.

Financial protection requirements, during both operation and the decommissioning process, are clearly established by the Price-Anderson Act, 42 U.S.C. 2210, as implemented by 10 C.F.R. Part 140. Petitioners provide no basis for supposing that Applicants will not provide the amount of financial protection required by law. To allege that Applicants should do more than is required by law is a challenge to the requirements of the Price-Anderson Act and the Commission's implementing regulations. Such challenges are not allowable in a Commission proceeding. Florida Power & Light Company (Turkey Point, Units 3 and 4), Commission Memorandum and Order, 4 AEC 787, 788 (1972); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 81 fn.7 (1974).

Contention 11 (ECCS Testing)

Petitioners here assert that certain "items have not been finally tested." This contention conflicts with Commission regulations and is therefore a challenge to the regulations. It also fails to meet the Commission's basis requirements. Either reason requires that this contention not be allowed.

All of the "items" listed in the contention are related to the emergency core cooling systems of the Perry units and the loss of coolant accident against which the ECCS is designed to

protect. The Commission's regulations include detailed ECCS acceptance criteria in 10 C.F.R. §50.46 and Appendix K to Part 50. That regulation requires that ECCS cooling performance be calculated in accordance with an acceptable evaluation model as set out in Appendix K. This has been done for the Perry ECCS. Because Petitioners are asserting that Applicants should go beyond the requirements of the Commission's ECCS regulations, and because the actions being proposed by Petitioners are in the nature of testing to qualify the evaluation model in the regulations, this contention is a direct challenge to the Commission's regulations, and must be disallowed pursuant to 10 C.F.R. §2.758. See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 324 (1979). Petitioners do not claim that the Perry ECCS fails to meet the Commission's regulations and, as shown in Section 6.3.3 of FSAR, the Perry ECCS fully meets the NRC performance requirements in the regulations.

Contention 12 (Cooling System Cracks and Corrosion)

Petitioners here allege that the type of cooling systems used at Perry are susceptible to cracks and corrosion which could lead to "a leak in the piping which the operators could not close in time to prevent a dangerous overheating of the reactor core." Applicants object to this contention for lack of basis, and as an impermissible challenge to the Commission's regulations.

Intergranular stress corrosion cracking involved in the BWR coolant pressure boundary piping has been under extensive study by the NRC and the nuclear industry since it was observed in the mid-1960's. This effect was the subject of NRC's Generic Task No. A-42, which was completed and resolved in 1979 with the issuance of NUREG-0313, Rev. 1, "Techrical Report on Material Selection and Processing Guidelines for BWR Coolant Pressure Boundary Piping." That document sets out the NRC staff's technical position on the matter, which includes the staff's acceptable methods for dealing with intergranular stress corrosion cracking. The subject is complex, and has been dealt with by the staff in considerable detail. Petitioners have not even attempted to explain why and how they believe the Perry units fail to conform to the staff's technical position. The contention fails to provide the basis required by 10 C.F.R. §2.714(b).

The contention should also be dismissed as a challenge to NRC regulations which fails to comply with 10 C.F.R. §2.758. The Commission's ECCS regulations in 10 C.F.R. §50.46 and Appendix K to Part 50 require an ECCS to mitigate the loss-of-coolant-accident (LOCA) postulated by the Petitioners in this contention; this, rather than closure of coolant piping leaks by reactor operators, is the required method of dealing with a LOCA. Contention 12 is therefore a challenge to Commission's regulations which must be disallowed.

Contention 13 (BWR Scram System)

Petitioners here assert that "proof" of compliance with "current regulations" be required for the Perry scram system. Petitioners have not, however, identified the "current regulations" which they allege Perry has not met, nor have they identified the aspects of the scram system which fail to meet the "current regulations." Applicants object to this contention for lack of specificity and basis.

Contention 14 (Airplane Crash Probabilities)

Petitioners allege that one of the small airports near the site "intends to expand," and the FSAR analysis of crash probabilities is therefore "insufficient." Petitioners have not identified the airport in question, have not described the alleged expansion, and have not provided the basis for assuming that such an expansion will occur.

Nearby aircraft activity, including future expansion plans, and the hazard probability, are discussed in the FSAR. Petitioners have provided no basis for asserting that Applicants' analysis is insufficient, and have not explained why expansion plans, if any, at one of the small airports would cause the analysis to be insufficient.

Contention 15 (Anticipated Transients Without Scram)

This contention alleges that Applicants' protection from anticipated transients without scram (ATWS) is "insufficient."

The contention provides no basis for this allegation of insufficiency other than a non-specific reference to the FSAR.

Section 15.8.1 of the FSAR is a discussion of the capabilities of the Perry design to accommodate ATWS. The FSAR identifies the existing plant systems for preventing or mitigating ATWS, including the recirculation pump trip, alternate rod insertion system, and standby liquid control system. The FSAR does not indicate insufficient ATWS protection, and the contention must therefore be excluded for lack of basis.

Applicants also oppose admission of this contention on the grounds that it is about to be the subject of a general rulemaking proceeding by the Commission.

ATWS has been the subject of extensive NRC study resulting in the issuance of NUREG-0460, Vols. 1-4. Volume 4, issued in March 1980, recommended rulemaking, and the Commission now has under consideration a proposed Federal Register Notice to commence the general rulemaking proceeding. SECY 80-409, November 7, 1980, as amended January 29, 1981. Additional work is underway to complete a regulatory guide to accompany the proposed rule for public comments. NUREG-0606, Vol.3, No. 1, February 13, 1981.

As discussed in Applicants' discussion of Contention 7 above, Commission precedent proscribes the litigation of issues in individual licensing proceedings which are, or are about to become, the subject of general rulemaking by the Commission.

Contention 16 (Electrical Wiring)

This contention asserts that the electrical wiring is "susceptible to fast flaming." The allegation is unfounded, and Applicants object to this contention for failure to provide a basis.

As stated in Reference 16 in Section 9.5.1 of the FSAR, the electrical cables used at the Perry facility are flame tested in accordance with the standards in IEEE-383, and are certified to be of fire retardant construction. Petitioners provide no basis for their allegation that they are susceptible to fast flaming.

Contention 17 (Containment Vessel Buckling)

Petitioners here contend that it has not been established that the containment vessel "accounts for buckling" and "is strong enough to resist the dynamic and static loads which may occur during the 40 year life of the plant." Applicants object to this contention for lack of basis.

Section 3.8.2.4 of the FSAR describes the design and analysis procedures for static and dynamic loads, and for buckling. Nowhere do Petitioners explain why the analyses are inadequate, or identify dynamic or static loads which have not been taken into account.

Contention 18 (Control Rod Ejection)

This contention relates to what Petitioners call "problems" that "have occurred in several reactors recently." These

problems are undefined and the reactors are unidentified. No basis is given for the contention and it must therefore be rejected.

Control rod ejection is a design basis accident for pressurized water reactors (PWR). See Final Environmental Statement Related to the Proposed Perry Project, Table 7.2 (April 1974). It is not applicable to Perry, which utilizes boiling water reactors (BWR) with totally different control rod drive systems.

Contention 19 (Cooling Lake)

Petitioners here contend that it cannot determine "whether or not Applicant's plans as far as a cooling lake are concerned comply with" NEPA. The short answer is that the Perry facility does not have a cooling lake. The contention provides no basis for thinking that there is a cooling lake.

The contention also asserts that Petitioner cannot determine "the effects the operation of the plant will have on Lake Erie in terms of its fishing industry or its availability for use as a recreational facility." This is not even a contention in that it does not assert (let alone provide a basis) that operation of the facility will have any significant effects on Lake Erie or that Applicants have underestimated those effects. These issues were dealt with at the construction permit stage. LBP-74-69, 8 AEC at 565-568, aff'd ALAB-443, 6 NRC 741. Petitioners have shown no basis for reopening these issues.

Contention 20 (ECCS Pump Suction Line)

Petitioners claim that ECCS performance will be degraded because (a) insulation will be dislodged during a LOCA, (b) it will "block off the drain of water" through the pump suction line strainers, (c) causing unreliable functioning of the emergency sump pump. Petitioners have provided no basis for any of these occurrences, and the contention must therefore be rejected.

The Perry containment does not have an emergency sump pump. Each ECCS pump takes suction directly from the suppression pool, which does not even have a sump. Section 6.2.2.2 of the FSAR explains in some detail why the possibility of insulation migrating to the strainers of the ECCS suction lines is virtually nonexistent. Petitioners' scenario appears to bear little or no relationship to the Perry facilities.

Contention 21 (Diesel Generator Reliability)

Here Petitioners simply state that the diesel generators for the on-site emergency power system "are not reliable in automatic start-up and operation because they are identical to generators that have failed. See NUREG-0660." Applicants oppose the admission of this contention on the grounds that no basis is provided for the assertion that the Perry diesel generators are not reliable.

The reliability of diesel generators is the result of a number of factors, including design, testing and operation requirements, inspections, and maintenance. Section 8.3 of the

FSAR presents extensive design and analytical information about the on-site emergency power system and its ability to meet all NRC requirements, including the required redundancy and independence, the single failure criterion, and the required capacity, capability, and reliability to meet General Design Criteria 17 (Electric Power Systems), 18 (Inspection and Testing of Electric Power Systems), and 21 (Protection System Reliability and Testability). Nowhere do Petitioners attempt to explain why the Perry diesel generators will be unreliable in view of the information on reliability presented in the FSAR; nor do Petitioners explain how Applicants fail to meet current NRC requirements and design criteria.

Petitioners make general reference to NUREG-0660. That document, entitled "NRC Action Plan Developed as a Result of the TMI-2 Accident," does not seem to be relevant to the contention. We believe Petitioners may have intended to cite NUREG/CR-0660, "Enhancement of On-Site Emergency Diesel Generator Reliability." Nowhere do Petitioners explain how the information in that document, which predates the FSAR, negates the information submitted in the FSAR. General reference to a 250- plus page document cannot be considered a basis which is "set forth with reasonable specificity."

Contention 22 (Valve Indication)

Petitioners assert that the indication of the position of the power operated relief valve and safety valve is "ambiguous and unreliable, as demonstrated by TMI." Applicants object to this contention on the grounds that it lacks basis. It does not seem to relate to the Perry facility.

The Perry units, being BWR's, do not have the power operated relief valves used at TMI. They do, however, have what are known as "safety/relief valves." As indicated in Appendix 1A of the FSAR, a valve position indicator will be installed in the control room. Petitioners have given no inkling of their basis for alleging that the indication will be "ambiguous and unreliable."

Contention 23 (Coating and Cleaning Stainless Steel Components)

This contention asserts that Applicants' stainless steel components will be "coated and cleaned with components that could contribute to intergranular stress corrosion cracking." The contention is simply a conclusory statement, with no basis for the conclusion. It therefore must be disallowed.

Applicants have described in Sections 5.2.3.4.1 and 6.1.1.1.3 of the FSAR how stainless steel components would be fabricated, processed, manufactured and constructed to protect against stress corrosion cracking, including discussions of coating and cleaning. Petitioners do not explain why these precautions are inadequate.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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