

08/02/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
CLEVELAND ELECTRIC ILLUMINATING)	Docket Nos. 50-440 OL
COMPANY, <u>ET AL.</u>)	50-441 OL
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

NRC STAFF RESPONSE TO MOTION OF SUNFLOWER ALLIANCE ET AL.,
FOR LEAVE TO SUBMIT ADDITIONAL CONTENTION

I. INTRODUCTION

On July 13, 1982, Sunflower Alliance et al. ("Sunflower") moved to amend its intervention petition and add two late-filed contentions.^{1/} The first contention asserts that the NRC Staff has incorrectly calculated in its Draft Environmental Statement (DES) the dose levels to humans from routine emissions from the Perry Nuclear Power Plant (PNPP), thereby rendering the long term environmental and health effect calculations invalid. The second contention alleges that the cost benefit balance has been skewed in favor of licensing PNPP by the failure to consider the value of locally grown and consumed food and nursery crops to the local and larger northeastern Ohio economy in its analysis.

In this response, the Staff urges that these two contentions be rejected for the reasons set forth below.

^{1/} Motion For Leave To Submit Additional Contention, dated July 13, 1982 ("Motion").

DESIGNATED ORIGINAL

Certified By Moore
P507

II. DISCUSSION

In order for proposed contentions, timely filed, to be found admissible, they must fall within the scope of the issues set forth in the Notice of Hearing initiating the proceeding^{2/} and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. The Commission's regulations in 10 C.F.R. § 2.714(b) require that a party proposing a contention to be litigated, submit the contention with its bases set forth with reasonable specificity.^{3/} The purpose of this requirement concerning basis and specificity is (a) to assure that the contention in question raises a matter appropriate to litigate in a particular proceeding,^{4/} (b) to establish a sufficient foundation to warrant inquiry into the subject matter addressed by the assertion,

^{2/} Public Service Co. of Indiana, Inc. (Marble Hill, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976).

^{3/} E.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542, 546 et. seq. (1980).

^{4/} A contention must be rejected where:

- (a) it constitutes an attack on applicable statutory requirements;
- (b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's review of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom, Unit 3), ALAB-216, 9 AEC 13, 20-21 (1974).

and (c) to put the other parties on general notice of what they will have to defend against or oppose.^{5/}

A late-filed contention must comply with additional standards as well, with its admissibility judged by a balancing of the five factors listed in 10 C.F.R. § 2.714(a)(1)(i-v).^{6/}

Those five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The proponent of a late contention must affirmatively address these five factors and demonstrate that, on balance, the late-filed contentions should be admitted as matters in controversy in the proceeding.^{7/}

^{5/} Id. at 20.

^{6/} Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC _____, slip op. (March 31, 1982).

^{7/} Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

A. Low Level Radiation Health Effects

Sunflower alleges that because computerized models based on expected radiation releases are used by the NRC and EPA to estimate radiation doses to hypothetical individuals, "the NRC Staff has not correctly calculated the dose levels to real human beings from routine emissions at PNPP, rendering the long term environmental and health effect calculations invalid." Motion, pages 1-2. The bases for this contention are sixfold. Motion, pages 1-2. The Staff concedes that the Intervenor has set forth with reasonable specificity the bases for the contention.

Notwithstanding that some examples given by Sunflower may provide a basis for this contention, and that it is set forth with reasonable specificity, the contention is nonetheless late-filed and Sunflower does not provide adequate justification as required by § 2.714(a)(1)(i-v).

Sunflower alleges that good cause for lateness exists because the Perry DES and the U.S. Court of Appeals decision in Natural Resources Defense Council v. NRC, No. 74-1586, (D.C. Cir. 1982) (Vermont Yankee III) contains "new information" or information that was previously unavailable to them. Sunflower objects to the method used by the NRC to calculate dose levels to human beings from routine emissions from PNPP. These doses are calculated for the hypothetical individual potentially subject to maximum exposure, and they form the basis of the NRC's evaluation of impacts. DES, pages 5-17. The same analytical approach, i.e. use of the hypothetical "maximally exposed" individual, was used by the Cleveland Electric Illuminating Company in the Applicants'

Environmental Report. This Environmental Report was available in June, 1981, prior to the March 1982 issuance of the Perry DES. In that Environmental Report, the Applicant explains that the calculation of maximum individual doses were based on NRC guides current as of September 1979.^{8/} Therefore, the use of this approach by the NRC hardly qualifies as "new information" that would constitute "good cause" for late-filing under § 2.714(a). Good cause for lateness must be evaluated in terms of when the allegedly new information was available; the issuance of a staff document is not, in itself, new information when the information has been previously available.^{9/} Furthermore, Sunflower has failed to show how Vermont Yankee III provides good cause with respect to the contention advanced.

Sunflower has not made a sufficient showing on the remaining four factors of 10 C.F.R. § 2.714(a). Sunflower merely asserts that the inclusion of this contention will "certainly aid in the development of a sound record," 10 C.F.R. § 2.714(a)(1)(iii) but provides no substantive reasons as to how it will do so. Sunflower admits the issues will be broadened by the admission of this contention, but the amount of delay is "unknown." Motion, pages 2-3. 10 C.F.R. § 2.714(a)(1)(v).

^{8/} Cleveland Electric Illuminating Company Environmental Report, Volume 2, Section 5.2.4.

^{9/} Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974); Indiana and Michigan Electric Co. (Cook Nuclear Plant, Units 1 and 2), CLI-72-25, 5 AEC 13, 14 (1972).

The fact that there are no other means available to protect Sunflower's interest, § 2.714(a)(1)(ii), and that its interest is not being represented by another party, § 2.714(a)(1)(iv), do not outweigh the negative determinations on the other three factors. Therefore, this contention fails to meet the standards for a late-filed contention.

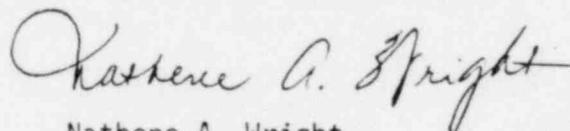
B. Value Of Locally Grown And Consumed Food And Nursery Crops

Sunflower alleges that the "cost benefit analysis has been skewed in favor of licensing PNPP by the failure to include the value of locally grown and consumed food and nursery crops to the local and larger [northeastern] Ohio economy in its analysis." Motion, page 2. Sunflower has failed to specify the basis for this contention. It is unclear to the Staff whether this unsubstantiated assertion is in fact a contention or is in some way related to the contention discussed above. As such, no foundation warranting inquiry into the subject matter has been laid, nor has the Staff been put on notice of what it is to defend or oppose. In this regard, it is not an acceptable contention and should be rejected.

III. CONCLUSION

Accordingly, the Staff opposes both of the proposed contentions and requests that they be rejected.

Respectfully submitted,



Nathene A. Wright
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of August 1982

08/02/82

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NUCLEAR REGULATORY COMMISSION

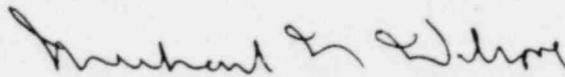
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Unit 1 and 2))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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- Name of Party: - NRC Staff



 Michael N. Wilcove
 Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of August 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF PARTIAL ANSWER TO SECOND SET OF INTERROGATORIES TO NRC STAFF BY THE SUNFLOWER ALLIANCE", "NRC STAFF RESPONSE TO MOTION OF SUNFLOWER ALLIANCE ET AL., FOR LEAVE TO SUBMIT ADDITIONAL CONTENTION" and "NOTICE OF APPEARANCE" 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 2nd day of August 1982:

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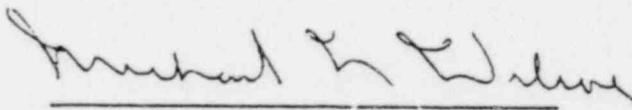
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