12/11/81

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 OL 50-441 OL
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

RESPONSE OF NRC STAFF TO MOTIONS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY FOR LEAVE TO FILE CONTENTIONS 15 AND 16

I. INTRODUCTION

On November 21, 1981, Ohio Citizens for Responsible Energy ("OCRE") moved in two separate filings[1/] to amend its intervention petition to add two new, late-filed[2/] contentions. These concerned, respectively, the the storage and disposal of radioactive materials and the use of magnesium oxide bricks. In this response, the NRC Staff urges that both proposed contentions should be rejected for the several reasons discussed below.

1/ Ohio Citizens for Responsible Energy Motion for Leave to File Its Contention 15 and Ohio Citizens for Responsible Energy Motion for Leave to File Its Contention 16, both dated November 21, 1981.

2/ The Notice of Opportunity for Hearing in this proceeding, 46 Fed. Reg. 12372 (February 13, 1981), required petitions for leave to intervene to be filed by March 16, 1981.

DESIGNATED ORIGINAL

Certified By

DS07
S
1/1

II. BACKGROUND

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,[3/] and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. 10 C.F.R. § 2.714(b) requires that a list of contentions which an intervenor seeks to have litigated be filed along with the bases for those contentions set forth with reasonable specificity. The purpose of the requirement of 10 C.F.R. § 2.714 for a basis is to (a) assure that the contention in question raises a matter appropriately litigated in a particular proceeding,[4/] (b) to establish a sufficient foundation

---

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

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 view 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, Units and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

to warrant further inquiry into the subject matter addressed by the assertion, and (c) to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose."[5/]

A late-filed contention -- in essence an amendment to the initial petition to intervene -- must comply with a more stringent standard than a contention timely filed. When a contention is filed late in a proceeding, its admissibility must be judged by a balancing of the five factors listed in 10 C.F.R. § 2.714(a)(1) of the Commission's regulations. Pacific Gas and Electric Company (Diablo Canyon, Units 1 & 2), CLI-81-5, 13 NRC 361, 364 (1981). In order for any judgment to be made concerning these five factors, the proponent of a late contention must affirmatively address them and demonstrate that, on balance, the contentions should be admitted as matters in controversy in the proceeding. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

The first and most important factor which must be considered in determining the admissibility of an intervenor's late-filed contentions is whether good cause exists for the late filing. When a party filing late contentions fails to demonstrate the existence of good cause for the late filing, it then must make a particularly strong showing with respect to the remaining factors. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977).

5/ Id. at 20.

III. DISCUSSION

A. OCRE's Proposed Contention 15

> The applicant has not provided reasonable assurance that it will be able to safely store and/or dispose of of the radioactive materials that will be generated at PNPP (Perry Nuclear Power Plant).

This late-filed contention should be rejected (1) because the ongoing rulemaking on the storage and disposal of nuclear waste, the "waste confidence" rulemaking, preempts consideration by this Licensing Board of the issues raised by this contention and (2) because OCRE has failed to meet the requirements of §2.714(a) for a late-filed contention.

The substance of OCRE's argument in support of proposed Contention 15 is as follows:[6/] OCRE questions whether a safe off-site disposal of radioactive waste would be available and, if one is not available before the expiration of the operating license for the Perry plant, whether such wastes could continue to be stored safely on-site. OCRE concedes that the concerns it has could be properly addressed in a generic rulemaking, but claims that the ensuing rulemaking has shown little or no progress since the time OCRE filed its contentions in this proceeding. In OCRE's view, that rulemaking has become ineffective. Therefore, OCRE now seeks to have the waste disposal issue litigated in this proceeding instead.

6/ OCRE Motion on Contention 15, supra.

1. OCRE's attempt to have this contention admitted is barred by the express language used by the Commission when it promulgated the notice of the waste confidence rulemaking:

> During this proceeding the safety implications and environmental impacts of radioactive waste storage on site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided, however, that during this proceeding the issues being considered in the rulemaking would not be addressed in individual licensing proceedings. These issues are most appropriately addressed in a generic proceeding of the character here envisaged. Furthermore, the court in the State of Minnesota case, by remanding this matter to the Commission but not vacating or revoking the facility licenses involved, has supported the Commission's conclusion that licensing practices need not be altered during this proceeding. However, all licensing proceedings now underway will be subject to whatever final determinations are reached in this proceeding. 44 Fed. Reg. 61373 (October 25, 1979).

In addition, OCRE concedes that the proposed rulemaking, if "effective", would address the very issues of concern to OCRE.7/ As the Commission stated:

> The purpose of this proceeding is solely to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or storage is available. 44 Fed. Reg. 61373 (October 25, 1979).

7/ As OCRE indicated in its Motion on Contention 16, at 2: "Logic and judicial economy dictate that (w)here factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of the question rather than relitigating the question in each proceeding in which it is raised. Minnesota [sic], supra at 416, 417. So with the procedure the NRC adopted to address this waste materials issue, OCRE grinds no ax. OCRE dissatisfaction stems, however, from the nature of that ensuing rulemaking, and upon that basis seeks to have this issue litigated in the above captioned forum."

A licensing board is a delegate of the Commission[8/] and has no authority to disregard its express direction. If OCRE has a complaint with the progress of a proposed rulemaking, its recourse is to bring that concern, as appropriate, to the Presiding Officer in the rulemaking[9/] or to the Commission itself;[10/] Staff can find no evidence, and OCRE presents none, that this intervenor has in any way attempted to become involved in the waste confidence rulemaking. Nor has OCRE cited any authority for the proposition that a Licensing Board can make its own assessment of the progress of a proposed rulemaking and then, as a result of that assessment, disregard the express Commission direction on the Board's proper role.[11/] For these reasons, proposed Contention 15 should be rejected.

8/ Commonwealth Edison Co., (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980), and cases cited therein.

9/ See 44 Fed. Reg. 61374 (October 25, 1979).

10/ E.g., Diablo Canyon, supra, at 364.

11/ OCRE's argument that it is the Licensing Board's duty "to reassess its finding periodically" on waste confidence is misplaced. Motion on Contention 15, supra, at 4. It is the Commission which has indicated an intent to reassess periodically the finding that it had confidence that safe disposal will take place. See 42 Fed. Reg. 34391, 34393 (July 5, 1977). There is no evidence that the Commission has delegated the task of reassessing to individual licensing boards.

2. OCRE has also failed to meet the standards of § 2.714(a) for late-filed contentions. OCRE's sole attempt to show "good cause" for filing its proposed contention at this late date is the fact that the "absence of progress has raised fresh doubts in this Intervenor's collective consciousness about the safety and health impacts of PNPP."[12/] This position is without merit.

There is no basis for concluding that progress is not now being made in the waste confidence rulemaking. In an Order served November 9, 1981[13/] the Commission set forth a schedule for proceeding in that rulemaking. Participants have until December 21, 1981 to file with the Commission written statements on the major issues of the proceeding and on January 21, 1982 are to present to the Commission oral arguments on these issues.

The apparent failure of OCRE to take part in the proposed rulemaking also casts doubt on its claim that it now has "fresh doubts" about health and safety matters because of the pace of the rulemaking. OCRE could have filed a petition with the Commission--as many parties have already[14/] -- for expedited procedures in the pending rulemaking. But OCRE did not.

12/ Motion on Contention 15, supra, at 4.

13/ The Order is found in Attachment A.

14/ See Appendix B.

Therefore, because the claim of OCRE that no progress is being made is without basis,[15/] OCRE has failed to show good cause for its late-filed Contention 15.

Nor has OCRE made the compensatory strong showing on the remaining four elements contained in § 2.714(a). Contrary to its assertion, OCRE had an alternative means to protect its interest, § 2.714(a)(1)(ii) -- participation in the pending rulemaking. Nor has OCRE shown how it can assist the Board in developing a sound record, § 2.714(a)(1)(iii). OCRE's claim that its members possess "extensive experience" is at best ambiguous and fails to establish just what expertise its members possess.[16/] Thus, it is not possible for the Board to find that OCRE would made a contribution to the development of a sound record in this proceeding.

The failure of OCRE to make the requisite showing on the first three factors is not outweighed by the fact that no existing party could represent OCRE's interest on this issue, § 2.714(a)(1)(iv), or that consideration of the contention, although broadening the proceeding, may not delay it, § 2.714(a)(1)(v).

15/ The Licensing Board must consider the merits of a petitioner's assertion of good cause in ruling on a late-filed petition, Florida Power and Light Co. (St. Lucie, Unit 2), CLI-78-12, 7 NRC 939, 948-949 (1978).

16/ Detroit Edison Co. (Greenwood, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978).

Therefore, even if proposed Contention 15 were not barred by the waste confidence rulemaking, OCRE would have failed to meet the requirements for a late filed contention.

B. OCRE's Proposed Contention 16

> Applicant should include in its containment design for PNPP the use of magnesium oxide bricks.

This contention should be rejected for several reasons:

1. OCRE has failed to satisfy the standards of § 2.714(a) not only for late-filed contentions but also for those timely filed;
2. The contention is an attack on the regulations to the extent it attempts to address an issue arising under the Atomic Energy Act; construed as such an attack, the contention fails to meet the requirements of 10 C.F.R. § 2.758; and
3. The contention fails to state an issue arising under the National Environmental Policy Act (NEPA).

1. OCRE, in filing Contention 16, has failed to satisfy the standards of § 2.714 for a late-filed contention. In addition, even if judged by the more lenient standards for timely filed contentions, this contention is deficient.

OCRE argues that it has shown "good cause" for this late-filed contention because "a newspaper article printed less than two weeks ago...provided OCRE with its first notice of this issue."[17/] This argument misses the mark. "Good cause" for lateness should be judged against an objective, not a subjective standard. The Licensing Board in

---

17/ OCRE Motion on Contention 16, supra, at 2.

the first instance is to look at when the new information first became available, not when the information first came to an intervenor's attention.[18/] An intervenor's excuse for tardiness is to be assessed in the context of the date when the information became available.

OCRE could and should have discovered this matter at an earlier date. OCRE has indicated previously in this proceeding a concern with core melt accident scenarios. For example, OCRE expressed its fear that clam fouling could "cause partial blockage of intake vessels and condensors leading to a loss of coolant accident."[19/] The group also felt that one of the dangers of electromagnetic pulses was that they could "lead to core degradation."[20/] In view of its stated concern with a core meltdown, OCRE had both a perception of a danger and an incentive to seek out means to mitigate it. If OCRE had seriously acted upon this stated interest, it should have found well before the publication of the cited Wall Street Journal article some of the extensive information[21/] on devices to

---

18/ Indiana & Michigan Electric Co. (Cook, Units 1 and 2), CLI-72-25, 5 AEC 13, 14 (1972); Perkins, ALAB-431, supra, at 463.

19/ Perry, supra, at 224.

20/ OCRE Motion for Leave to File its Contention 14, July 6, 1981, at 2.

21/ E.g., Consolidated Edison Co. of New York (Indian Point, Unit 2), LBP-72-16, 5 AEC 43, 52 (1972), U.S.N.R.C., 1979 Annual Report, p. 99.

mitigate core meltdown. In this context, OCRE's excuse for tardiness in filing Contention 16 is inadequate and lacks good cause.

Nor is OCRE persuasive on why the proposed rulemaking on degraded reactor cores[22/] -- which, as is discussed below, is to address the question of devices to retard a meltdown -- is not an adequate means to protect its interests § 2.714(a)(1)(ii). OCRE provides no basis for its assertions[23/] that the results of rulemaking "might" not be applied to the Perry plant or that an examination of the use of magnesium oxide bricks may not be amenable to a generic solution.

In addition, in view of OCRE's assertions concerning its "scarce resources"[24/] and its admitted lack of knowledge about the magnesium oxide bricks or how they work,[25/] more is required than OCRE has provided to show that the group will contribute to the development of a sound record, § 2.714(a)(1)(iii).

22/ Domestic Licensing of Production and Utilization Facilities; Consideration of Degraded or related cores in Safety Regulation, 45 Fed. Reg. 65474 (October 2, 1980).

23/ Motion on Contention 16, supra, at 2.

24/ Id.

25/ Id., at 1.

The fact that OCRE's interest is not being represented by another on this issue, § 2.714(a)(1)(iv), or that the proceeding, while broadened, may not be delayed by admission of this contention, § 2.714(a)(1)(v), does not outweigh the negative determinations on the first three factors. Therefore, proposed Contention 16 should be rejected for failure to meet the standards for a late-filed contention.

Even if this contention were judged by the more lenient standards for a timely filed contention, it should be rejected for failure to provide a basis and to state with the requisite specificity the issue of interest. An intervenor must do more than speculate about the applicability of an issue to the Perry plant. If the basis requirement of § 2.714(b) means anything, it requires some showing that the assertion has applicability to the plant under study.[26/] In addition, by failing to suggest what standard, if any, OCRE believes would be violated by a failure to employ magnesium oxide bricks, OCRE has failed to put the parties on notice of what they must defend against or oppose.[27/] Thus, even if judged as timely filed,

---

26/ Peach Bottom, supra, at 21.

27/ Id.

this contention fails to state an adequate basis and to articulate a concern with reasonable specificity.

2. The fundamental obligation of a licensing board in determining whether an operating license application satisfies the standards for licensing is to ascertain compliance with applicable Commission regulations at issue in the proceeding. As pointed out by the Appeal Board in the Maine Yankee operating license proceeding, a licensing board need not go beyond ascertaining that an applicant has complied with applicable Commission regulations in determining whether there is adequate protection to the public health and safety.[28/] If an intervenor attempts to expand the reach of the regulatory framework to add a requirement which is not mandated by existing regulations, the intervenor in essence is challenging the Commission's rules. The proper recourse them is to file either a petition for a waiver of the rules pursuant to § 2.758 or a petition for rulemaking pursuant to § 2.802.[29/]

28/ Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1010 (1973), remanded for elaboration, CLI-74-002, 7 AEC 2 (1974), further stagement of Appeal Board Views, ALAB-175, 7 AEC 62 (1974), affirmed sub nom, Citizens for Safe Power v. N.R.C. 524 F.2.d 1291 (D.C. Cir. 1975). Accord; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 545 (1975) and Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977).

29/ See Diablo Canyon, supra, at 364. This case makes clear that when an intervenor questions whether more is required of an applicant than compliance with all applicable regulations under the Atomic Energy Act, that issue is properly raised under § 2.758, unless there is a Commission delegation to a Licensing Board of the power to consider the rule challenge. The Commission has made such a limited delegation with respect to certain issues related to the accident at Three Mile Island, Unit 2; Statement of Policy; Further Commission Guidance for Power Reactor Operating Licenses, 45 Fed. Reg. 85236 et seq. (December 24, 1980.)

OCRE's proposed Contention 16, if alleging a safety concern, is a direct challenge to the regulations promulgated pursuant to the Atomic Energy Act. OCRE has identified no regulation to which it asserts that magnesium oxide bricks are in any way relevant, nor has Staff been able to find one. In addition, it cannot be determined whether OCRE's attempt to require a device for retaining a melted core is not in essence a challenge to the specific regulatory provisions with respect to the emergency core cooling system (ECCS).30/

That a device for core retention is not now required by the Commission's regulations can be inferred from the question posed by the Commission in a proposed rulemaking on the consideration of melted cores in safety regulation.31/ The Commission asked for comments explicitly concerning whether the Commission

---

30/ 10 C.F.R. § 50.46; Appendix A to Part 50, General Design Criterion 35; and Appendix K to Part 50.

31/ Domestic Licensing of Production and Utilization Facilities; Consideration of Degraded or Melted Cores in Safety Regulation, 45 FR 65474 (October 2, 1980).

should "require incorporation into containment design, a core retention system to mitigate the consequences of core meltdown..."[32/] The Commission specifically asked for views on the use of magnesium oxide bricks.[33/] A reasonable inference from this proposed rulemaking is that core retention systems, such as the use of magnesium oxide bricks, are not now required under the regulations of the Atomic Energy Act.

It may be that OCRE postulates the need for magnesium oxide bricks in the context of a hypothesized loss of coolant event involving reactor pressure vessel failure or failure of the ECCS. But the first of these scenarios is not litigable when the intervenor, as here, fails to show special circumstances.[34/] As to the second scenario OCRE has made no assertion of the failure of any aspect of the ECCS to conform to the Commission's regulations. If OCRE argues that the Commission's requirements for the

---

32/ Id., at 65476.

33/ Id.

34/ Motion on Contention 16, supra. See Cleveland Electric Illuminating Co. (Perry Units 1 and 2), LBP-81-24, 14 NRC 175, 227 (1981).

ECCS are inadequate to ensure that the ECCS will be effective in preventing a core meltdown,[35/] that is clearly a challenge to the Commission's rules under the Atomic Energy Act, and OCRE's Contention 16 should be rejected as a result.

3. OCRE's contention also fails to the extent it raises an issue relevant to the Commission's NEPA responsibilities. The basis advanced for this contention is that the Commission Staff concluded with respect to an application to construct eight floating nuclear power plants that the addition of certain elements -- including the use of magnesium oxide bricks -- to mitigate the environmental consequences of a core melt accident would ensure that the floating plants would be environmentally acceptable.[36/] As the Staff stated in its Final

---

35/ See Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1089 (D.C. Cir. 1974).

36/ NUREG-0502, Final Environmental Statement, Floating Nuclear Power Plants, Part III, December, 1978; See generally, Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257 (1979).

Environmental Statement, "with suitable modifications [including the magnesium oxide bricks], there is reasonable assurance that eight [floating nuclear plants] can, from an environmental point of view, be sited in generalized, yet to be specified, offshore and nearshore locations of the Atlantic Ocean and the Gulf of Mexico..."[37/] The Staff's consideration of methods to retard a melted core for the offshore plants was the direct result of the unique aspects of the floating plants as compared to those constructed on land.[38/]

In sharp contrast, OCRE fails to allege that the Perry plant possesses unique characteristics of the sort found pertinent in the Offshore proceeding. Therefore, the mere citation to a design feature found in the floating nuclear plants provides no support for this contention.

37/ NUREG-0502, Id., p. 4-13 (emphasis supplied).

38/ FES, supra, pp. 3-46 to 3-49, 4-3 to 4-13; CLI-79-9, supra, 10 NRC 262 n. 11; Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40101 (June 13, 1980).

IV. CONCLUSION

For the reasons stated above, the Licensing Board should reject the late-filed Contentions 15 and 16 proposed by OCRE.

Respectfully submitted,

James H. Thessin

James H. Thessin
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of December, 1981

Appendix A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne
Thomas M. Roberts

SERVED NOV 9 1981

In the Matter of PROPOSED RULEMAKING ON THE STORAGE AND DISPOSAL OF NUCLEAR WASTE (Waste Confidence Rulemaking)	PR-50, 51	(44FR61372)

SECOND PREHEARING MEMORANDUM AND ORDER

I. Background

On May 23, 1979 the U.S. Court of Appeals for the District of Columbia Circuit remanded two nuclear plant licensing amendment actions to the Commission, to consider whether an off-site storage or disposal solution for nuclear wastes will be available by the expiration dates of the nuclear plant licenses in question. If not, the Commission was to consider whether spent fuel can be safely stored at those sites past those expiration dates and until an off-site solution is available (State of Minnesota v. NRC, 602 F.2d 412). A generic rulemaking proceeding was initiated on October 25, 1979 by the Commission, both in response to that judicial decision and also as a continuation of previous proceedings conducted by it in this area (44 Fed. Reg. 61372).

In its Notice of Proposed Rulemaking the Commission stated that the "purpose of this proceeding is solely to assess generically the degree of assurance now available that radioactive waste can

be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or storage is available." 44 Fed. Reg. at 61373.

In undertaking the above generic reconsideration the Commission chose "to employ hybrid rulemaking procedures" (Id.). Members of the public were permitted to file notices of intent to participate as a "full participant" in this proceeding. Such notices of intent were filed by 56 persons and organizations. Statements of position were to be filed by full participants as their "principal contribution to the waste confidence proceeding" (Id.). Such statements of position were filed by 32 participants before June 9, 1980, after the Department of Energy (DOE) as the lead agency on waste management filed its statement of position on April 15, 1980. In accordance with the schedule established by the First Prehearing Conference Order, cross-statements of position discussing the statements filed by other participants were filed by 21 participants on August 11, 1980.

The Presiding Officer by a May 29 order offered all participants an opportunity to file before October 6, 1980 their suggestions as to further proceedings, additional areas of inquiry or further

data or studies. Twenty-three participants in fifteen submittals availed themselves of this opportunity.

By its Memorandum and Order dated January 16, 1981, the Commission observed that with the filing of the participants' statements and cross-statements the opening stage of the proceeding as envisioned in the original notice of proposed rulemaking has been completed. However, it noted that the Working Group was preparing a summary of the record so far compiled, and felt that the content of the record would be a major consideration affecting the choice of further proceedings. Accordingly, the Commission decided that a firm decision on further proceedings should follow rather than precede the Commission's opportunity to review the Working Group's summary of the record and identification of issues. The Working Group filed its report on January 29, 1981. The participants were allowed to submit comments regarding the accuracy of the Working Group's summary of the record and its identification and description of the issues. Such comments were made by 20 participants by March 5, 1981.

II. NRDC's Motion for Judgment

On August 28, 1981 the Natural Resources Defense Council (NRDC) filed a motion requesting a prompt ruling that, on the basis of the present record, there is not reasonable assurance that off-site

storage or disposal will be available by the year 2007-2009. In support of this motion NRDC asserted that the Administration has changed its policy with respect to reprocessing of spent fuel. NRDC contended that, based upon a policy shift by the Administration favoring reprocessing, NRDC was entitled to a ruling now of no reasonable assurance in the availability of off-site spent fuel storage by 2007 because the schedules and timetables analyzed in the DOE position statement were based on storage and disposal of spent fuel, not reprocessed waste.

Seven other participants have filed answers arguing that this motion for judgment should be denied. The American Nuclear Society, Niagara Mohawk et al, the Atomic Industrial Forum, the Tennessee Valley Authority, the Department of Energy, Utility Nuclear Waste Management Group - Edison Electric Institute (UNWMG-EEI), and Consumers Power Company have filed responses. DOE contends that the policy shift toward reprocessing should not affect the Commission's ultimate decision in this proceeding since a purpose of the proceeding is to determine that there is at least one safe means of disposal and much of DOE's program is not dependent upon the waste form. Niagara Mohawk and others stress that the record already compiled in this proceeding adequately demonstrates that reprocessed wastes as well as spent fuel can be safely stored and disposed of. On October 5, NRDC submitted a Request to File Consolidated

Reply to Responses to NRDC Motion for Judgment and Reply to Motion to Strike. In this filing they reiterated their central point stated above and continued to urge a decision now of no confidence that safe waste disposal will be achieved by 2007-2009. On October 8, 1981, the UNWMG-EEI filed a response in opposition to the NRDC Request to File Consolidated Reply.

Because this is a rulemaking proceeding, the Commission may consider information from many sources. The Commission notes that the August 28 NRDC motion was directed to the Presiding Officer of the Waste Confidence proceeding. The October 5 NRDC reply was addressed to the Presiding Officer, but urged the Commission to find no confidence in the event that the Presiding Officer did not have the authority to grant their August 28 filing. The Presiding Officer does not have the authority to make such a judgment in this proceeding. Determinations of confidence are to be made by the Commissioners themselves.

The Commission believes that the issue raised in the August 28 NRDC motion is one of several recent developments which may bear on the Commission's ultimate decision. Accordingly, the Commission accepts and will consider the NRDC filings and the responsive

filings by other participants as a part of the record in the Waste Confidence proceeding and will seek participants' views concerning the applicability of recent developments to its decision in this proceeding.

III. Next Phase of the Proceedings

While most participants indicated in their recommendations for further proceedings that they believe the record is adequate for a decision, the Commission believes that limited further proceedings will be useful to allow the participants to state their basic positions directly to the Commissioners and to enable the Commissioners to discuss with the participants some specific issues including those described later in this order and other based on participants' positions or statements. Therefore, the following procedures are hereby adopted.

The next phase of this proceeding will provide for oral presentations to the Commissioners addressing first the issues already raised in this proceeding, or other significant information which participants believe should be brought to the Commission's attention. Second, presentations should address how the recent developments enumerated below may bear on a Commission decision in this proceeding.

To conduct oral presentations on a manageable basis, it is necessary to have a consolidation of participants holding similar views.

Consequently, for purposes of this order, participants are consolidated into the following groups. The statements already submitted by the participants suggest that the groups listed below constitute a reasonably representative consolidation. The consolidation and sequence of presentations is as follows:

1. Department of Energy

2. Arms Control and Disarmament Agency, Council on Environmental Quality, Office of Science and Technology Policy, and United States Geological Survey.

3. California Department of Conservation, California Energy Commission, Delaware, Illinois, Massachusetts, Minnesota, Missouri, New York, Ocean County and Lower Alloways Creek Township (New Jersey), Ohio, South Carolina, Vermont, and Wisconsin.

4. American Institute of Chemical Engineers, American Nuclear Society, Association of Engineering Geologists, Atomic Industrial Forum, Bechtel Corp., Consumers Power Co., General Electric, Neighbors for a Safe Environment, Scientists and Engineers for

Secure Energy, Tennessee Valley Authority, Utilities Group (Niagara Mohawk, Omaha Public Power Dist., Public Service Co. of Indiana), and Utilities Nuclear Waste Management Group--EEI.

5. Environmental Coalition on Nuclear Power, Marvin Lewis, Mississippians Against Disposal, Natural Resources Defense Council, New England Coalition on Nuclear Pollution, Safe Haven, Ltd., Sensible Maine Power, William Lochstet.

Each consolidated grouping may file a single written statement prior to the oral presentations within 45 days of the date of this order. These written statements should succinctly outline the grouping's arguments and views on the merits of major issues that have been identified in the proceeding, with particular reference to those key points to be addressed orally. Page citations to source documents in the record must be included. These statements may also include suggestions of key questions for the Commission in its discretion to ask of other participants. In any case statements should not exceed 20 pages in length. In addition, each grouping should designate to the Presiding Officer its spokesperson to make the oral presentation on behalf of the grouping. Groups may wish to have technical experts available to answer questions or offer supporting statements. DOE should plan for a presentation of no

more than one hour. Each of the other proposed groupings should plan for a presentation of their views on the issues before the Commission not to exceed thirty minutes. However, additional time will be provided as necessary to answer questions posed by the Commission in the course of the presentations. At the conclusion of the oral presentations, the Commission will allow a brief period for rebuttal.

At the oral presentations, the participants may assume that the Commissioners are familiar with their original position and cross statements, the Working Group's summaries, the participants' comments on the summaries, and the statements filed by consolidated groupings. The Commissioners reserve the right to ask questions at any time during the oral presentations. The participants should be prepared to answer technical as well as more general questions.

In addition to the procedures outlined above for oral presentations and the associated statements to be filed by consolidated groups, individual participants may file written supplementary statements containing their views on how the recent developments outlined below may bear on a Commission decision in this proceeding. Participant supplementary statements should not exceed 20 pages in length and should be filed 45 days after the date of this order.

IV. Recent Developments

Participants are requested to address in their written statements as well as their oral presentations the significance of recent developments listed below to the Commission's decision in this proceeding.

(1) Reprocessing and other waste management program changes

On October 8, 1981, the President issued a statement outlining a policy favoring commercial reprocessing.[1] In that statement he also instructed the Secretary of Energy, working closely with industry and state governments, to proceed swiftly toward deployment of means of storing and disposing of commercial high-level radioactive waste. He said that the steps must be taken now to demonstrate to the public that the problems associated with management of nuclear waste can be resolved.

In addition, as NRDC pointed out, the Deputy Secretary of Energy testified that, "The waste management program that we are proposing differs markedly with the previous Administration's program. . . We believe that the cornerstone of the waste management program should be that the reference waste form, as it was prior to the Carter Administration and as is in concert with

[1] Presidential Nuclear Policy Statement, October 8, 1981.

the rest of the world, is reprocessed high-level waste [instead of spent]."[1]

Also, the President has proposed to dismantle the Department of Energy and place its functions in other Federal agencies.[2] Since this may bear upon the waste management program organization and management issue, participants may wish to comment on the implications of this potential development.

Recent congressional testimony[3] by DOE's Assistant Secretary for nuclear energy indicated that the Department's current plan for high-level waste disposal will emphasize development of a test and evaluation (T&E) facility for the testing of disposal concepts which could affect the schedule for repository development and construction reported in the DOE Position Statement. The Commission is also interested in participants' views on this matter.

(2) Away-from-reactor storage policy

On March 27, 1981, the Department of Energy (DOE) submitted information to the Presiding Officer concerning a change in

[1]July 9, 1981 statement of Kenneth Davis, Deputy Secretary, U.S. Department of Energy before the Subcommittee on Energy and the Environment, Committee on Interior and Insular Affairs at 4-5.

[2]Presidential address to the Nation, "Program for Economic Recovery," September 24, 1981.

[3]October 6, 1981 statement of Shelby T. Brewer, Assistant Secretary for Nuclear Energy, U.S. Department of Energy before the Senate Committees on Energy and Natural Resources and Environment and Public Works.

the DOE program wherein they have "discontinue[d] [their] efforts to provide federal government-owned or controlled away-from-reactor (AFR) [spent fuel] storage facilities." The submittal explains that this change is a result of a "change (reduction) in DOE's projections of the quantity of spent fuel that may require interim storage" and a later time frame for need for such storage.

The submittal states that the previously planned Federal AFR storage is only one of several possible approaches to satisfying storage needs. The letter suggests that the Commission should assume any additional storage requirements will be satisfied by any one or more ways described in the letter.

The participants are asked to comment on the significance to the proceeding of issues, particularly institutional concerns, resulting from this policy change and to comment on the merits of DOE's new projection of spent fuel storage requirements and on the technical and practical feasibility of DOE's suggested alternative storage methods.

V. Schedule

The schedule below shall be followed.

(Note: Assumes order approved by the Commission on November 6.)

(1)	Participants shall file any objection to the Order with the Presiding Officer.	November 20
(2)	Participants may file individual or consolidated written statements prior to oral presentations.	December 21
(3)	Tentative date for oral presentations to the Commission.	January 11

Following the oral presentations, the Commission will decide what additional steps, if any, are necessary and will notify the participants as appropriate.

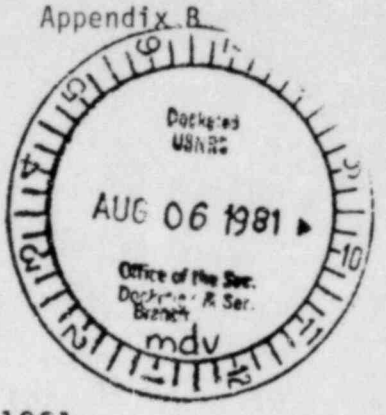
It is so ORDERED.

For the Commission

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.
this 6th day of November 1981.

Appendix B



STATE OF NEW YORK
DEPARTMENT OF LAW
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
TELEPHONE: 212-488-7565

ROBERT ABRAMS
Attorney General

DOCKET NUMBER
PROPOSED RULE PR-50, 51
(44 FR 61372)

August 4, 1981

Chairman Nunzio Palladino
Commissioner John Ahearne
Commissioner Victor Gilinsky
Commissioner Peter Bradford
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Waste Confidence Rulemaking;
PR-50, 51 (44 Fed. Reg. 61372)

Gentlemen:

We are writing to urge the Commission to proceed with and conclude the above rulemaking proceeding, which has been stalled for several months.

On January 16, 1981 the Commission issued an order directing its working group to serve its report by January 29, 1981, and giving the participants until March 5, 1981 to comment on the report. At this stage of the proceeding, the Commission is called upon to decide procedural issues--such as, whether the record should be closed, and if so what schedule should be established to allow for the presentation of closing arguments leading to a decision by the Commission. Nonetheless, although it is nearly five months since the participants' comments were filed, the Commission has not even addressed these procedural issues, and resolution of the confidence issue is nowhere in sight.

This proceeding was commenced pursuant to a court directive in State of Minnesota v. U.S. Nuclear Regulatory Commission, 602 F.2d 412(1979). The U.S. Court of Appeals for the D.C. Circuit there concluded that the Commission had to decide whether it had confidence that nuclear waste will be safely disposed of. A conclusion on confidence or no confidence, for example, could affect whether the Commission could lawfully allow the increased on-site storage of nuclear waste, or, we submit, whether it could legally license new nuclear plants, consistent with its obligations under the Atomic Energy Act to protect public health and safety.

Dupe of
81-08140133

Acknowledged by card. 8/6/81. mdv.

In light of the importance of reaching a prompt decision of the issue of confidence, the Commission initially proposed a schedule under which its final ruling would be issued about 15 months after the commencement of the proceeding on October 25, 1979 (see 44 Fed. Reg. 61375). Under that schedule, the ruling should have been issued by February 5, 1981--some six months ago. Similarly, that schedule would have required a Commission ruling within 280 days after the filing of cross-statements. Since cross-statements were filed on September 5, 1980, a final ruling on the confidence issue was due on June 12, 1981. Yet that date has long since passed, and the Commission has not yet even resolved the procedural issues, let alone the merits.

This long delay is improper in view of the importance of the waste confidence issue, as recognized by the Court of Appeals. It is also most prejudicial in view of the Commission's emphasis on licensing new plants. New plants should not be licensed if the Commission does not have confidence in waste disposal. For the Commission to speed up licensing while refusing to face the confidence issue is at odds with the ruling in State of Minnesota, and contrary to the Commission's duty to protect public health and safety under the Atomic Energy Act.

We accordingly urge the Commission to conclude this rulemaking as a matter of high priority, and to issue shortly a schedule for prompt completion of any necessary procedural steps and for issuance of a final ruling on the confidence issue by a designated date.

Very truly yours,

Ezra I Bialik

EZRA I. BIALIK
Assistant Attorney General

EIB:ra
cc: service list

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

ADDRESS REPLY TO:
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
1935 WEST COUNTY ROAD B-2
ROSEVILLE, MN 55113
TELEPHONE: (612) 296-7342

August 14, 1981

Chairman Nunzio Palladino
Commissioner John Ahearne
Commissioner Victor Gilinsky
Commissioner Peter Bradford
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: In the Matter of Proposed Rulemaking on the Storage and Disposal of Nuclear Waste (Waste Confidence Proceeding) PR- 50, 51 (44 Fed. Reg. 61372)

Gentlemen:

The State of Minnesota joins in the request of Assistant Attorney General Ezra I. Bialik, made on behalf of New York Attorney General Robert Abrams, to proceed with and conclude the above rulemaking proceeding. For the reasons stated in Mr. Bialik's letter dated August 4, 1981, the State of Minnesota urges the Commission to proceed with any remaining procedural steps which may be necessary and to conclude this rulemaking as a matter of high priority.

Very truly yours,

Jocelyn F. Olson
JOCELYN F. OLSON

Marlene E. Senechal
MARLENE E. SENECHAL

Special Assistant
Attorneys General

Counsel for State of Minnesota

cc: attached mailing list

Dupe of
8108210302

LAW OFFICES

LOWENSTEIN, NEWMAN, REIS & AXELRAD

1025 CONNECTICUT AVENUE, N. W.

WASHINGTON, D. C. 20036

202 · 862-8400

ROBERT LOWENSTEIN
JACK R. NEWMAN
HAROLD F. REIS
MAURICE AXELRAD
KATHLEEN H. SHEA
J. A. BOUKNIGHT, JR.
MICHAEL A. BAUSER
DOUGLAS G. GREEN
DAVID G. POWELL

E. GREGORY BARNES
ANNE W. COTTINGHAM
ROBERT H. CULP
PETER G. FLYNN
STEVEN P. FRANTZ
FREDERIC S. GRAY
ALVIN H. GUTTERMAN
DAVID B. RASKIN
DONALD J. SILVERMAN

August 27, 1981

Chairman Nunzio Palladino
Commissioner Victor Gilinsky
Commissioner Peter Bradford
Commissioner John Ahearne
Commissioner Thomas Roberts
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Waste Confidence Rulemaking; PR-50, -51
(44 Fed. Reg. 61,372)

Gentlemen:

In a letter dated August 4, 1981 Assistant Attorney General Ezra I. Bailik, on behalf of New York Attorney General Robert Abrams, urged that the Commission act to conclude the above-referenced rulemaking as a matter of high priority. While not agreeing with all of the statements contained in that letter, the Utility Nuclear Waste Management Group-Edison Electric Institute (UNWMG-EEI) join in the request of the New York Attorney General that this proceeding be brought to a prompt conclusion.

In October the proceeding will enter its third year. Under the estimated schedule published with the notice of proposed rulemaking, this matter should have been concluded and a ruling issued in the early part of 1981. As yet, however, there has not been a decision on the nature of the concluding phase of this proceeding, and no projected date for completion has been established.

In view of the importance of the waste confidence rulemaking and its already lengthy duration, UNWMG-EEI request

Copy of
8109240358

that the Commission act to complete this proceeding promptly and on a prescribed schedule.

Respectfully submitted,

UTILITY NUCLEAR WASTE MANAGEMENT GROUP
EDISON ELECTRIC INSTITUTE

By Michael A. Bauser

Lowenstein, Newman, Reis & Axelrad
Suite 1214
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

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 OL 50-441 OL
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF NRC STAFF TO MOTIONS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY FOR LEAVE TO FILE CONTENTIONS 15 AND 16" 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 11th day of December, 1981:

*Peter B. Bloch, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jay Silberg, Esq.
Shaw, Pittman, Potts, Trowbridge & Madden
1800 M Street, N.W.
Washington, D.C. 20036

Donald T. Ezzone, Esq.
Assistant Prosecuting Attorney
105 Main Street
Lake County Administration Center
Painesville, Ohio 44077

Tod J. Kenney
228 South College Apt. A
Bowling Green, Ohio 43402

Daniel D. Wilt
Wegman, Hesiler & Vanderberg
7301 Chippewa Road, Suite 102
Brecksville, Ohio 44141

Jeff Alexander
920 Wilmington Avenue
Dayton, Ohio 45420

Terry Lodge, Esq.
Attorney for Intervenors
915 Spitzer Building
Toledo, Ohio 43604

*Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert Alexander
OCRE Interim Representative
2030 Portsmouth St. #2
Houston, Texas 77098

James H. Thessin

James H. Thessin
Counsel for NRC Staff