

DOCKETED
USNRC

'82 SEP 14 A11:20
September , 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Before the Atomic Safety and Licensing Board

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

APPLICANTS' MOTION TO REVISE
PROCEDURES FOR LATE-FILED CONTENTIONS

In its August 4, 1981, Procedural Order Requiring Replies by Intervenors Filing Late Contentions, the Licensing Board directed intervenors to file replies to the arguments presented by Applicants and the Staff in their answers to late-filed contentions. Failure to reply, according to the order, "could result in adverse factual or legal findings". The use of the reply mechanism in this proceeding has placed Applicants (and the Staff) in a very unfair position. By putting forward factual allegations and legal arguments for the first time in their reply filings, intervenors have effectively deprived Applicants (and the Staff) of their right to address the intervenors' assertions. For this reason, Applicants respectfully request the Licensing Board to rescind the mandatory reply procedure.

The normal practice for timely-filed contentions is for the intervenor to file his contention, the applicant and staff to respond, and for argument on the contentions to take place at the special prehearing conference held pursuant to 10 C.F.R. §2.751a. The special prehearing conference gives all parties the opportunity to fully comment on the arguments for and against the contention. For late-filed contentions, the oral argument opportunity does not normally exist.

The Licensing Board, in its August 4, 1981, Order was presumably seeking to provide some of the benefits of the special prehearing conference by requiring intervenors to reply to Applicants and the Staff. While providing intervenors with the benefit of a reply, the Order put Applicants at a potentially severe disadvantage. If an intervenor at the special prehearing conference raised a new argument favoring a contention, Applicants were able to respond to the argument on the spot. For a late-filed contention, Applicants have no such right.^{1/} Applicants did not initially anticipate that intervenors' replies would place Applicants in an unfair position. However, in several recent instances, intervenors have used their reply filings to introduce new bases for their contentions, advance new "good cause" argument, and present other matters which should have been included in the original motion submitting the late-filed contention.

^{1/} In fact, under 10 C.F.R. §2.730(c), which allows a Licensing Board to permit a reply to an answer to a motion, it could be argued that the Licensing Board is not authorized to allow a response to such a reply filing.

A number of examples aptly illustrate the problem. Sunflower Alliance's July 13, 1982 Motion for Leave to Submit a New Contention cited as its good cause the April 27, 1982 decision of the U.S. Court of Appeals for the D.C. Circuit in Natural Resources Defense Council v. N.R.C. (involving the Table S-3 rule) and the Draft Environmental Statement issued in March, 1982. In response to the Staff and Applicant answers, Sunflower now cites as good cause two additional studies which, according to Sunflower, were "not yet available to the public at filing time". Sunflower Alliance, et al. Response to NRC Staff Response to Motion for Leave to Submit Additional Contention, dated August 30, 1982. Sunflower did not respond to the arguments on "good cause" made by Applicants and Staff and did not even explain the relevance of these studies to the contention or the Perry plant.^{2/}

Another example is Sunflower's untimely addition of a new "basis" for this contention in its allegation that doses from crops, fish, etc. have not been included. Sunflower Alliance, et al. Response to Applicant's Answer to July 13, 1982 Motion to Submit Additional Contention, dated September 3, 1982, at 1-2.

^{2/} One "study" cited by Sunflower involves the "Savannah River Plant", a Department of Energy weapons facility. Sunflower fails to provide a reference to any such study, thus making it impossible even to confirm its existence, let alone examine its relevance. The second study cited is a paper by Dr. Alice Stewart. Since a discussion of Dr. Stewart's study appeared in the June 19, 1982 issue of Science News (a periodical to which intervenors have often cited), Sunflower's failure to cite this study in its original July 13, 1982 motion should estop it from relying upon it now.

(Continued next page)

The assertion appears unrelated to anything in Sunflower's July 13, 1982 filing. Sunflower has simply taken the opportunity of its reply filing to add an additional argument supporting a late-filed contention on radiation doses. Apart from being incorrect,^{3/} it is also based on a citation that is at least 3 years old.^{4/} Thus, there was no justification for Sunflower's failure to include this argument, however unmeritorious, in its original motion.

Another argument which Sunflower raised for the first time in its reply was that doses were "calculated for the 'average' individual within 50 miles of PNPP -- not taking into account the relatively higher fallout nearer the plant". Sunflower Response to Applicant, at 2. Here, too, the assertion, while clearly incorrect,^{5/}

2/(continued)

Furthermore, Stewart's studies have been thoroughly evaluated and considered in the scientific literature. See, e.g., Report of the Advisory Committee on the Biological Effects of Ionizing Radiation, "The Effects on Populations of Exposure to Low Levels of Ionizing Radiation" (1972) ("BEIR I"), pp. 160-167; Committee on the Biological Effects of Ionizing Radiations, "The Effects on Populations of Exposure to Low Levels of Ionizing Radiation" (1980) ("BEIR III"), pp. 536-548, 553-556.

3/ Both the DES and the FES show that the Staff's evaluation included doses from locally grown food. See DES (and FES) 5.9.3.1.2, and App. D. See also Environmental Report - Operating License Stage ("ER-OLS"), §5.2.2.

4/ The document cited as "Methodologies for the Study of Low-Level Radiation in the Midwest-Huver (sic) et al." was printed in 1979. We assume that this is also the document referred to by Sunflower in their reply to the Staff's answer when they mentioned "conclusions by ... Hoover".

5/ Both the DES/FES (see, e.g., Appendix D, Tables D-5, D-6, D-7, D-8) and the ER-OLS, §§5.2.4.1, 5.2.4.2 and Tables 5.2-2, -4, -6 evaluated doses to the maximally exposed individual.

is also unrelated both to Sunflower's original July 13, 1982 motion and to Applicants' response.

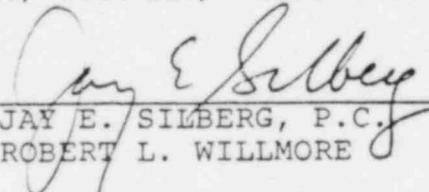
In all of these cases, Applicants should have had the opportunity to point out the numerous defects in Sunflower's additional arguments. While it might be argued that Applicants could merely request the opportunity to respond to intervenors' replies, such a suggestion would merely extend the already extended time frame for filing on late-filed contentions. This problem becomes increasingly important as we approach the evidentiary hearing. An additional response by Applicants would also lead to intervenors seeking an opportunity to respond to Applicants' answer to intervenors reply to Applicants' answer to intervenors' original motion, and so on.

A motion to admit a late-filed contention should put forward all of an intervenor's arguments for the motion. Applicants can then respond to those arguments and the Licensing Board can decide the issue. The present procedure permits intervenors to submit a "bare-bones" pleading and then use the reply mechanism to deprive Applicants of their right to respond to arguments which the intervenor failed to think of in time for his initial pleading. As it is currently being applied, the reply required by the Licensing Board places Applicants at an unfair disadvantage. Applicants therefore respectfully request that the procedure be revised and that the mandatory reply obligation be rescinded.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

BY:


JAY E. SILBERG, P.C.
ROBERT L. WILLMORE

Counsel for Applicants
1800 M Street, N.W.
Washington, DC 20036
(202) 822-1000

UNITED STATES OF AMERICA

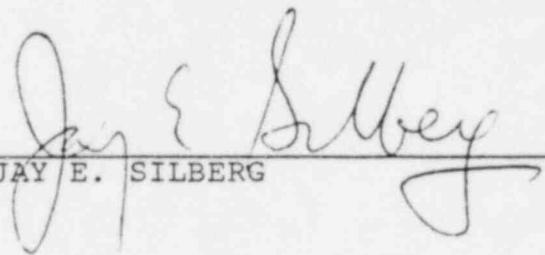
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Motion To Revise Procedures For Late-filed Contentions" were served by deposit in the U.S. Mail, First Class, postage prepaid, this 13th day of September, 1982, to all those on the attached Service List.



JAY E. SILBERG

September 13, 1982

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SERVICE LIST

Peter B. Bloch, Chairman
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

Dr. Jerry R. Kline
Atomic Safety and Licensing Board
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

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

Stephen H. Lewis, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Christine N. Kohl, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ms. Sue Hiatt
OCRE Interim Representative
8275 Munson Avenue
Mentor, Ohio 44060

Dr. John H. Buck
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel D. Wilt, Esquire
P. O. Box 08159
Cleveland, Ohio 44108

Gary J. Edles, Esquire
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

John G. Cardinal, Esquire
Prosecuting Attorney
Ashtabula County Courthouse
Jefferson, Ohio 44047

Terry Lodge, Esquire
915 Spitzer Building
Toledo, Ohio 43604