

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD 82 OCT -6 A11:47

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

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SERVED OCT 6 1982

In the Matter of

Docket Nos. 50-440-OL
50-441-OL

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

(Perry Nuclear Power Plant, Units 1 & 2)

October 6, 1982

MEMORANDUM AND ORDER
(Concerning Procedures for Late-Filed Contentions)

On September 13, 1982, Cleveland Electric Illuminating Co., et al., (applicant) filed a motion that, in essence, requested reconsideration of our Order of August 4, 1981. That Order related to the procedure to be followed when intervenors file late contentions. It required intervenors to respond to applicant's arguments that their motions to admit late-filed contentions should be denied.

Applicant now requests, based on its recent experience with this procedure, that intervenors no longer be permitted to respond in writing to its motions concerning their late-filed contentions. It claims that intervenors have abused this process by filing unexpected material in their reply pleadings, depriving applicants of the opportunity to respond to this new material. Intervenors Sunflower Alliance Inc., et al. and Ohio Citizens for Responsible Energy have joined in opposition to this motion. The Staff of the Nuclear Regulatory Commission (staff) supports applicant's motion, to the extent that it favors prohibiting intervenors from using their reply to introduce new material.

We find applicant's argument to be without merit. We are governed by Houston Lighting and Power Company, ALAB-565, 10 NRC 521 (1979), which deals with this subject extensively and appears to prohibit us from adopting the

principle urged upon us by applicant. The Appeal Board said, in a somewhat tentative voice:

Before any suggestion that a contention should not be entertained can be acted upon favorably, the proponent of the contention must be given some chance to be heard in response.

Id. at 525. Despite the advisory nature of the Appeal Board's conclusion, we agree with it.

The decision on the admission of a contention is a crucial part of the case. Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. If applicant challenges the basis for a late-filed contention, the rationale of Allens Creek seems to be directly applicable. In addition, although Allens Creek is directly applicable only to the filing of timely contentions, we believe its implications are far reaching. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. The Board needs to know intervenor's views about the previous availability of information on which intervenor relies to show cause for late filing. The best source of this information is the party directly affected by the argument.

We therefore conclude that intervenors should be permitted to reply to the opposition to the admission of a late-filed contention. Since intervenors do not challenge our order requiring them to file such replies, we need not reconsider our decision to require those replies.

Relevance

We note that applicant and staff argue that the prevailing procedure permits intervenors to file bare-bones pleadings and to spring new arguments on the unsuspecting applicant. However, applicant's motion was filed prior to our decision concerning Sunflower's Late-Filed Radiation-Dose Contention. LBP-82-79, 15 NRC _____ (September 15, 1982). In that decision, we dis-

cussed some "surprise statements of cause for late filing" and concluded that there was no good cause found in those surprise statements. Had we found that good cause had been shown in those filings, we would have provided applicant a chance to respond. The principle that a party should have an opportunity to respond is reciprocal. When applicant raises legal and factual issues in its response, intervenors may respond to those. When intervenor introduces material that is entirely new, we will permit applicant to respond. Due process requires an opportunity to comment.

We agree with the staff that intervenor's reply should not be an opportunity to assert new bases for late-filed contentions. Intervenors are now experienced in what is expected of them. Their initial filings, which often have been of high quality, are expected to contain their best arguments and factual support for their contentions. While they may respond to applicant's challenges, their response should be more by way of explanation than of new evidence or entirely new lines of argument.

If intervenors find that they must make new factual or legal arguments, they should clearly identify this new material and give an explanation of why they did not anticipate the need for this material in their initial filing. If this explanation is satisfactory, the material may be considered; but applicant will be permitted to respond.

We will permit intervenors to respond fully concerning the admissibility of their contentions, but we will not permit the opportunity to reply to be abused. As staff has pointed out, an overly liberal use of the opportunity to reply would be tantamount to permitting intervenors to refile late-filed contentions without showing good cause for late refiling.

It is our opinion that the reply procedure used in this case has worked well. It has been helpful to the Board in deciding the appropriateness of admitting contentions. See LBP-82-79, 15 NRC _____ (September 15, 1982) at 2, 3. Although the procedure has occasionally assisted the Board in excluding contentions, intervenors have not objected to its use. By permitting the Board to be fully informed before deciding whether to admit contentions, the procedure has helped the Board to reach appropriate decisions

about the admission of contentions. In particular, it has helped the Board to admit contentions of potential safety and environmental importance and to exclude contentions that have no basis, in light of the documents already on file in this case.

O R D E R

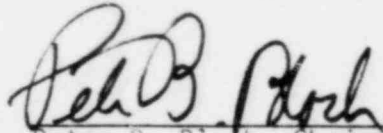
For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 6th day of October, 1982,

ORDERED

(1) Intervenors shall comply with the procedures governing late-filed contentions that are announced in the accompanying memorandum.

(2) In all other respects, Cleveland Electric Illuminating Co., et al.'s September 13, 1982 Motion to Revise Procedures for Late Filed Contentions is denied.

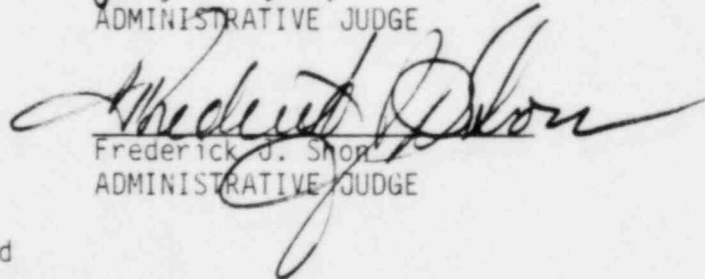
FOR THE
ATOMIC SAFETY AND LICENSING BOARD



Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE



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Bethesda, Maryland