September 30, 1982

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' ANSWER TO SUNFLOWER ALLIANCE, INC. MOTION TO COMPEL APPLICANTS TO ANSWER SECOND SET OF INTERROGATORIES

By motion of September 10, 1982, Sunflower Alliance, Inc. et al. ("Sunflower") asks the Licensing Board to compel Applicants to answer certain interrogatories of Sunflower's Second Set of Interrogatories to Applicants, dated April 30, 1982. All the interrogatories in question are directed at Issue #1 -- the workability of the off-site emergency evacuation plan. On September 2, 1982, Applicants' counsel and Mr. Daniel D. Wilt, counsel for Sunflower, conducted a telephone conference with regard to Applicants' objections to Sunflower's Second Set of Interrogatories. In light of the relevancy rulings made by the Licensing Board in its Order of August 18, 1982 (Concerning a Motion to Compel), Applicants agreed to

answer certain interrogatories to which they originally had objected, and to reconsider their objections as to other interrogatories. As to those interrogatories Applicants hereby agree to answer, Applicants will file their responses shortly.

The Legal Standards

Applicants already have discussed the relevant legal standards, see "Applicants' Substantive Answer to Sunflower Alliance, Inc. et al. Motion to Applicant to Compel Discovery" ("Applicants' Substantive Response"), filed July 23, 1982, and will not burden the Licensing Board with yet another discussion of these relatively straight forward legal principles. It may bear repetition, however, that the relevant standard is set forth unequivocally in the Commission's Rules of Practice. 10 C.F.R. § 2.740(b)(1) clearly requires that discovery "shall relate only to those matters in controversy." The fact of the matter is that many of Sunflower's interrogatories do not relate to Issues admitted by the Licensing Board to this proceeding. However broad Sunflower believes discovery ought to be, Sunflower simply is not entitled to discovery once it reaches beyond the subject matter of the Issues in controversy. It also may bear repetition that Sunflower again mischaracterizes the basis of Applicants' objections. Applicants have never objected to any interrogatory on the ground that Sunflower is seeking information inadmissible at the hearing. See "Motion to Strike Sunflower Reply Brief in Support of

Motion to Compel Discovery," filed August , 1982. Sunflower's arguments on that point attack a straw man no one is attempting to defend.

Applicants' Objection:

Applicants refer the Licensing Board to Applicants' previous discussion of the scope of Issue #1 contained in Applicants' Substantive Response, at pages 5-7. As in that Response, Applicants will examine each of Sunflower's arguments, using the numbered paragraphs in Sunflower's brief.

Paragraphs 7 - 10:

Sunflower asks the Licensing Board to direct Applicants to answer Interrogatories #44, #45, #46 and #47, but only with regard to Applicants' Emergency Operations Facility ("EOF"). As to Interrogatory #44, Sunflower limits the Interrogatory to Sections 5.1 and 5.2 of NUREG-0814.1/ As to Interrogatory #47, Sunflower has clarified its concern as directed at whether visitors will be allowed in the EOF during normal operating conditions. With these limitations, Applicants will answer the Interrogatories. The responses will be filed shortly.

1/ Sunflower identifies only Sections 5.1 and 5.2 as being relevant to Issue #1. Thus, Sunflower only has attempted to meet its burden of persuasion as to those two sections. See Applicants' Substantive Response, at 4-5 (burden of persuasion lies with party seeking discovery).

Paragraphs 11 - 13:

Sunflower asks the Licensing Board to direct Applicants to answer to Interrogatory #56.

The Interrogatory deals with Applicants' engineered safeguards to prevent or reduce radioactive releases during an accident. The Interrogatory thus goes far beyond the scope of the contention admitted by the Licensing Board. As best Applicants can determine, Sunflower's argument is that the plant's engineered safeguards are relevant to Issue #1 since their failure might cause more serious radioactive releases, making it imperative that there be a workable emergency evacuation plan. Sunflower also appears to argue that it needs discovery on the engineered safeguards in order to determine whether the appropriate Emergency Action Level ("EAL") is used as to any accident. By those lines of logic, every safety feature in the plant comes within the scope of Issue #1. Indeed, there would be no need for any other safety contentions since, under Sunflower's logic, every safety consideration would impact the need for a workable off-site emergency evacuation plan.

These arguments already have been rejected by the Licensing Board in the context of plant instrumentation. During the August 13, 1982, Prehearing Telephone Conference, intervenors argued that they wanted discovery on plant instrumentation since such instrumentation would inform the operators that an accident was taking place, which, in turn, would be the

basis for the appropriate emergency response. Applicants noted that such reasoning, if taken to its logical conclusion, would mean that every safety related feature in the plant was subsumed within the scope of Issue #1. Applicants observed that a line must be drawn somewhere, and that the Issue should not be read so broadly as to make its scope virtually boundless.

The Licensing Board agreed that Issue #1 could not be given the breadth intervenors are seeking. As to the plant instrumentation interrogatories, the Licensing Board held that intervenors could not use Issue #1 to obtain discovery on whether the plant instrumentation would function as it is designed to function. Rather, intervenors would have to assume "that the instrumentation in the plant is sufficient to inform the people within the plant of the condition of the plant." Tr. at 708. There is no principled distinction between the arguments made by intervenors with regard to plant instrumentation and by Sunflower with regard to the plant's engineered safeguards. If anything, the engineered safeguards are removed even a step further from the workability of the off-site emergency evacuation plan. For the same reasons that intervenors are not permitted to use Issue #1 to obtain discovery on all plant instrumentation, they should not be allowed to use the Issue to obtain discovery on the plant's engineered safeguards.

An additional answer to Sunflower's argument is that the need for an off-site emergency evacuation plan is not at issue here. Commission regulations require that Applicants demonstrate a workable plan, and Applicants will not receive a full power operating license until the Commission has concluded that such a plan exists. Whether the need for a workable plan is more crucial or less crucial depending on the consequences of any one particular accident is irrelevant to the fact that Applicants must have a workable plan. Thus, Applicants' obligation to demonstrate such a workable plan is completely unaffected by the reliability of the plant's engineered safeguards.

Paragraphs 14 - 15:

Sunflower asks the Licensing Board to direct Applicants to answer Interrogatories #59 and #60. Sunflower argues that the interrogatories are relevant, and, therefore, should be answered.

Applicants already have answered the Interrogatories to the best of their ability. Applicants have not objected to the Interrogatories on the basis of relevancy or for any other reason.

As clearly stated by Applicants in response to the Interrogatories, and as restated during the telephone conference of September 2, 1982, neither Interrogatory can be answered further. There simply is no way Applicants can

determine the consequences associated with a particular evacuation time estimate without knowing the type of accident, the time of day, the meteorological conditions, and a host of other factors necessary to determine the consequences of any accident. Similarly, Applicants are unable to state an "acceptable" range of estimates without knowing what type of accident and associated conditions Applicants are dealing with.

Paragraph 16:

Sunflower asks the Licensing Board to direct Applicants to answer Interrogatories #61 and #62.

The Interrogatories are irrelevant. Issue #1 is concerned with the workability of the off-site emergency evacuation plan. The Issue is not concerned with the radiological consequences of particular accidents. Sunflower argues that it must have this information to determine whether the off-site emergency evacuation plan is workable as to every type of accident. Sunflower's argument, however, is predicated on a misappreciation of the purpose of evacuation planning.

Applicants do not contend, nor are they required to show, that evacuation will be used for every type of accident and as to all weather conditions. To the contrary, it is well established that in certain situations, the desirable protective action would not be evacuation, but sheltering. What Applicants are required to show is that there is a workable off-site emergency evacuation plan -- that is, a plan that will

safely evacuate the residents within the plume exposure pathway EPZ, or a selected portion thereof. The evacuation time estimate study is developed not to show that the evacuation will "outrun" all accidents under all conditions, but, rather, as a planning tool to enable the responsible officials in time of an emergency to determine whether an evacuation should be ordered or some other protective measure taken. As recently stated by the licensing board in Diablo Canyon, "[t]he purposes for evacuation time estimates are to identify transportation routes for which traffic control planning is needed and to provide time estimates which enable decision makers to choose between sheltering and evacuation as protective actions." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Initial Decision, slip op. at 173 (August 31, 1982).2/ If the consequences of a particular accident are so serious that evacuation is not feasible, the off-site emergency evacuation plan does not thereby become unworkable. It simply means that evacuation is not the desirable protective measure.

2/ See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 N.R.C. 1211, 1574-75 (1981) (licensee's plan correctly considers sheltering as alternative to evacuation if "evacuation could not be well under way prior to expected plume arrival due to short warning time, high wind speeds and/or foul weather"), 1578-79 ("primary purpose of [evacuation] time estimates is to provide a basis on which to determine whether evacuation is a viable protective action option in a particular situation"); see generally NUREG-0654, at 8-9 (discussing protective actions that may be taken within plume exposure pathway EPZ); NUREG-0396, at 13 (same).

Thus, the radiological consequences of particular accidents are not relevant to the workability of the off-site emergency evacuation plan, and, therefore, not within the scope of Issue #1.

Paragraphs 17 - 18:

Sunflower asks the Licensing Board to direct Applicants to answer Interrogatories #63 and #64.

Applicants objected to Interrogatory #64 and part of Interrogatory #63 on the ground that Issue #1 is concerned only with off-site emergency evacuation planning within the plume exposure pathway EPZ. Commission regulations do not require emergency evacuation planning beyond the plume exposure pathway EPZ, and inquiries directed at areas outside of that EPZ thus are beyond the scope of the admitted Issue. (And, for that matter, beyond the scope of any issue that could be admitted under applicable Commission regulations.)

Sunflower advances two arguments for why Applicants should be ordered to answer the Interrogatories. First, Sunflower argues that the ingestion pathway EPZ is relevant to the Issue, and that areas within the ingestion pathway EPZ thus may be the subject of discovery. Second, Sunflower cites a pending petition for rulemaking which seeks to have the plume exposure pathway extended from ten to twenty miles.

Sunflower's first argument -- that the ingestion pathway EPZ is relevant to Issue #1 -- was dispositively rejected by

the Licensing Board in its Order of August 18, 1982 (Concerning a Motion to Compel), at page 2. Sunflower implies that 10 C.F.R. § 50.47(a)(10)3/ and NUREG-0654 require emergency evacuation planning for the entire ingestion pathway EPZ. Sunflower, however, cites no specific passages for this extraordinary assertion. Quite to the contrary, although certain protective actions are required for the ingestion pathway EPZ, evacuation has never been one of those actions, and no regulation, NUREG, or licensing or appeal board decision has even suggested that evacuation may be required for that EPZ. See Applicants' Substantive Response, at 6-9.

Sunflower's second argument -- that there is a pending rulemaking petition to extend the plume exposure pathway EPZ -- provides no support for Sunflower's position. If anything, the rulemaking petition implicitly recognizes that evacuation planning is not required outside the plume exposure pathway EPZ, and that the appropriate challenge to the prevailing standard should be in the form of a request to the Commission for reconsideration through a generic rulemaking proceeding. Thus, neither of the reasons advanced by Sunflower on behalf of its interrogatories can be the basis of an order compelling Applicants to answer.

3/ Presumably Sunflower is citing to § 50.47(b)(10). There is no § 50.47(a)(10).

During the Telephone Prehearing Conference of August 13, 1982, the Licensing Board raised the possibility that some form of emergency evacuation planning may be necessary outside of the plume exposure pathway EPZ. The Licensing Board cited a sentence on page 11 of NUREG-0654 which reads: "On the other hand, for the worst possible accidents, protective actions would need to be taken outside the planning zones." The Licensing Board wondered whether this might require some form of emergency planning outside of the plume exposure pathway EPZ.

Neither Commission regulations nor NUREG-0654 recommend evacuation planning beyond the plume exposure pathway EPZ. Both the regulations and NUREG-0654 expressly state that the plume exposure pathway EPZ should be approximately ten miles in radius. 10 C.F.R. § 50.47(c)(2); NUREG-0654 at 11-12.4/ NUREG-0654 acknowledges that it is "unlikely that any protective actions for the plume exposure pathway would be required beyond the plume exposure pathway EPZ." Id. at 12. This statement in NUREG-0654 is consistent with the statements in NUREG-03965/ that doses of radiation requiring evacuation "are,

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4/ The Commission cites NUREG-0654 as guidance on implementing its emergency planning regulations. See 10 C.F.R. Part 50, Appendix E, § I n.1 and § IV n.4; Notice of Final Rulemaking, 45 Fed. Reg. 55402, 55403 (August 19, 1980).

5/ NUREG-0396, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light-Water Nuclear Power Plants" (December, 1978), introduced the concept of emergency planning zones. The NUREG has been endorsed for use as guidance, see Commiss. n Policy

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for all practical purposes, confined to areas within 10 miles of the reactor," NUREG-0396 at I-50, and that the approximately ten mile limit is designed to account for "a full spectrum of accidents and corresponding consequences," NUREG-0396 at 15.

NUREG-0654 also indicates that in the extremely unlikely event of a severe core-melt accident requiring evacuation beyond the plume exposure pathway EPZ, the "detailed planning within the 10 miles would provide a substantial base for expansion of response efforts." NUREG-0654 at 12. Similarly, NUREG-0396 states that "actions [outside the plume exposure pathway EPZ] could be taken on an ad hoc basis using the same considerations that went into the initial action determinations," NUREG-0396 at 16.

As stated in NUREG-0396, the ten mile limit for the plume exposure pathway EPZ "sets bounds on the planning problem." NUREG-0396 at 14. In this regard, it must be emphasized that the Commission intentionally was very conservative in where it drew the line on evacuation planning. As the Commission has noted, the regulatory basis for the EPZ concept is a "decision to have a conservative emergency planning policy in addition to the conservatism inherent in the defense-in-depth philosophy."

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Statement, 44 Fed. Reg. 61123 (October 23, 1979); 10 C.F.R. § 50.54 n.1, Part 50, Appendix E n.2, and its conclusions and basic rationale concerning EPZs are restated in NUREG-0654.

Statement of Considerations to Final Rule, 45 Fed. Reg. 55402, 55405 (August 19, 1980).6/ The highly conservative nature of the ten mile limit has been recognized in a number of decisions refusing to consider evacuation beyond the plume exposure pathway EPZ. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 N.R.C. 1211, 1553-1559 (1981) (refusing to rule on or review the adequacy of twenty mile emergency response plans); Southern California Edison Company (San Onofre Nuclear Generating Station, Unit 1), DD-81-19, 14 N.R.C. 1041, 1047-49 (1981) (uncategorically refusing to consider evacuation planning outside the plume exposure pathway EPZ); Southern California Edison Company (San Onofre Nuclear Generation Station, Unit 1), DD-81-20, 14 N.R.C. 1052, 1059-53 (1981) (same).7/

6/ Essentially, the ten mile delimitation was the result of a careful balancing by the Commission. On the one hand, the Commission sought to provide maximum protection to the public. On the other hand, it was recognized that at some point the benefits of evacuation are greatly outweighed by its costs. The Commission deliberately struck a highly conservative result by requiring evacuation up to ten miles from the plant -- this despite overwhelming evidence that evacuation to that distance would almost never be necessary. The ten mile limit was chosen in large part because the Commisson's supporting documents showed that the immediate benefits from evacuation were almost nonexistent beyond that point. See NUREG-0396, at I-50 - I-52. Sunflower, by citing sources that claim that evacuation is necessary beyond ten miles, is requesting that the Licensing Board litigate the factual findings and the balancing of interests at the core of the Commission's emergency planning regulations.

7/ See also Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1 and 2), "Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference)," dated September 22, 1982. In Shearon Harris, an intervenor

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Many of the Commission's regulations clearly indicate that evacuation should be limited to the plume exposure pathway. For instance, 10 C.F.R. § 50.47(b)(5) requires "early notification and clear instruction to the populace" for protective actions "within the plume exposure pathway Emergency Planning Zone" (emphasis added). 10 C.F.R. Part 50, Appendix E, § IV requires "an analysis of the time required to evacuate and for taking protective actions for various sectors and distances within the plume exposure pathway EPZ for transient and permanent populations" (emphasis added). The regulations also call for "yearly dissemination to the public within the plume exposure pathway EPZ of basic emergency planning information," and for "initial notification of the public within the plume exposure pathway EPZ within about 15 minutes" of a radiological

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submitted a proposed contention to expand the plume exposure pathway EPZ to twenty miles. The intervenor argued that evacuation might be necessary outside of the ten mile plume exposure pathway EPZ for worst case accidents. The Shearon Harris licensing board rejected the proposed contention as a "direct attack on 10 C.F.R. 50.47(c)(2) and 10 C.F.R. Part 50, Appendix E, which require a plume exposure pathway EPZ of 'about 10 miles' in radius." Id., slip op. at 26.

The recent Diablo Canyon Initial Decision, supra, also is of particular relevance. There, the State of California had certain emergency evacuation planning requirements going beyond the ten mile plume exposure pathway EPZ. The licensing board held that while the State had the right to promulgate and enforce such requirements, the licensing board had no authority to enforce evacuation requirements going beyond the federally established ten mile plume exposure pathway EPZ. See id., slip op. at 12-13, 97.

emergency. 10 C.F.R. Part 50, Appendix E, § IV.D.2 and 3 (emphasis added). Similarly, Appendix E requires the issuance of an operating license before a full-scale exercise to test emergency planning "which will enable each State and local government within the plume exposure pathway EPZ . . . to participate." 10 C.F.R. Part 50, Appendix E, § IV.F.1.b (emphasis added). Perhaps most significant is the Commission's statement that "[t]he plans for the ingestion pathway EPZ shall focus on such actions as are appropriate to protect the food ingestion pathway." 10 C.F.R. §§ 50.47(c)(2), 50.54(s)(1) (emphasis added).8/ It simply is not possible to reconcile the body of Commission regulations dealing with emergency evacuation solely in the context of the plume exposure pathway EPZ with the argument that Applicants must plan for evacuation outside the plume exposure pathway EPZ.

For these reasons, Sunflower's request that Applicants be compelled to answer Interrogatories #63 and #64 should be denied.

8/ By requesting that evacuation planning be required beyond the plume exposure pathway EPZ, Sunflower effectively attempts to negate the Commission's mandatory language that planning beyond the plume exposure pathway EPZ and within the ingestion pathway EPZ focus only on protecting the food ingestion pathway.

Paragraph 19:

Sunflower asks the Licensing Board to direct Applicants to answer Interrogatory #69.

For the same reasons discussed with regard to Interrogatories #61 and #62 (Paragraph 16), Interrogatory #69 is irrelevant in that it seeks information on radiological consequences of nuclear accidents rather than information on the workability of the off-site emergency evacuation plan.

Moreover, Applicants' opinion of what an "acceptable level of risk to the public" would be, has no relation whatsoever to the workability of off-site emergency evacuation plans. In this regard, Applicants note that they do not "have an assumption of what is acceptable in terms of human life loss and injury as a cost of doing business."

Paragraph 20:

Applicants will file their response to Interrogatory #75 shortly.

Paragraph 21:

Sunflower asks the Licensing Board to direct Applicants to answer Interrogatory #80.

As stated by Applicants' counsel to Mr. Wilt, Applicants are at a complete loss on how Interrogatory #80 is at all related to the off-site emergency evacuation plan. The explanation offered by Sunflower in its Motion to Compel -- that "Applicant[s'] answer doesn't cite anything which would

show that the emergency plan has taken into account the consideration of liquid pathway [sic]" -- does no more than restate the Interrogatory without providing any explanation for its relevancy. Sunflower thus has not carried its burden of persuasion on the Motion. See Applicants' Substantive Response, at 4-5 (party seeking discovery must do more than make general assertion of relevancy).

Applicants only can reassert that they do not understand how the liquid pathway has any relationship to the workability of the off-site emergency evacuation plan. Sunflower has offered no explanation for what appears to be a totally irrelevant Interrogatory. The Licensing Board should deny Sunflower's request that Applicants be compelled to answer the Interrogatory.

Paragraph 22:

Applicants will file their response to Interrogatory #85 shortly. However, as stated to Mr. Wilt, Applicants will not answer any portion of the Interrogatory directed at Applicants' security plans. Nor has Sunflower moved to compel Applicants to answer the Interrogatory with regard to Applicants' security plans.

Paragraph 23:

Despite Sunflower's implication to the contrary, Interrogatory #86 does not ask Applicants to provide a bibliography of protective action studies. Mr. Wilt, however, asked

Applicants' counsel to provide such a bibliography voluntarily, and Applicants will supply such a bibliography shortly.

Paragraph 24:

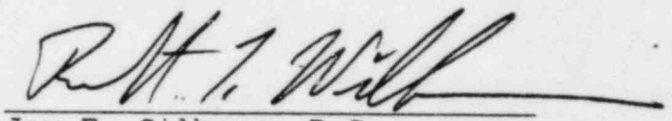
Applicants will file a response to Interrogatory #88 shortly that will respond to those portions of the Interrogatory relevant under the Licensing Board's Order of August 18, 1982 (Concerning a Motion to Compel).

Conclusion

For the stated reasons, Sunflower's Motion to Compel responses to its Second Set of Interrogatories should be denied in its entirety.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 

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Dated: September 30, 1982

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer to Sunflower Alliance, Inc. Motion to Compel Applicants to Answer Second Set of Interrogatories," were served by deposit in the U.S. Mail, First Class, postage prepaid, this 30th day of September, 1982, to all those on the attached Service List.

Robert L. Willmore

Dated: September 30, 1982

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