

12/15/78

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 50-341
THE DETROIT EDISON COMPANY,)	(Operating License)
<u>et al.</u>)	
(Enrico Fermi Atomic Power)	
Plant, Unit No. 2))	

APPLICANTS' ANSWER TO FIRST AMENDED
INTERVENTION PETITION OF
CITIZENS FOR EMPLOYMENT AND ENERGY

Introduction

On October 9, 1978, Citizens for Employment and Energy ("CEE") filed a request for leave to intervene in this operating license proceeding for the Enrico Fermi Atomic Power Plant, Unit No. 2 ("Fermi 2"). Applicants for the operating license, The Detroit Edison Company, Northern Michigan Electric Cooperative, Inc., and Wolverine Electric Cooperative, Inc., filed their response to CEE's intervention request on November 22, 1978, urging that CEE be denied intervention. On December 4, 1978, and pursuant to this Board's November 13, 1978 order, CEE filed the instant "Amended Petition to Intervene".

Applicants submit that CEE's present intervention petition, which, except for two addenda, appears identical in most respects to its earlier petition, is only a marginal improvement on the first effort, and is insufficient to

warrant the award of intervention as a matter of right, or, as a matter of discretion. Further, CEE's amended petition fails to raise a single admissible contention.^{1/}

Argument

I.

CEE'S AMENDED PETITION FAILS TO DEMONSTRATE THAT CEE IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Section 2.714 of the Commission's Rules of Practice, designated in the Federal Register notice inviting intervention petitions^{2/} as the standard to which such petitions must conform, clearly and concisely requires that the alleged interest of the petitioner be "set forth with particularity". Any petitioner must also demonstrate how his interest may be affected by the outcome of the proceeding. These requirements, which closely track judicial rules of standing, apply with equal force to an

^{1/} Although Applicants had earlier anticipated the need to file a response to contentions advanced by Mrs. Martha Drake and Mr. Dan Drake, Applicants have been informed recently by the NRC Staff that the Drakes do not desire to pursue intervention in this proceeding any further. Accordingly, Applicants' answer is limited to CEE's amended petition and does not address the summary contentions advanced by the October 10 joint Drake petition. Should, however, the Drakes again desire to intervene either individually or jointly, Applicants respectfully request they be allowed to respond further to the petition, including any contentions filed.

^{2/} 43 Fed. Reg. 40,327 (1978).

organization seeking intervention. See Nuclear Engineering Co., Inc. (Sheffield Site), ALAB-473, 7 NRC 737, 741 (1978); Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422-23 (1976).

An examination of CEE's amended petition reveals that it has alleged no specific injury to itself as an organization that would flow from the grant of an operating license for the Fermi 2 facility. Accordingly, intervention cannot be granted on that ground.

Lacking such an alleged injury to itself, an organization may, nonetheless, predicate intervention on the interests of its members. See Warth v. Seldin, 422 U.S. 490, 511 (1975); Sheffield, supra; Barnwell, supra. In such a case, however, the interests of the individual members (or member) must themselves be articulated and shown to be placed in jeopardy by the possible outcome of the proceeding. Simply put, the organization "can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit." Warth v. Seldin, supra at 516.

CEE's petition fails to "particularize" the interests of any of its individual members. Sheffield,

supra at 741. The amended petition, which closely resembles the ACLU/SC petition found deficient in Barnwell, merely identifies a single member of CEE. It does not spell out what specific interests this member possesses, what specific interests of the member might be affected by the results of this proceeding, or even what specific interests CEE is to advocate on the member's behalf. It is not clear, for example, what property or other economic interests Mr. Alson possesses. Although he recites that he resides in Ypsilanti, Michigan^{3/}, it is unclear whether Mr. Alson will continue to reside in this area at such time as Fermi 2 is scheduled to operate. Cf. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421-22, n.4 (1977). Mr. Alson's unspecific reference to "my interests" and blanket adoption of CEE's interests -- which themselves are unspecified -- is insufficient to warrant intervention by CEE in his behalf.

Another aspect of the judicially developed standing doctrine, made applicable to this proceeding by Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976), renders CEE's petition defective on yet a second ground. When an organization seeks to represent the interests of its members, "the interests [of its members] it seeks to

^{3/} Ypsilanti is the home of Eastern Michigan University.

protect [must be] germane to the organization's purpose".

Hunt v. Washington State Apple Advertising Commission, ____
U.S. ____, 97 S. Ct. 2434, 2441 (1977).

CEE's petition recites (at 1) that its members are "interested in the dissemination of information and stimulation of public awareness and involvement in the study of nuclear power and alternate sources of safe electrical energy generating sources." Without more, and assuming the foregoing correctly recites the organization's purpose, it does not appear that there is the necessary link between the purposes of CEE as an organization and the as yet unarticulated and unspecified interests of the individually-identified member. Indeed, CEE's organizational interest appears to be a classic academic, general interest in a subject similar to that found wanting in Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Unlike other organizations whose charters include the furthering of the individual interests and concerns of their members, CEE's petition demonstrates that its abstract interest in the study of nuclear power does not legitimately encompass the vindication of the interests of any of its members.

In sum, Applicants submit that the individual interests of CEE's members on whose behalf intervention is sought have not been sufficiently identified and shown to be at issue in this proceeding, and further, that CEE's

organizational purpose lacks the required connection to any interests that may be possessed by CEE's members.

II.

CEE SHOULD NOT BE AWARDED INTERVENTION PURSUANT TO AN EXERCISE OF THIS BOARD'S DISCRETION.

In an operating license proceeding, discretionary intervention is not appropriate unless the petitioner has demonstrated an ability to make a "valuable contribution to the development of a sound record." Public Service Co. of Oklahoma (Black Fox, Units 1 and 2), ALAB-397, 5 NRC 1143, 1151, n.14 (1977); see also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). As set forth in Applicant's response to CEE's earlier intervention petition, the Appeal Board has subsequently tightened this test for discretionary intervention. CEE must now not only assume the burden of demonstrating that discretionary intervention is indeed appropriate, but also, it "must specify the extent to which it will involve itself on those issues and the contribution which that involvement can reasonably be anticipated to make." Sheffield, supra at 745.

On this score, CEE's instant petition constitutes no improvement on its October 9 petition. These tests for discretionary intervention have not even been addressed --

let alone met. Accordingly, Applicants submit that discretionary intervention should not be awarded in this case, especially given the fact there is now no other successful intervenor and thus a very real possibility of avoiding the substantial burden of conducting a hearing.

III.

CEE'S AMENDED PETITION FAILS TO SET FORTH ANY VALID CONTENTIONS.

As an initial matter, Applicants point out that because CEE has not established its standing to intervene in this proceeding as of right or demonstrated that intervention should be granted pursuant to an exercise of this Board's discretion, it is unnecessary for the Board to reach the question of whether any of the petitioners' contentions would be admissible in this proceeding. In view, however, of the Board's Memorandum of December 4, 1978 inviting the Applicants and Staff to comment on the petitioners' contentions, Applicants offer the following responses to the contentions set forth in CEE's amended petition.

In sum, Applicants submit that not one of the contentions advanced by CEE meets the requirements of 10 C.F.R. § 2.714. Paragraph (b) of § 2.714 requires (1) that a petitioner state with particularity the contentions that it seeks to have litigated, and also (2) that the

petitioner set forth with reasonable specificity the evidentiary bases for each contention. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), 6 NRC 249 (1977); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), 3 NRC 209, 212 (1976). Most of the contentions proposed by CEE are vague and conclusionary. More importantly, none of the contentions advanced by CEE is supported with a proper factual basis.

It is important to emphasize that an individual or organization that seeks to intervene in a licensing proceeding has an affirmative obligation to assist the Licensing Board in considering relevant issues. As the Supreme Court recently noted in Vermont Yankee Nuclear Power Corp. v. NRC, ___ U.S. ___, 98 S. Ct. 1197, 1216 (1978), it is incumbent upon those "who wish to participate to structure their participation so that it is meaningful." At the very least, this underscores the requirement that a petitioner must meet the standards established by the Commission for structuring a contention. Further, in that same case, the Court declared:

Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure

reference to matters that "ought to be" considered.

Id. at 1217.

Many of the numerous contentions advanced by CEE, in addition to failing to meet the Commission's requirements detailed in 10 C.F.R. § 2.714, attempt to project issues into this proceeding by making cryptic and obscure references to inarticulable concerns. Some of CEE's proffered contentions refer to other proceedings and other companies without establishing the relevance of those proceedings to the instant case. The petitioners must do more than present an indiscriminate collection of questions, concerns, and beliefs sifted from other proceedings.

Other of CEE's contentions are highly speculative and unsupported by any showing "sufficient to require reasonable minds to inquire further." Vermont Yankee, supra at 1217. Still other contentions constitute attacks on Commission regulations, and thus are clearly barred by 10 C.F.R. § 2.758(a) which prohibits challenges to Commission regulations. Finally, several of the contentions advanced by CEE attempt to interject issues that are irrelevant to this proceeding.

After careful review, Applicants conclude that each of CEE's contentions is deficient. Accordingly, and

for the additional reasons set forth below,^{3/} Applicants submit the Board should dismiss the petition.

Contention 4. This proposed contention contains numerous and largely unspecific allegations relating to the construction of the facility. Moreover, several of CEE's complaints are irrelevant.

Paragraph (a). The assertion that there has been an "appalling lack of physical security" at the Fermi 2 site is made without any factual support whatsoever. Not one example of inadequate security is identified. No specific safety problem is alleged, nor has it ever been suggested that any Commission regulation or other requirement has been violated. The assertion is not, therefore, a proper contention.

Paragraph (b). This allegation also lacks sufficient particularity and any factual basis. No specific examples are given. No allegation is made that any Commission regulation or other requirement was violated.

Paragraph (c). CEE's complaint concerning "allegations among workers" is irrelevant. If CEE is attempting to allege quality assurance violations, the contention is vague

^{3/} For the convenience of the Board, Applicants have adopted the paragraph numbering employed by CEE in its Amended Petition. Thus, the first contention set out by CEE appears in paragraph 4 and will be referred to here as Contention 4.

and lacks an evidentiary basis. CEE has not alleged the violation of any quality assurance requirement.

Paragraph (d). The replacement of supervisors and the change in general contractors for the project are irrelevant to this proceeding. The allegations concerning quality control are vague and lack an evidentiary basis. CEE has not alleged the violation of any quality assurance requirement.

Paragraph (e). In subparagraphs (1) and (2), CEE attempts to identify problems allegedly encountered during the construction of the Fermi 2 facility. CEE has not, however, alleged -- or even suggested -- that these problems are now serious, unrepaired, or have any safety significance whatsoever. Given the construction reporting requirements of § 50.55(e) and Part 21, and the NRC's inspection of any problem so reported, CEE has failed to meet its burden of establishing that these occurrences have some present safety significance.

In subparagraph (3), CEE alleges that there is an absence of "any 'fence post detection'" at this time. The short answer to this complaint is that there is no legal requirement for such radiological monitoring during construction. Monitoring is only required during operation. See 10 C.F.R. §§ 50.36a, 50.34a.

Paragraph (f). The allegation that morale among the construction workers has been or is low, even if

it were supported by some evidence, is totally irrelevant to this proceeding.

Contention 5. This proposed contention is inadmissible under § 2.714 because it is vague and without any articulated factual basis. It fails to specify how, in CEE's belief, the radiation monitoring system is "insufficient and incomplete" or to indicate what would be an "adequate" monitoring system.

Contention 6. This contention is speculative in the extreme. CEE asserts that "numerous components" within the facility, none of which it attempts to identify, will become exposed "to radiation and to adverse physical conditions" during operation. CEE does not specify what level of radiation and what "adverse physical conditions" it believes these unidentified components will undergo. Nevertheless, the petitioners assert that such undefined exposure will result in "unexpected deterioration" of such components. It is difficult to discern what CEE means by this assertion. CEE does not offer any evidence to suggest that its members have even the most rudimentary knowledge of the useful life now projected for any of the materials or components within the facility. Further, CEE sets forth no evidence that should prompt the Board to question whether deterioration will in fact occur. CEE carries its speculation a step further by asserting that this alleged deterioration could threaten "the operation and safeguards"

of Fermi 2.

As if to anticipate a defense that unforeseen deterioration could be corrected if it should develop, CEE attempts to complete this contention by asserting, again without setting forth any factual basis, that Applicants will not undertake "adequate" inspection and replacement of these unidentified "critical components".

CEE's references to other facilities -- some of which are not even identified -- hardly improve the contention. There is no allegation of similarity in design and no specification of what "parts" in these facilities are at issue.

Contention 7. CEE's contention that the "steam generator system" will experience "unexpected corrosion" is similarly speculative and lacks the evidentiary basis required by § 2.714. Again, the obscure reference to other facilities, which utilize pressurized water reactors as opposed to the boiling water reactor design of Fermi 2, in no way demonstrates that problems that may have been encountered at these facilities are relevant to the instant proceeding.

Contention 8. This contention constitutes an attack on Commission regulations as they have been construed by Commission decisions. It is therefore inadmissible under § 2.758. Specifically, Applicants are

not now required to devise an emergency plan for areas outside the low population zone. See New England Power Co. (Seabrook Station, Units 1 and 2), ALAB-390, 5 NRC 733 (1977). Thus, Detroit itself and other unspecified towns within CEE's proffered 100 mile radius are beyond the zone for which Applicants must plan. With respect to CEE's alleged concern over the evacuation of the Stony Point area, Applicants submit that it is incumbent upon CEE to demonstrate why the emergency plan may be inadequate for this area.

The Commission's currently proposed rule for facility emergency planning does suggest that emergency planning in areas beyond the low population zone may be appropriate for some facilities. 43 Fed. Reg. 37,473 (August 23, 1978). Further, the Commission indicated that this proposed rule would be immediately effective as "interim guidance" in reviewing an applicant's emergency plan. CEE, however, has made no showing how the factors set forth in the notice of the proposed rule would apply here, even assuming that the proposed rule's "interim guidance" is legally effective despite failure to comply with the Administrative Procedure Act requirements.

Contention 3. This contention is nothing more than a generalized statement of concern that lacks specificity and is totally unsupported by any factual allegations.

Indeed, CEE's assertion is so vague that it makes a direct response difficult. It is not clear whether CEE complains that the emergency planning standards with which Applicants must comply, 10 C.F.R. Part 50, Appendix E, ¶IV, are inadequate, or whether CEE asserts that Applicants have not met such standards. If the former is the contention, Applicants submit it is an impermissible attack on Commission regulations. If the latter is CEE's meaning, Applicants reiterate that it is incumbent upon CEE to provide a factual basis for its contention.

Contention 10. CEE asserts that the design of Fermi 2 does not incorporate solutions to certain generic safety problems of boiling water reactors that CEE alleges were identified in NUREG-0410. A petitioner cannot incorporate lengthy documents by reference as a basis for, or a statement of, a contention. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209 (1977). Notwithstanding, CEE has attempted to do just that here. The non-selective incorporation of such a document as NUREG-0410 frustrates the requirement in § 2.714 that the petition set forth with particularity the basis for the contentions. Id. at 216.

CEE's obscure reference to the "River Bend case" hardly strengthens their position. On the contrary, the Appeal Board decision in that proceeding, Gulf States Utilities Company (River Bend Station, Units 1 and 2),

ALAB-444, 6 NRC 760 (1977), stands for the position Applicants now take. There it was held that "mere identification of a generic technical matter" that is under study by the Commission does not establish an issue in controversy. A proponent of the contention, if it is to prevail, must show (1) that the generic issue has safety significance for the particular facility being reviewed and (2) "that the fashion in which the application deals with the matter in question is unsatisfactory." Id. at 773.

CEE has made no showing that any of the issues identified in NUREG-0410 apply to this proceeding or that any of those problems exist or are likely to exist at the Fermi 2 facility. CEE does not even refer to the Application. It is also not clear whether the shopping list of problems set forth in the contention is merely a list of those mentioned in the report, or a list of problems CEE contends Applicants in fact have neglected.

The final allegation that "Edison has not shown adequate solutions" is patently insufficient.

Contention 11. The petitioners assert that "Edison has not proven" that the facility is safe from flooding. Applicants submit such a statement does not constitute a valid contention. CEE has provided no evidentiary basis that would elevate their vague concern that flooding might be a danger to the status of a legitimate

issue. In short, CEE has made no showing "sufficient to require reasonable minds to inquire further". Vermont Yankee, supra at 1217.

Contention 12. This entire contention is, on its face, a series of direct attacks on the Commission regulations set forth in 10 C.F.R. Part 20. As such it is clearly impermissible under § 2.758.

Contention 13. CEE's allegation that the facility is designed to emit radiation that exceeds "maximum permissible concentration levels" is pure assertion without any evidentiary basis to support it. Applicants submit, therefore, it does not comply with the requirements of § 2.714.

Contention 14. Paragraph (a). CEE seeks to raise as an issue the safety of mining, milling, enrichment, and fabrication activities. From the health and safety standpoint, the safety of these other activities, conducted at locations other than the Fermi 2 site, has nothing to do with the specific health and safety findings which must be made by the Commission as a prerequisite to issuance of an operating license for Fermi 2. See 10 C.F.R. § 50.57. Those findings extend only to the activities authorized by the operating license, and exclude the fuel cycle activities referred to by CEE. The safety of each of these activities is addressed in the license proceeding for the activity or

facility under consideration. CEE's contention seeks to raise safety issues outside the scope of this operating license proceeding and is inadmissible.

Paragraph (b). This contention is simply an attack on the Commission's radiation protection standards. It is barred by § 2.758.

Paragraph (c). This contention is not specific and lacks an evidentiary basis. CEE does not articulate what "current plans" it is concerned with or in what manner such plans are inadequate. Of course, any expansion of the capacity of the spent fuel storage pool will require an operating license amendment, and thus will require prior Commission approval.

Paragraph (d). As set forth in our response to contention 14(a), 10 C.F.R. § 50.57 requires no finding prior to issuance of an operating license concerning the safety of other fuel-cycle activities. Specifically, no Commission safety finding -- either generic or, by implication, in an individual proceeding -- must precede reactor operating license issuance. See NRDC v. NRC, 2 Nuc. Reg. Rep. (CCH) ¶ 20,089 (2d Cir. July 5, 1978), rehearing denied (Sept. 26, 1978). Accordingly, the safety of high-level waste storage is outside the scope of this proceeding.

Contention 15. It is clear from the final sentence of this contention that paragraphs (a) and (b) are assertions based on the economic interests of CEE

members as ratepayers. Such considerations are outside the "zone of interests" of either the Atomic Energy Act or the National Environmental Policy Act. The Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473 (1978). Furthermore, the Commission lacks jurisdiction over rates. These assertions, therefore, are not proper subjects in this proceeding.

Paragraph (c) attempts to introduce as an issue the United States balance of trade. This matter is not within the jurisdiction of this Board.

Contention 16. This contention constitutes a collateral attack on the prior resolution of the legality of the sale of an ownership interest in the facility to two of the present Applicants. Dr. Robert Asperger, who in the instant proceeding purports to represent CEE, previously sought Commission review of the sale pursuant to § 2.206. The Staff addressed this issue (see letter from Edson G. Case, Acting Director of Nuclear Reactor Regulation, to the Detroit Edison Company (March 3, 1978)) and the Commission declined to review the matter. The doctrines of res judicata and collateral estoppel now bar any consideration of the issue. Cf. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, affirmed as to this point, CLI-74-12, 7 AEC 203 (1974).

Contention 17. The matters asserted in this contention are, simply put, extremely speculative and

irrelevant to this proceeding. Furthermore, it is not the function of the Commission to review a NEPA assessment made by another agency. Cf. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978). More specifically, it has been held appropriate for a Licensing Board to refuse to scrutinize the decision-making process of the Rural Electrification Agency. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC ____ (August 30, 1978).

Contention 18. An assertion that the evaluation of alternatives has been inadequate must be specific. Furthermore, by making a bald assertion without more, CEE has failed to meet the "threshold" burden incumbent upon an intervenor under Vermont Yankee to make a showing in support of the allegation that would reasonably prompt the Board to inquire further.

To the extent that CEE attacks the impact statement prepared for the construction permit proceeding, the allegations are simply irrelevant. The issue of the adequacy of that impact statement is not before this Board.

Contention 19. This proposed contention is far too vague to be admitted as an issue in this proceeding. The alleged "peculiar atmospheric conditions" of the Monroe area are not identified even in the briefest fashion. Moreover, no evidentiary basis is advanced to support the

assertion that atmospheric effects have been inadequately considered. Finally, it is not clear which environmental assessment CEE is attacking.

Conclusion

For the foregoing reasons, Applicants request that the intervention petition of CEE be denied.

Respectfully submitted,

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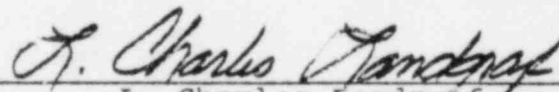
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NOTICE OF APPEARANCE

In accordance with § 2.713(a) of the Rules of Practice of the Nuclear Regulatory Commission, the following attorney herewith enters an appearance in the above-captioned matter:

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December 15, 1978