

July 6, 1982

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, et al.)	50-441
)	
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

APPLICANTS' ANSWER TO "SUNFLOWER
ALLIANCE, INC. ET AL. MOTION
TO APPLICANT TO COMPEL DISCOVERY"

On June 21, 1982, intervenor Sunflower Alliance, Inc., et al. ("Sunflower") filed a motion to Applicants to compel discovery. Applicants respectfully submit that the motion must be denied for failing to comply with the time limit established by the Commission's Rules of Practice.

Under NRC rules, a party dissatisfied with a response (or non-response) to its discovery request may file a motion to compel. However, the Commission has established a time limit of 10 days for such motions. As set forth in 10 C.F.R. §2.740(f)(1),

If a . . . party upon whom a request for . . . answers to interrogatories is served . . . objects to the request, or any part thereof . . . the party submitting the request may move the presiding officer with-
in ten (10) days after the date of the
response . . . for an order compelling a
response . . . in accordance with the request.
(emphasis added).

Sunflower's motion totally fails to comply with this requirement and must therefore be denied.

On February 5, 1982, Applicants filed their Answers to Sunflower Alliance, Inc. First Round Interrogatories. This filing included objections to a number of the interrogatories on the grounds that they were beyond the scope of the admitted contentions. Prior to filing these objections, Applicants had discussed them with counsel for Sunflower in an attempt to resolve the issues. Three of these "required communications"^{1/} took place at Applicants' initiative during December 1981 and January 1982. See Applicants' Answers to Sunflower Alliance, Inc. First Round Discovery Requests, at 2-3 (February 5, 1982).

On March 24, 1982, almost two months after Applicants' objections were filed, Sunflower wrote to counsel for Applicants "objecting to your objections." And finally, on March 29, 1982, another conversation between counsel for Sunflower and Applicants took place in which Applicants indicated that they did not agree with Sunflower's objections to Applicants' objections.

Not until more than four months beyond the time limit established by §2.740(f)(1) did Sunflower submit its motion to compel. Since Sunflower cites to the provisions of §2.740,^{2/} there is no reason to assume that their counsel was unaware of

1/ See Special Prehearing Conference Memorandum and Order Concerning Party Status, etc., LBP-81-24, 14 N.R.C. 175, 230 (1981).

2/ Brief accompanying Sunflower's Motion, at 2.

the 10 day time limit. Nor did Sunflower miss the deadline by a just few days. And its filing is totally devoid of any explanation seeking to justify its untimely filing. As the Appeal Board ruled in an analogous context,

[M]anifestly we would not be justified in accepting a belated appeal in the absence of a showing of good cause for the failure to have filed it on time. And, the greater the tardiness, the more compelling need be that showing. In this instance, [the petitioner] is very late with no explanation at all.

Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1, ALAB-547, 9 N.R.C. 638, 639 (1979). The Allens Creek petitioner (who was "a layman and thus possibly may be unfamiliar with our Rules of Practice", Id.) was three months late. As his appeal was dismissed for being unjustifiably late, so too should Sunflower's motion.

Having disregarded the §2.740(f) time limit, ignored the obligation to seek an extension of time before the time period had expired, and failed to show good cause, Sunflower's motion must be denied. As the Commission recently stated:

The Boards are advised to satisfy themselves that the 10 C.F.R. 2.711 "good cause" standard for adjusting times fixed by the Board or prescribed by Part 2 has actually been met before granting an extension of time. Requests for an extension of time should generally be in writing and should be received by the Board well before the time specified expires.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 454 (1981).

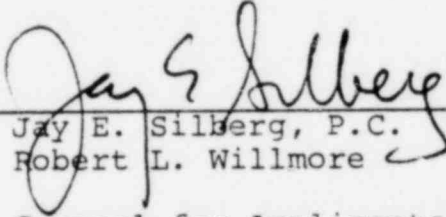
Denying Sunflower's motion would be consistent with judicial practice. Courts deny discovery sanctions even though the Federal Rules provide no deadlines comparable to 10 C.F.R. §2.740(f)(1).^{3/} For example, in Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 40 F.R.D. 96, 108 (N.D. Ill. 1966), the court denied plaintiff's motion to strike where it waited two months to complain about defendant's allegedly evasive and incomplete interrogatory responses. Here, Sunflower waited four months beyond the deadline which the Commission established.

For these reasons, Applicants believe that Sunflower's motion must be dismissed.^{4/}

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:


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^{3/} In general, the provisions of 10 C.F.R. §2.740 are patterned after Rules 26 and 37 of the Federal Rules of Civil Procedure. 37 Fed. Reg. 15127 (1972); Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 A.E.C. 457, 460 (1974); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980).

^{4/} If, notwithstanding Sunflower's unexcused untimeliness and total failure to comply with Commission procedures, the Licensing Board nonetheless decides that it is appropriate to examine the substance of Sunflower's claims, Applicants would request leave to file an appropriate responsive pleading.

UNITED STATES OF AMERICA

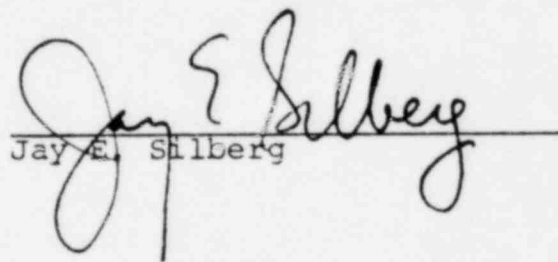
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CERTIFICATE OF SERVICE

This is to certify that copies of "Applicants' Answer To 'Sunflower Alliance, Inc. Et Al. Motion To Applicant To Compel Discovery'" were served on all those on the attached Service List by deposit in the U. S. Mail, First Class, postage prepaid, this 6th day of July, 1982.


Jay E. Silberg

Dated: July 6, 1982

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