

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board **35 FEB 25 P1:35**

In the Matter of
THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY
(Perry Nuclear Power Plant,
Units 1 and 2)

)
)
)
)
)
)
)

OFFICE OF SECRETARY
DOCKETING & SERVICE
Docket Nos. 50-441 and 50-441

* * *

SUNFLOWER'S ANSWER TO MOTION FOR SUMMARY
DISPOSITION OF CONTENTION C

By 10 CFR Section 2.749(d), Applicant must show that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law. The record is to be viewed in the light most favorable to the party opposing the motion. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981).

Applicant continues to deny the lead role in declaration of an emergency which must be borne by the Governor of the State of Ohio. Using a political scientist-affiant does not comprise evidence of hard law.

In the event of a radiological emergency at PNPP, CEI staff are responsible for classifying the incident, activating the onsite emergency organization, and notifying offsite authorities. NUREG-0887 Supp. 4 at 13-2.

The State of Ohio Disaster Services Agency (DSA), Adjutant-General's office is the lead support agency to affected county governments, and it falls to DSA to notify other state officials and locally involved entities. Id.

Ashtabula's County Commissioners will "control" actions to be

8502260399 850223
PDR ADOCK 05000440
PDR
Q

taken. See State Plan, Rev. 3 at 5-31. Lake County's Commissioners did not even rate a mention as to their roles in the State Plan. Id. at 5-25. In the event of a "general emergency," where protective steps must be taken for the public within a 10-mile radius of PNPP in as little as 15 minutes, Ashtabula County's "Radiological Emergency Response Plan" (RERP) states that its County Commissioners will "order" shelter or even evacuation, based on advice of County staff and "recommendations" of the Governor's office. Id. at 4. See also Lake County RERP at 1. See also State Plan, Rev. 3 at 5-27., wherein the Lake County Prosecutor advises on emergency authorities and proclamations. In sum, there is no consistently-defined role in a major or minor emergency for County Commissioners, especially in conjunction with any leadership which would be forthcoming from the State.

Sadly, the plans are deficient in a major technical respect. Worse, in a major evacuation, they completely sidestep the logic and mandates of Ohio law.

NUREG-0654 obliges Applicant's plans to "contain (by reference to specific acts, codes or statutes) the legal basis for such authorities" of various component entities in emergency activities. Nowhere does any such documentation or discourse appear. Moreover, the tenor of the state and local plans ignores the overwhelming fact of Ohio law that only the Governor may declare an emergency. O.R.C. 5915.01(D) defines "emergency" as:

(A)ny period during which the president or the congress of the United States or the governor has proclaimed that an emergency exists.

(emphasis supplied)

There are legal and policy reasons for the requirement that the Governor declare an emergency. Ohio has a "good Samaritan" statute for persons assisting during a civil defense emergency, which only provides coverage and immunity from civil liability upon declaration of an emergency by the Governor.

R.C. 5915.10. That section of the Ohio Revised Code states as follows:

(A) The state, any political subdivision, municipal agency, civil defense volunteer, or another state or a civil defense force thereof or of the federal government or of another country or province or subdivision thereof performing civil defense services in this state pursuant to an arrangement, agreement or compact for mutual aid and assistance, or any agency, member, agent or representative of any of them, or any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, in good faith carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to sections 5915.01 to 5915.143 inclusive, of the Revised Code, any federal law, or any arrangement, agreement or compact for mutual aid and assistance or any order issued by federal or state military authorities relating to civil defense, shall not be liable for any injury or death to persons or damage to property as the result thereof during training periods, test periods, practice periods or other civil defense operations, or false alerts, as well as during enemy attack, actual or imminent, and subsequent to the same except in cases of willful misconduct.

(emphasis supplied)

In the past two years, perhaps a dozen different decisions of the Ohio Supreme Court have virtually destroyed the doctrine of "sovereign immunity" which has traditionally protected governmental units from civil liability for mistakes of its officials. However, there has not been a civil disaster the magnitude of an extraordinary nuclear occurrence to test what may remain of local government immunity under this faded doctrine and R.C. 5915.10. Under the proposed plans, local officials such as Ashtabula County Commissioners might expose themselves and the numerous civil "volunteers" comprising the backbone of governmental response to the potential of civil monetary damages by "proclaiming" an emergency and ordering merely shelter, as opposed to evacuation, to avoid liability for such problems as a drunken or drugged or exhausted volunteer bus driver's antics, while all the while the

the Lake County Commissioners "proclaim" an evacuation and direct all emergency personnel to cut and run. Besides the enormous inconsistencies in preserving the public health and safety, Sunflower wonders if local officials really want to roll the dice of multimillion dollar liability by ordering all in the EPZ not to evacuate. What are the liabilities of a county commissioner who votes to "proclaim" an emergency in the absence of the Governor's proclamation, but instead of ordering evacuation orders shelter only, thereby committing hundreds or thousands in the plume exposure pathway to toxic radiation poisoning?

Complicating these issues is the official guidance for decision-making. NUREG-0654 at 1-3 states that:

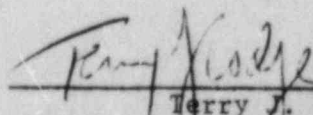
Prompt notification of offsite authorities is intended to indicate within about 15 minutes for the unusual event class and sooner (consistent with the need for other emergency actions) for other classes. The time is measured from the time at which operators recognize that events have occurred which make declaration of an emergency class appropriate.

(emphasis supplied)
See also 10 CFR§50 App. E (IV) (D) (s).

The issue in this contention is not whether the roles and responsibilities of the commissioners of each county are "parallel." The issue is what entity-the county commissioners or the Governor-declares an emergency and sets an evacuation into motion. As Applicant has not resolved this issue by its motion, it should be summarily denied.

Respectfully submitted,

By


Terry J. Lodge
618 N. Michigan Street
Suite 105

Toledo, Ohio 43624
Phone: (419) 255-7552

Counsel for Sunflower Alliance