UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL (Perry Nuclear Power Plant, Units 1 & 2)	Docket Nos. 50-440-OL 50-441-OL
	September 9, 1981

MEMORANDUM AND ORDER

CONCERNING THE STATUS OF ASHTABULA COUNTY AND OBJECTIONS TO THE SPECIAL PREHEARING CONFERENCE ORDER

Sunflower Alliance, Inc., et al. (Sunflower), Cleveland Electric Illuminating Company, et al. (Applicant) and the Staff of the Nuclear Regulatory Commission (Staff) have filed objections to our Special Prehearing Conference Order of July 28, 1981. In addition, the Ashtabula County Commissioners and the Ashtabula County Disaster Agency (Ashtabula) have petitioned for admission as parties participant pursuant to 10 CFR §2.715(c). The purpose of this memorandum and order is to analyze and resolve these motions.

I OBJECTIONS OF SUNFLOWER

A. Need for Power

Sunflower objects to the exclusion of its contentions regarding the need for power and airplane crash probabilities.

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In its motion concerning the need for power, Sunflower now states that it can "conclusively prove the complete absence of need for power from the Perry units by Applicant or its co-venturers." However, we consider this to be an enlargement of Sunflower's previous arguments, as reviewed by us in our Special Prehearing Conference Order at pp. 42-44. We find that an attempt to amend the contention at this stage is inappropriate. Furthermore, even at this stage of the proceeding, Sunflower does not provide a basis for its assertion of a total absence of need for power from the Perry Nuclear Power Plant (Perry). Consequently, we shall consider Sunflower's motion to be a request that this contention, as previously framed and argued, shall be admitted.

Sunflower does not object to the Board's application of collateral estoppel to the need for power issue. However, it argues that there are substantially changed circumstances and that collateral estoppel cannot appropriately be applied to this issue. We disagree. For reasons we stated fully in our prior opinion at pp. 37-48, we do not think the reduction in need for power which Sunflower asserts justifies relitigation of the environmental factors which were weighed by the Commission when it issued a construction permit to Perry. At the operating license stage, changes in the need for power must be sufficiently extensive to offset the environmental and economic costs of construction, which has been authorized and has become a sunk cost. Furthermore, we decided that litigation of this issue would be fruitless because proof of the alleged change in the need for power would not demonstrate the need to refuse to license or condition the license of Perry. Consequently, we saw no reason to admit this issue into the proceeding, and Sunflower has not persuaded us to the contrary.

B. Airplane Crashes

Sunflower asserts that FSAR data on load growth at Lost Nation airport were inadequate and that its contention concerning air crashes should be admitted. However, Sunflower has never provided any basis for believing that load growth at an airport 15 miles removed from Perry should have any effect on Perry's design. This point was more fully explained at pp. 72-74 of our decision and we are not convinced that we were wrong.

C. Tandem Licensing

Sunflower has not persuaded us that it is necessary to divide this proceeding into two at this time. However, as the proceeding draws to a close, Sunflower will be provided with the opportunity to argue that it has pending contentions which must be resolved before the Board can recommend that an Operating License be issued for Perry Unit 2, which is still in early stages of construction. At that time, issues which are unique to Unit 2 will not have been adjudicated and Sunflower will have a full and fair opportunity to prevail on this argument.

D. Other Points

We see no reason to change our opinion with respect to the Commission's jurisdiction over this proceeding. Nor do we see any reason to apologize for calling to Sunflower's attention that our April 9 Order called for two filings and that Sunflower submitted only one. (We called for further particularization of contentions. Sunflower filed a statement of additional contentions but did not further particularize previously filed

contentions. We also called for "reasons, supported by legal authorities, why issues included in the petitions should be considered relevant", but Sunflower did not make such a filing.)

We wish to reassure Sunflower that we welcome its participation in this proceeding and do not derogate its potential contribution. On the other hand, these will be tough minded proceedings with difficult scientific and legal issues to resolve. When we set filing deadlines and request that specific briefs be filed, our requests are made in the interest of obtaining potentially valuable assistance in deciding issues correctly. However difficult it may be for Sunflower to marshall its volunteers to fulfill these assigned tasks, we urge it to strain to do so. Sunflower's success in informing the Board of its point of view will depend on its industry in complying fully with the Board's orders.

II OBJECTIONS OF APPLICANT

A. Emergency Planning

Applicant objects to the emergency planning contention accepted by the Board as Issue #1 on two grounds. First, it objects to the inclusion within the contention of the assertions of Tod J. Kenney. Second, it objects to the breadth and alleged vagueness of the contention.

First, we do not consider Mr. Kenney's petition to be untimely. His initial filing of March 23, 1981, noticed his concern about "emergency plans". Although he failed to particularize his contentions prior to the conference, we note that he is without counsel. We note also that certain issues which he raised seemed to us to be important safety contentions. Consequently, we are loathe to make any ruling which would deprive this

proceeding of his potentially valuable contribution. Mr. Kenney should understand that in the succeeding portions of this proceeding there will be no excuses. (See Public Service Electric & Gas Co., Salem Nuclear Generating Station 6 AEC 487, 489 (1973).) We are interested in solid legal and factual argumentation, filed within established deadlines. Only by meeting our requirements will Mr. Kenney be able to demonstrate the validity of his views.

As to breadth and vagueness, our reasons for admitting such a broad (but not vague) contention are adequately stated in our prior order. Intervenors added specificity both in their filings and at the prehearing conference. On the other hand, Applicant's point in footnote 8 to its pleading is well taken: the contention should track the latest version of 10 CFR 50 Appendix E. We also agree that the issue should be limited to emergency evacuation plans. As discovery proceeds, we will expect intervenors, Staff and Applicant to further refine these issues and, where possible, to eliminate matters by stipulation. Issue #1 should read:

> ISSUE #1: Applicant's emergency evacuation plans do not demonstrate that they provide reasonable assurance that adequate protective measures can and will be taken in the event of an emergency.

We also wish to clarify some procedural points relating to discovery and admissiblity for hearing, both for this issue and for others where we have indicated that intervenors still bear some burden prior to the hearing. First, we urge the parties to meet informally in order to make the discovery process workable. Second, we expect the parties to consider in good faith whether to stipulate that certain facts are genuinely in dispute and should be included in the hearing. Third, if issues where intervenors bear a burden of proof are subject to motions for summary disposition, the

responding party will have the burden of going forward to demonstrate that factual issues exist which require a hearing. (To this extent, certain contentions may be thought of as "conditionally" admitted.) To pursue such motions, movant would, of course, retain the ultimate burden of demonstrating that there is no genuine issue of fact with respect to any issue it seeks to exclude from a hearing.

B. Quality Assurance

We affirm our finding that Sunflower made certain general assertions concerning quality assurance and thus provided sufficient basis for a contention at the Conference. Applicant is correct in stating, however, that the admission of this issue was intended to be limited to the quality assurance implications arising from the stop work order issued to it and the steps taken by it to remedy alleged deficiencies leading up to the stop work order. Sunflower did not provide the basis for any other allegations relating to quality assurance. It will not be permitted to launch a generalized attack on the Applicant's entire quality assurance program. Its license to explore is limited to the stop work order, steps taken to remedy that deficiencies that led to that order, and residual deficiencies related thereto.

Should Applicant move for summary judgment on this issue, Sunflower would need to demonstrate the existence of a genuine issue of fact concerning the existence of unsafe conditions as the result of a quality assurance deficiency.

III STAFF'S REQUEST FOR CLARIFICATION

A. Status of Lake County

We have admitted the lake County Board of Commissioners and the

Lake County Disaster Services Agency pursuant to 10 CFR §2.715. Our listing them as parties should not be interpreted to imply any different status.

B. Status of the Sunflower Alliance

Staff is correct that Sunflower Alliance, Inc., et al., have always filed a consolidated brief and we have no reason to believe that they intend to pursue any other practice. We have treated them as a consolidated party and intend to continue to do so.

C. Lead Intervenors

Staff has requested that we identify for each listed party intervenor the contention or contentions found to be valid for that party. However, we do not find any such requirement in the rules. All that is required is that at least one contention be admitted for each intervenor. Clearly, that has occurred and neither Staff nor Applicant challenge the status of any intervenor.

Staff argues, however, that it is necessary to the orderly conduct of the proceeding for us to identify parties with the contentions for which they are responsible. We have done so. We expect that the lead intervenor will lead in all aspects of the case. Other intervenors will be free to participate as well, providing that their efforts are not cumulative. We will not permit duplicative arguments, evidence, or examination.

Lead intervenors should, as staff suggests, play a role in coordinating the responses to discovery requests by the Staff and Applicant. Discovery requests should be served on each party intervenor; but the lead intervenor should keep track of progress being made on the interrogatories

by each of the parties and should be prepared to discuss procedural questions with the parties or the Board.

IV ANTICIPATED TRANSIENTS WITHOUT SCRAM

Since the federal register notice about anticipated transients without scram (ATWS) has not yet been issued, we have decided to reserve decision concerning the effect of the rulemaking on the admissibility of this issue. Consequently, this issue is suspended from eligibility for discovery. Under these circumstances, Sunflower Alliance may file its brief on ATWS issues prior to September 30, 1981.

V STATUS OF ASHTABULA COUNTY COMMISSIONERS

The Ashtabula County Commissioners and Ashtabula County Disaster Services Agency (Ashtabula) have petitioned for admission as party participants pursuant to 10 CFR §2.715(c). Applicant requested that Ashtabula show cause for its late intervention.

We find that 10 CFR §2.714, dealing with intervention, does not apply to §2.715(c) petitions. The requirements for timely filing under §2.714 relate to the filing of contentions by intervenors. Necessarily, contentions must be filed in a timely fashion so that the case may commence and progress may begin to be made on resolving disputed issues. Consequently, §2.714 requires intervenors to make timely filing or to show cause for late filing.

On the other hand, we note that §2.715(c) is contained in a general section dealing with "participation by a person not a party." The first subsection deals with limited participation by individuals who are clearly not required to make timely filings under §2.714. Likewise, §(d) deals with participation amicus curiae by persons who are not parties; and no showing

of timeliness is required under that subsection. We find no reason to treat subsection (c) differently.

Consequently, Ashtabula shall be admitted as a non-party participant under §2.715(c).

VI PROGRESS REPORTS

After reviewing the initial attempts of parties to comply with our order concerning discovery plans, we have decided to rescind our directions.

The problem with which the Board is faced is that the Commission expects us to manage the discovery process in the interest of expedition. However, the early stages of discovery generally are attempts to uncover information and it is particularly difficult at this stage, therefore, to complete a plan with any meaningful content.

After reviewing the alternatives for managing discovery, we have concluded that the most meaningful requirement we could institute at this time would be a bimonthly progress report, commencing on October 15 and continuing with one report every two months thereafter. These reports are expected to be brief, generally less than two full double-spaced pages. They should review the parties' discovery activities during the previous two months, including requests and responses. They also should indicate the parties' plans for requests and responses during the following two months. If appropriate, they may contain a brief section evaluating the discovery schedules of the other parties or a brief section outlining a proposal for expediting discovery.

O R D E R

For all the foregoing reasons and based upon consideration of the entire record in this matter, it is this 9th Day of September, 1981

ORDERED

(1) The objections of the parties to our July 28, 1981 Special Prehearing Conference Order are denied except to the extent that they are granted in this order or that the accompanying memorandum clarified points that were raised.

(2) Issue #1 shall be rephrased as follows: "Applicant's emergency evacuation plans do not provide reasonable assurance that adequate protective measures can and will be taken in the event of an emergency."

(3) To the extent that the Special Prehearing Conference Order required intervenors to retain certain specified evidentiary burdens, those contentions may be considered "conditionally" admitted, subject to procedures outlined in the accompanying memorandum.

(4) The issues admitted into the proceeding shall be interpreted in light of the accompanying memorandum.

(5) The petitioners who joined in the petition originally filed by the Sunflower Alliance, Inc., shall be consolidated as a single party, to be referred to collectively as "Sunflower".

(6) Lead intervenors shall assume the responsibilities described in Section III,C., of the accompanying memorandum.

(7) Sunflower may file a brief on the admissibility of the ATWS issue by September 30, 1981.

(8) Parties shall file progress reports, prepared pursuant to the accompanying Memorandum, on October 15 and at two month intervals thereafter.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

September 9, 1981
Bethesda, Maryland