

July 20, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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Docket No. 50-440 OL  
50-441 OL

NRC STAFF'S ANSWER OPPOSING OCRE'S MOTION  
TO STRIKE PORTIONS OF APPLICANTS'  
ANSWER IN SUPPORT OF NRC STAFF'S MOTION  
FOR SUMMARY DISPOSITION OF ISSUE #13

I. INTRODUCTION

On June 30, 1983 Intervenor Ohio Citizens for Responsible Energy (OCRE) filed a motion <sup>1/</sup> seeking to have stricken from the record certain portions of Applicants' answer <sup>2/</sup> supporting the NRC Staff's motion for summary disposition of Issue #13. <sup>3/</sup> As grounds for the relief requested, OCRE asserts that those portions of the Applicants' answer which OCRE seeks to have stricken constitute an impermissible reply brief. For the reasons discussed below the Staff opposes OCRE's motion to strike and urges that it be denied.

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- 1/ "Motion to Strike Portions of Applicants' Answer in Support of NRC Staff Motion for Summary Disposition of Issue #13" (June 30, 1983).  
2/ "Applicants' Answer in Support of NRC Staff Motion for Summary Disposition of Issue #13" (June 27, 1983).  
3/ "NRC Staff's Motion for Summary Disposition of Issue #13 (May 31, 1983).

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II. DISCUSSION

OCRE seeks to have stricken from the Applicants' answer supporting the Staff's motion for summary disposition of Issue #13 those portions of the Applicants' answer which address the answers of OCRE and Sunflower on the ground that they constitute responses that are prohibited by 10 CFR 2.749 of the Commission's regulations. The Staff does not agree that the Applicants are prohibited by 10 CFR 2.749 from addressing in their answer supporting the Staff's motion any facts that in their view warrant addressing so long as they file their answer within the time allowed, as they did. That OCRE and Sunflower, as opponents of the Staff's motion for summary disposition, have an opportunity to respond to the merits of Applicants' supporting answer within 10 days of its service prevents their being prejudiced. 10 CFR 2.749(a). Intervenors' actions in filing their initial opposing responses before they were due (thereby giving Applicants the opportunity to address Intervenors' opposing responses in Applicants' own response to the Staff's motion) and in failing to avail themselves of their opportunity to reply to the merits of the Applicants' supporting answer are problems of their own making. OCRE's present challenge to Applicants' actions on procedural grounds alone is without merit.<sup>4/</sup> Moreover, since OCRE cites

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<sup>4/</sup> OCRE itself has failed to file an affidavit showing good reasons for its inability to make a timely response to the Staff's motion on the merits or an affidavit showing that the one person whom OCRE alleges to have located is competent in the area of turbine missiles. See 10 CFR 2.749(b) & (c); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 755 (1977); and "OCRE's Amended Response to NRC Staff's Motion for Summary Disposition of Issue #13" with attached affidavit (June 29, 1983).

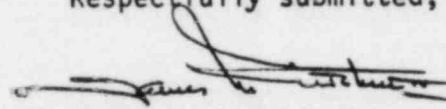
ALAB-443, it should be aware that where a Board believes that the existing record is not sufficient to allow summary disposition and that a party could submit the necessary evidence given the opportunity to do so, it is not improper for the Board to give a party supporting summary disposition an opportunity to submit that evidence and for the Board to consider such evidence in reaching a decision on summary disposition. ALAB-443, 6 NRC at 751-2.

In summary, Applicants were not prohibited by 10 CFR 2.749 from addressing the answers of OCRE and Sunflower opposing the Staff's motion for summary disposition of Issue #13, and the intervenors were not prejudiced by Applicants' doing so.

### III. CONCLUSION

For the reasons discussed above OCRE's motion to strike should be denied.

Respectfully submitted,



James M. Cutchin IV  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 20th day of July, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER OPPOSING OCRE'S MOTION TO STRIKE PORTIONS OF APPLICANTS' ANSWER IN SUPPORT OF NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF ISSUE #13" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 20th day of July, 1983:

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