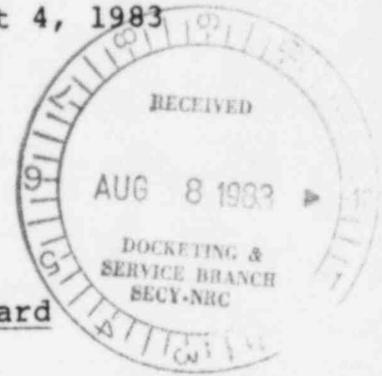


August 4, 1983

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, <u>ET AL.</u>)	50-441
)	
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

APPLICANTS' ANSWER TO OCRE MOTION
TO REOPEN THE RECORD ON ISSUE #3

I. INTRODUCTION

Ohio Citizens for Responsible Energy ("OCRE"), by its Motion to Reopen the Record on Issue #3, dated July 13, 1983 ("Motion"), requests the Board to reopen the record on Issue #3 to take further evidence. OCRE asserts in its Motion that it has recently received documents through the Freedom of Information Act ("FOIA") which indicate that "CEI's control of Comstock . . . may be much worse than the testimony presented at the recent hearing would lead one to believe." Id. at 1 (emphasis added). OCRE relies on three FOIA documents, attached to the Motion. The documents are (1) a June 1982 Engineering Change Notice ("ECN") involving cable tray fill specifications; (2) an August 6, 1982

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letter discussing Comstock Task Force review findings regarding uncertified inspectors; and (3) several pages of unsigned, undated notes discussing the Quality Assurance Advisory Committee ("QAAC") and several other areas of the Perry quality assurance program. These documents are said to "raise significant questions as to the credibility of Staff and Applicant testimony," and to "address a significant safety matter." Id. at 1, 4. We agree with the Staff^{1/} that OCRE's Motion fails to meet the stringent test for reopening a record. Applicants therefore respectfully request that the Board deny the Motion.^{2/}

II. OCRE MUST MEET A HEAVY BURDEN
TO REOPEN THE RECORD

OCRE properly acknowledges the significant legal obstacles a party faces when seeking to reopen a record. Motion at 3. "As is well settled, the proponent of a motion to reopen the record has a heavy burden." Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 N.R.C. 320, 338 (1978)(and cases cited therein). That "heavy burden" requires

^{1/} See NRC Staff's Answer Opposing OCRE's Motion to Reopen the Record on Issue #3, July 26, 1983.

^{2/} By telephone conference dated July 20, 1983, Chairman Bloch granted Applicants an extension of time until August 4, 1983 to answer OCRE's Motion, as agreed to by OCRE.

that the motion to reopen must be (1) timely, (2) address a significant safety issue, and (3) establish a different result than the one reached (or, in this case, to be reached) on the evidence already considered. Id. at 338. "Bare allegations" do not suffice. Neither do "generalized assertions to the effect that 'more evidence is needed.'" The record cannot be reopened absent significant new documentary evidence not included in the record, that materially affects the decision. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 N.R.C. 361, 362-63 (1981); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 N.R.C. 43, 63 (1981).

The purpose of such a stringent rule is to prevent dissatisfied litigants from seeking to reopen the hearing every time "some new circumstance has arisen, some new trend has been observed, or some new fact discovered." Otherwise, "there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." ICC v. Jersey City, 322 U.S. 503, 514 (1944) cited in The Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 N.R.C. 741, 750-1 (1977); see also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 N.R.C. 619, 620-1 (1976).

Finally, even if OCRE could satisfy the tripartite test set forth above, which it cannot, no reopening of the hearing can be required "if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding." See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523-5, 527 (1973).

Applicants submit that OCRE's Motion and Attachments cannot, by any stretch of the imagination, be deemed to constitute even an "apparently significant safety issue." We dispute the Motion's timeliness and significance as well as its ability to affect the outcome of this case. Nonetheless, in the event the Board sees it differently, we are attaching affidavits^{3/} addressing the substance^{4/} of the three attachments. The affidavits demonstrate beyond question that there are no "triable issues of fact" raised by the Motion. Id. at 523-4.

^{3/} Affidavit of Gary R. Leidich, August 4, 1983 ("Leidich Affidavit") and Affidavit of Cyril M. Shuster, August 4, 1983 ("Shuster Affidavit").

^{4/} With respect to the unsigned notes, our affidavit only addresses what may be a related finding in an official NRC inspection report. Applicants cannot speculate on any other matters that may have been in the mind of the anonymous notetaker.

III. THE MOTION IS NOT TIMELY

OCRE argues that the Motion is timely because OCRE received the FOIA material on June 22, 1983, and therefore the "material could not have been available at the hearing." Motion at 4. Obviously, OCRE could have received the June, 1982 ECN and the August 6, 1982 Comstock letter sooner. All OCRE had to do was to file its FOIA request sooner. Instead, OCRE waited until April 15, 1983 (see Attachment 1 to OCRE's Motion), months after the extended discovery period on Issue #3 was closed. The timing of this matter was in OCRE's hands. It chose to file an expansive FOIA request a month before the hearing date, and it is not surprising that it took the Staff four weeks to gather the hundreds of documents requested. Should OCRE now be rewarded for its own tardiness? The capacity for mischief is obvious in this instance. A party could erase the Commission's timeliness requirement merely by filing a tardy FOIA request. Cf. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 18 N.R.C. ____ July 1, 1983).

Moreover, OCRE was free to inquire into these matters in discovery and at the hearing. The ECN issue was set forth as an unresolved item in Report No. 81-19 (Board Exhibit No. 3, p. 75). Report No. 81-19 was the subject of extensive cross-examination. At the hearing, OCRE evinced no interest in the unresolved item.

Had OCRE inquired it would have learned that the item had been closed out by the NRC prior to the hearing. Leidich Affidavit, ¶6. OCRE itself had access before the hearing to the inspection report closing out the ECN issue. Similarly, with respect to the inspector certification issue, OCRE had free access to Applicants' electrical QA documents during discovery and indeed copied hundreds, if not thousands, of pages of documents, including electrical area NRS, CARs, and DARs. The NRS, CAR, and DAR described in the Leidich Affidavit, ¶10, were readily available to OCRE prior to the hearing. The NRC inspection report dealing with the Comstock Task Force (see Leidich Affidavit, ¶9), was admitted as Board Exhibit No. 4 in the proceeding (following Tr. 1619). Indeed the very letter cited by OCRE as new information is listed in the Report (Board Exhibit No. 4, page 3). And of course there was cross-examination at the hearing concerning the Comstock Task Force. See e.g., Tr. 1611-19 (Williams, Konklin).

Finally, although we cannot speculate as to its source or date, OCRE's Attachment No. 4 covers a number of subjects, such as the QAAC, the quarterly reports, and CEI audits and surveillance of Comstock, which were extensively covered at the hearing. The fact that OCRE has uncovered undated, unidentified, unauthoritative notes on subjects covered authoritatively on the record, hardly satisfies the timeliness requirement for reopening a record.

For all these reasons, OCRE has failed to show that its Attachments disclose "new" information and that its Motion is timely.

IV. THE MOTION FAILS TO RAISE
A SIGNIFICANT SAFETY ISSUE

OCRE's Attachments, standing alone, indicate no significant QA problems, and certainly do not involve significant plant safety issues. The cable tray fill ECN (Motion, Attachment No. 2) involved a single procedural clarification in response to an NRC finding regarding non-safety related cables. The portion of the Comstock letter cited by OCRE (Motion, Attachment No. 3) involves inspector certification discrepancies, identified by Comstock in a task force review. Nothing on the face of the letter suggests that the certification discrepancies involved safety problems, let alone serious problems. The last document (Motion, Attachment No. 4) is undated and unsigned, and is likewise limited to discussions of procedural problems that are of no direct safety consequence.

With respect to the last item, we note that CEI recently received an NRC inspection report, Report No. 50-440/83-13(DE); 50-441/83-12(DE)(Report No. 83-12/13), transmitted by the NRC on July 25, 1983, which discusses some of the same issues that are addressed in the unsigned, undated notes. We are attaching a copy of Report No. 83-12/13 for the Board's information. As the Board will note, the inspection report only identifies a

single violation, involving limited QAAC scheduling and documentation discrepancies in 1981 and 1982. The QAAC discrepancies do not raise issues calling into question the safety of the plant. The violation was of the lowest severity level. In fact, Inspection Report No. 83-12/13 concluded that in many of the areas reviewed, such as in the area of "contractor program control," there was "effective performance by the Perry site organization." Report No. 83-12/13, pp. 10-11.

If there is the slightest doubt concerning the safety significance of OCRE's documents or Inspection Report No. 83-12/13, the Leidich Affidavit and Shuster Affidavit must remove any such doubt. The Leidich Affidavit explains the ECN disposition which OCRE's Motion criticizes. The Affidavit shows that, rather than "sanctioning" cable tray overfill, the ECN in question added inspection criteria and review procedures to assure that the intent of the specifications were met. Similarly, the Leidich Affidavit explains that the inspector certification discrepancies received the close attention of Comstock, CEI, and the NRC. The Leidich Affidavit shows conclusively with respect to OCRE's Attachment No. 3 that the certification discrepancies have been thoroughly reviewed and that the reinspections have identified no significant safety problems.

Finally, we are submitting the Shuster Affidavit to amplify on the circumstances related to the attached NRC Notice of Violation. The Shuster Affidavit shows that the QAAC has met frequently and has properly reviewed QA program documents. Indeed, the Shuster Affidavit is consistent with prior testimony by the Staff that the QAAC has been beneficial for the Project. See Tr. 1781-83 (Maxwell).

For these reasons, OCRE's Motion fails to satisfy the second test for reopening, namely, that there must be a serious safety issue shown.

V. THE MOTION FAILS TO PRODUCE NEW
DOCUMENTARY EVIDENCE THAT
WOULD CAUSE A DIFFERENT RESULT

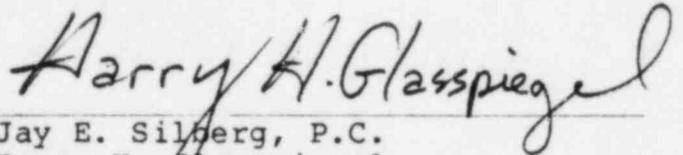
Inasmuch as OCRE's FOIA documents fail to raise new issues, or issues of safety significance, it necessarily follows that additional testimony on the FOIA documents would neither add to the record nor change the outcome of the Board's resolution of Issue #3.

VI. CONCLUSION

For all the reasons stated, Applicants respectfully request the Licensing Board to deny OCRE's Motion.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

A handwritten signature in cursive script that reads "Harry H. Glasspiegel". The signature is written in dark ink and is positioned above a horizontal line.

Jay E. Silberg, P.C.
Harry H. Glasspiegel

Counsel for Applicants

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Dated: August 4, 1983

August 4, 1983

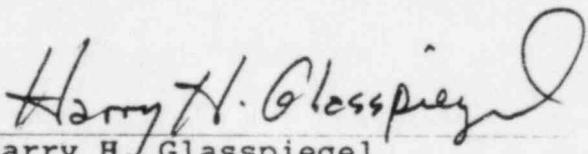
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer to OCRE Motion to Reopen the Record on Issue #3" were served by deposit in the United States Mail, first class, postage prepaid, this 4th day of August, 1983, to all those on the attached Service List.


Harry H. Glasspiegel

DATED: August 4, 1983