November 18, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket Nos. 50-440 50-441
	)	(Operating License)
(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' ANSWER TO OHIO CITIZENS FOR RESPONSIBLE ENERGY PETITION FOR WAIVER OF COMMISSION RULE

Intervenor Ohio Citizens for Responsible Energy ("OCRE") has attempted to have adjudicated in this proceeding a contention relating to the effects on plant operation of electromagnetic pulses (EMP) caused by the detonation of nuclear weapons. Both Applicants and the Regulatory Staff opposed admission of the contention on the grounds that it constituted an impermissible challenge to a Commission regulation, 10 C.F.R. §50.13, which specifically provides that an applicant for a construction permit or operating license is not required to provide for design features or take other measures for the specific purpose of protecting against the effects of enemy attacks or the use or deployment of weapons incident to U.S. defense activities. 1/

1/ See OCRE Motion for Leave to File Its Contention 14, July 8, 1981; Applicants' Answer to OCRE Motion for Leave to File Contention 14, July 20, 1981; NRC Staff Response to Motion of OCRE for Leave to File Its Contention No. 14, July 28, 1981; (footnote continued next page)

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The Licensing Board, by Memorandum and Order dated October 2, 1981, rejected the contention as being proscribed by section 50.13.[2/] OCRE now has before the Licensing Board a November 3, 1981, petition filed pursuant to 10 C.F.R. §2.758(b) which seeks a waiver of 10 C.F.R. §50.13 to allow consideration of the EMP contention in this proceeding.

Applicants oppose granting of the relief requested on the grounds that none of the requirements of section 2.758 of the Commission's Rules of Practice has been satisfied.

Section 2.758(a) specifically provides that no rule or regulation of the Commission shall be subject to attack in an adjudicatory licensing proceeding, except under very limited, carefully constrained conditions. Section 2.758(b) states that the sole ground for a petition for waiver or exception shall be that "special circumstances with respect to the subject matter of the particular proceeding" are such that application of the rule "would not serve the purpose for which the rule or regulation was adopted." Further, the petition must be supported by an affidavit sufficient to make a "prima facie showing." The OCRE petition meets none of these requirements.

1/ (footnote continued from page 1)
Procedural Order of the Licensing Board, August 4, 1981; and OCRE Reply to Staff and Applicants' Response to OCRE Contention 14 (Electromagnetic Pulse), August 19, 1981.

2/ The Board rejected a Staff argument that the contention was filed late and did not meet the criteria for admission in 10 C.F.R. §2.714. See also a related Memorandum to the Commission filed by the Licensing Board on October 7, 1981.

The Commission's fundamental, underlying purpose in promulgating section 2.758 was to set out its clear policy that basic policy issues were to be developed in rulemaking proceedings rather than in individual licensing proceedings. Thus, a request for waiver of a rule was not to be entertained in the course of an individual licensing proceeding unless there were shown to be special circumstances with respect to the subject matter of the particular proceeding:

> In view of the expanding opportunities for participation in Commission rule making proceedings and increased emphasis on rule making proceedings as the appropriate forum for settling basic policy issues, new §2.758 provides that challenges to Commission regulations in quasi-adjudicatory proceedings involving initial licensing shall be restricted to the matter of whether the application of a specified regulation or provision thereof should be waived or an exception made for the particular proceeding because special circumstances with respect to the subject matter of the particular proceeding are such that the application of the regulation would not serve the purposes for which it was adopted. (emphasis added)

37 Fed. Reg. 15127, 15129 (July 28, 1972).

The only "special circumstance" cited by OCRE is the possibility that it may, in general, be possible to protect nuclear plants against the effects of EMP. OCRE ignores entirely the crucial element of the Commission's requirement that there be special circumstances unique to the Perry facilities that would warrant granting an exception to the Commission's strong policy against challenging rules in individual licensing proceedings. OCRE's position, that the rule should

be revisited for generic reasons, is precisely the type of situation which the Commission has stated should be addressed in a rulemaking proceeding.

Since OCRE has not described special circumstances unique to the Perry Nuclear Power Plant which would enable waiver pursuant to section 2.758, it is not necessary to address the question of whether the special circumstances are such that application of section 50.13 would not serve the purposes for which it was adopted. However, it is perhaps worth noting that OCRE has mischaracterized the purpose of that regulation.

The Commission's purpose in promulgating section 50.13 was to establish and codify Commission practices to reflect the strong national policy that protection of the United States against hostile enemy acts is the responsibility of the nation's defense and internal security establishments. OCRE, on the other hand, seems to be saying that the purpose of the rule was to eliminate requirements for protective measures only if they are not "practicable." The Commission's Statement of Considerations accompanying the issuance of the regulation, 32 Fed. Reg. 13445 (September 26, 1967), indicates a recognition by the Commission that protection against "the full range of the modern arsenal of weapons" is not practicable, but nowhere makes a distinction between protection which is practicable and protection which is not. More significantly, that statement is but "one factor underlying the Commission's practice," Id., not the purpose for which the rule was adopted. Other factors cited by the

Commission as underlying the practice codified in the regulation are that:

(1) "the defense and internal security capabilities of this country constitute, of necessity, the basic 'safeguards' as respects possible hostile acts by an enemy of the United States;"

(2) the national policy encompasses other structures within our complex industrial economy, not just nuclear facilities;

(3) the risk of enemy attack or sabotage is a risk shared by the nation as a whole;

(4) assessment of whether and to what extent another nation would use force against the facility, and the nature and likelihood of success of such hostile force, is "speculative in the extreme;" and

(5) examination of such matters, apart from their speculative nature, "would involve information singularly sensitive from the standpoint of both our national defense and our diplomatic relations."

Neither the Commission's purpose for adopting section 50.13, which is to reflect conformance with the national policy of leaving protection against enemy acts in the hands of the defense and internal security establishments, nor any of the foregoing factors underlying the Commission's practice, is contravened by the Board's application of §50.13 in this proceeding.

Quite apart from the above arguments, the affidavit in support of the contention is totally inadequate. A simple statement that it "may" be practicable to defend and design against the effects of EMP, made by an affiant who has demonstrated no credentials in the subject matter, cannot possibly constitute the prima facie showing required by 10 C.F.R. §2.758.

For the reasons stated above, Applicants respectfully submit that the requirements of 10 C.F.R. §2.758 have not been met, a prima facie showing has not been made, and the petition for waiver should be denied by the Licensing Board.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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