

December 7, 1981

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'81 DEC -8 P5:15

Before the Atomic Safety and Licensing Board

SECRETARY  
REGULATORY & SERVICE  
BRANCH

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

Docket Nos. 50-440  
50-441

APPLICANTS' ANSWER TO OHIO  
CITIZENS FOR RESPONSIBLE ENERGY  
MOTION FOR LEAVE TO FILE ITS  
CONTENTION 15



In a filing dated November 21, 1981, Ohio Citizens for Responsible Energy ("OCRE") seeks permission to amend its Petition to Intervene to add a new contention. The proposed contention argues that Applicants have "not provided reasonable assurance that [they] will be able to safely store and/or dispose of the radioactive materials that will be generated at PNPP". OCRE's contention should be dismissed as untimely. It is also barred by an explicit Commission ruling in the on-going Waste Confidence rulemaking.<sup>1</sup>

<sup>1</sup> See Notice of Proposed Rulemaking, "Storage and Disposal of Nuclear Waste", 44 Fed. Reg. 61372 (1979).

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I. OCRE Has Not Justified Its Untimely Contention

OCRE acknowledges that its contention is a "non-timely filing[]". Motion, p. 4. Applicants agree. OCRE claims that a balancing of the factors set forth in 10 CFR §2.714 justifies the contention's admission. We disagree. It must be borne in mind that intervenors proposing untimely contentions "properly have a substantial burden in justifying their tardiness". Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975)<sup>2</sup>

The most important factor in determining whether a late contention should be admitted is the intervenor's showing of "good cause" for the delay. See Nuclear Fuel Services, Inc., supra at 275; Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-24, 12 NRC 231, 237 (1980). OCRE's allegation of "good cause" is strained at best. OCRE claims that as of March 1981, it "stood content that the on-going rulemaking on this issue, commenced in 1979, was near fruition". Motion, p. 4. No basis appears for this statement. Nor indeed is there any indication that OCRE is aware of the actual status of the rulemaking.<sup>3</sup> In March 1981, the

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2 Although West Valley dealt with a non-timely intervention petition rather than late-filed contentions, the same tests apply in both situations. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-13, 13 NRC 559, 574 (1980).

3 For example, OCRE states that in the eight months since March 1981, there has been a "lack of visible or tangible progress on the issue". Motion, p. 4. OCRE seems unaware, for

Commission had yet to announce the procedures or schedules for subsequent phases of the hearing. Thus, OCRE's confidence in the schedule for completion of the rulemaking seems to be an after-the-fact rationalization.

The second factor, other means to protect OCRE's interest, presents the clearest case for rejecting the contention. If OCRE is dissatisfied with the pace of the Waste Confidence Rulemaking, it could have sought to participate in it. Applicants have reviewed the record of that rulemaking and have found no indication that OCRE, its representatives or its members have participated in any way in it.

As to the third factor, ability to assist in developing a sound record, OCRE provides no indication of expertise on the issues of radioactive waste disposal.<sup>4</sup> The fourth factor, representation of OCRE's interest by existing parties, would favor the contention. As to the fifth factor, broadening the issues and delaying the proceeding, admission of the contention would certainly broaden the issues; whether or not it would delay the proceeding is speculative.

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(continued)

example, of the Commission's Second Prehearing Memorandum and Order (November 9, 1981), establishing schedules and guidance for the next phase of the proceeding.

4 OCRE's motion states that "several OCRE members have extensive experience in this area". Motion, p. 5. It would seem, however, that the "area" in question is the tenet that "all producers of energy in Ohio [should] deal responsively with any and all concomitant negative impacts the production of that energy might cause," Motion, p. 4, rather than radioactive waste management.

On balance, and giving the particular weight which the first factor deserves, Applicants submit that OCRE has failed to meet its burden.

II. The Commission Has Explicitly Directed That This Issue Be Excluded From Individual Licensing Proceedings

In addition to the general doctrine that matters which are the subject of on-going generic rulemaking should not be admitted as contentions in individual licensing proceedings,<sup>5</sup> the Commission has explicitly directed that the issues in the Waste Confidence rulemaking are not to be admitted as contentions in individual licensing cases.

During this proceeding the safety implications and environmental impacts of radioactive waste storage on-site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided, however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings. These issues are most appropriately addressed in a generic proceeding of the character here envisaged. Furthermore, the court in the State of Minnesota case by remanding this matter to the Commission but not vacating or revoking the facility licenses involved, has supported the Commission's conclusion that licensing practices need not be altered during this proceeding. However, all licensing proceedings now underway will be subject to whatever final determinations are reached in this proceeding.

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<sup>5</sup> Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

44 Fed. Reg. at 61373 (emphasis added). This position has been consistently followed by the Appeal Board.<sup>6</sup>

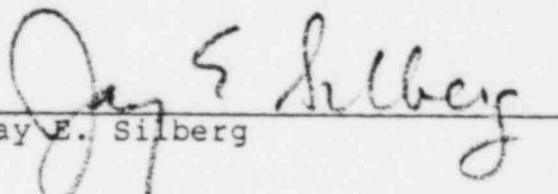
Especially where OCRE's complaint is with the speed at which the Commission is conducting the Waste Confidence rulemaking, an individual licensing proceeding is simply an inappropriate forum to raise that complaint. It is also difficult to understand the complaint where OCRE has apparently failed to participate in that rulemaking.

### III. Conclusion

For the reasons set forth above, Applicants respectfully request that the Licensing Board deny OCRE's motion to amend its Petition to Intervene by adding a new Contention 15.

Respectfully submitted

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: December 7, 1981

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<sup>6</sup> See, e.g. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 68-69 (1981); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980).

UNITED STATES OF AMERICA

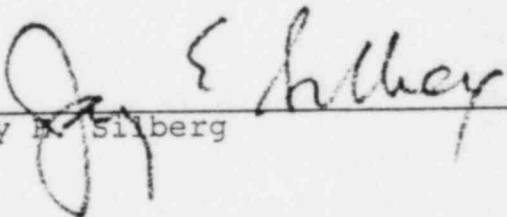
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer To Ohio Citizens For Responsible Energy Motion For Leave To File Its Contention 15" were served by deposit in the U. S. Mail, First Class, postage prepaid, this 7th day of December 1981, to all those on the attached Service List.

  
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Jay E. Silberg

Dated: December 7, 1981

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