

06/21/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CLEVELAND ELECTRIC ILLUMINATING)	Docket Nos. 50-440 OL
COMPANY, <u>ET AL.</u>)	50-441 OL
)	
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

RESPONSE OF NRC STAFF TO MOTION OF OHIO CITIZENS FOR
RESPONSIBLE ENERGY FOR LEAVE TO RESUBMIT CONTENTION 15

I. INTRODUCTION

On June 1, 1982, intervenor Ohio Citizens for Responsible Energy (OCRE) moved^{1/} to amend its intervention petition to resubmit a late-filed contention on the storage and disposal of radioactive wastes generated by the Perry Nuclear Power Plant. OCRE, having previously failed to have its proposed contention 15 admitted, resubmits it now in light of the recent ruling of the Court of Appeals for the District of Columbia Circuit in Natural Resources Defense Council v. NRC (Civil Action No. 74-1586) (NRDC).

Proposed contention 15 reads as follows:

The Applicant has not provided reasonable assurance that it will be able to safely store and/or dispose of the radioactive materials that will be generated by Perry Nuclear Power Plant. See 10 CFR section 50.57(a)(3) and 42 U.S.C. section 4332(2)(C)(1976). That this matter poses serious concerns for the health and environment of the OCRE members is undisputed. Vermont Yankee Nuclear Power Corp. v. N.R.D.C. 435 U.S. 519 (1978).

^{1/} Ohio Citizens for Responsible Energy Motion to Resubmit Contention 15.

In this response, the NRC Staff urges the Licensing Board to defer ruling on this contention until it receives further guidance from the Commission on the application of NRDC to licensing proceedings.

II. BACKGROUND

OCRE originally submitted this proposed contention on November 21, 1981.^{2/} In its motion of that date, OCRE questioned whether a safe offsite disposal facility for radioactive wastes would be available when the Perry operating license expires and, if not, whether these wastes could continue to be stored safely on site. OCRE conceded that its concerns could be dealt with to OCRE's satisfaction in a pending rulemaking on "waste confidence,"^{3/} if that rulemaking were "effective."^{4/} Because in its view that rulemaking had shown little or no progress, OCRE alleged that the issue of long-term waste disposal should be pursued instead in this proceeding.^{5/}

Both the Applicants^{6/} and the Staff^{7/} opposed OCRE's November motion on the grounds that (a) proposed contention 15 was barred by the

^{2/} Ohio Citizens for Responsible Energy Motion for Leave to File its Contention 15, dated November 21, 1981 (OCRE's November Motion).

^{3/} See Notice of Proposed Rulemaking, "Storage and Disposal of Nuclear Waste," 44 Fed. Reg. 61372 (1979).

^{4/} OCRE's November motion, supra, at 2.

^{5/} Id., at 3-4.

^{6/} Applicants' Answer to Ohio Citizens for Responsible Energy Motion for Leave to File its Contention 15, dated December 7, 1981.

^{7/} Response of NRC Staff to Motions of Ohio Citizens for Responsible Energy for Leave to File Contentions 15 and 16, dated December 11, 1981.

express language used by the Commission in its notice of the waste confidence rulemaking^{8/} and (b) OCRE had failed to meet the standards of § 2.714(a) for a late-filed contention. The Licensing Board rejected proposed contention 15 in a February 26, 1982 Order.^{9/} Without reaching the question of whether OCRE had good cause for the late filing of the contention, the Board held that the contention was beyond the Board's jurisdiction by the explicit direction of the Commission in the waste confidence proceeding.^{10/}

On April 27, 1982, the Court of Appeals overturned the Commission's fuel cycle rules which establish a set of values, denominated Table S-3,^{11/} to be used in determining the environmental impact of the uranium fuel cycle in support of individual nuclear power reactors under licensing consideration. Relevant to OCRE's proposed contention 15, the Court held that Table S-3 failed "to allow for proper consideration of uncertainties concerning the long-term isolation of high-level and transuranic wastes."^{12/} The Court defined these uncertainties as "1) uncertainty concerning the

^{8/} 44 Fed. Reg. 61373; as the Commission stated:

"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 rule-making would not be addressed in individual licensing proceedings."

^{9/} Memorandum and Order (Concerning Late-Filed Contentions: Waste Disposal and MgO₂ Bricks).

^{10/} Id., at 2.

^{11/} 10 C.F.R. § 51.20(e) (1981).

^{12/} NRDC, supra, slip op. at 11.

integrity of the permanent repository, if such a repository is ever built; and 2) uncertainty over whether and when such a repository, or equivalent system of disposal, will be developed."^{13/}

OCRE bases its present motion to resubmit contention 15 on this Court decision.^{14/}

III. DISCUSSION

The Staff anticipates that the Commission will be issuing directions to licensing and appeal boards on the effect of the NRDC decision on, inter alia, pending licensing proceedings. These directions might also address the relationship between the waste confidence proceeding and the NRDC decision. As such this guidance could have controlling effect on this Licensing Board's determination of the admissibility of proposed contention 15.^{15/} The Staff therefore believes it appropriate for the Board to await Commission's guidance before ruling on OCRE's proposed contention.

The Staff believes that the Commission's guidance will also have a bearing on the question of whether OCRE has good cause for the late filing of proposed contention 15. If the Commission's guidance has the

^{13/} Id., at 45.

^{14/} On June 11, 1982, the Department of Justice and the Commission have filed a petition for rehearing and reconsideration en banc of the NRDC decision.

^{15/} Although OCRE has styled its motion as a resubmittal of a waste confidence issue, its supporting justification suggests that OCRE is raising an issue concerning the environmental costs of waste management.

effect of permitting litigation in individual licensing proceedings of issues addressed in NRDC, that guidance may well provide a basis for a showing of good cause for the late filing of this contention. At present, the Staff has no basis for assessing whether good cause has been shown.

IV. CONCLUSION

For the reasons discussed above, the Licensing Board should defer ruling upon OCRE's proposed contention 15 until the Commission provides guidance to Licensing Board's on the consideration of fuel cycle issues in individual licensing proceedings. After this guidance is issued, the parties would be in a position to address, and the Licensing Board to rule upon, the admission of OCRE's proposed contention 15.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 21st day of June 1982

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