

10/4/82

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 RESPONSE TO APPLICANTS' MOTION TO REVISE
PROCEDURES FOR LATE-FILED CONTENTIONS

INTRODUCTION

In a motion filed on September 13, 1982^{1/} Applicants have requested the Licensing Board to rescind its mandate to Intervenor who late-file contentions to also file replies addressing the factual and legal arguments presented by the NRC Staff and the Applicants in their answers to the late-filed contentions.^{2/} Applicants ground their request on their claim that the manner in which the reply procedure has been used in this proceeding has been unfair to Applicants and the NRC Staff. For the reasons set forth below the NRC Staff supports the Applicants' motion.

1/ "Applicants' Motion to Revise Procedures for Late-Filed Contentions" filed September 13, 1982.

2/ "Procedural Order Requiring Replies by Intervenor Filing Late Contentions" dated August 4, 1981.

DESIGNATED ORIGINAL

Certified By

DSO 2pl

DISCUSSION

As the Applicants note, Intervenor who file their contentions prior to the special prehearing conference required by 10 CFR 2.751a are provided an opportunity at the conference to reply to the arguments of the Applicants and the Staff against the admission to litigation of those contentions, and the Licensing Board by the procedure that the Applicants seek to have rescinded presumably intended to provide a substitute method by which Intervenor who file contentions after that conference is held may reply to the arguments of the Applicants and the Staff against the admission to litigation of those "late-filed" contentions.

The Staff agrees with the Applicants that to the extent that an Intervenor in this mandatory reply, rather than being limited to rebutting the specific arguments of the Staff and the Applicants against the admissibility of its contentions as framed and supported in its initial motion, is permitted (1) to further specify or provide additional bases for the challenged contentions, (2) to advance new arguments in support of the admissibility of those contentions, or (3) to raise other matters which could and should have been included in the motion as initially filed, the Licensing Board's mandatory reply procedure is unfair to the Staff and the Applicants. Moreover, the raising of such new matters by an Intervenor constitutes, in the view of the Staff, an amendment of the Intervenor's initial motion, and such matters are even more untimely raised. Thus, to the extent that the Licensing Board's mandatory reply procedure neither explicitly prohibits the raising of such new matters by an Intervenor in its reply nor explicitly provides the Staff and the

Applicants with an opportunity to answer such amendments to the initial motion, it could be viewed both as in violation of 10 CFR 2.730 and a denial of due process to the Applicants and the Staff.

Neither the Atomic Energy Act of 1954 nor any NRC regulation requires that an Intervenor reply to objections to the admissibility of its contentions, regardless of whether those contentions are timely-filed or late-filed. Furthermore, except arguably in a situation involving a contention that is both wholly-based on new information and timely-filed with respect to the objectively-determined availability of that new information to the public,^{3/} it is not apparent to the Staff that an Intervenor who files additional contentions after the special prehearing conference required by 10 CFR 2.751a is entitled to any opportunity to reply to challenges to the admissibility of such contentions. For other situations involving such late-filed contentions, regardless of whether the contentions may be adequate in terms of reasonable specificity of basis, an Intervenor must persuade the Licensing Board that the "five factors" of 10 CFR 2.714(a)(1) balance in favor of admission of each contention. The contentions as to which the balance is unfavorable cannot be admitted to litigation. Situations involving motions for admission of such late-filed contentions are unlike those involving the timely filing of contentions to supplement a petition for leave to intervene. Therefore, in the view of the NRC Staff neither the Licensing Board's rescinding of its mandatory reply procedure nor its denial of an unrestricted opportunity

^{3/} See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ____, Slip opinion at 16 (August 19, 1982).

to an Intervenor to reply to challenges by the Applicants and the Staff to its late-filed contentions would conflict with the views expressed by the Appeal Board in its advisory opinion in the Allens Creek case^{4/} or its opinion interpreting the governing Rules of Practice in the Catawba case.^{5/}

The Atomic Energy Act of 1954 does not confer an absolute right of intervention on anyone; rather, the Commission may condition the exercise of the right to intervene and to raise issues for litigation upon the satisfaction of reasonable procedural requirements. BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974). It follows clearly that an opportunity to reply to objections to the admission to litigation of late-filed contentions (those that are filed later than 15 days prior to the special prehearing conference required by 10 CFR 2.751a), including those that are wholly-based on new information and timely-filed with respect to the availability of that new information, also can be conditioned upon the satisfaction of reasonable procedural requirements. Therefore, in the Staff's view a Licensing Board may require that an Intervenor seeking admission to litigation of such late-filed contentions demonstrate in its initial motion either (1) that the contentions are wholly-based on new information and timely-filed with respect to the availability of that information to the public or (2) that the factors in 10 CFR 2.714(a)(1) balance in favor of admitting the contentions. It may withhold an opportunity to reply to those portions of the challenges of the Staff and the Applicants to the admission of

^{4/} Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), 10 NRC 521 (1979).

^{5/} Supra at n.3.

late-filed contentions that are specifically grounded on claims that the late-filed contentions are not wholly-based on new information or timely-filed with respect to the availability of that information or that the "five factors" of 10 CFR 2.714 do not balance in favor of admitting the contentions. It may grant an opportunity to respond to challenges on other specific grounds such as (1) that the contention and its bases are not reasonably specific, (2) that the contention impermissibly challenges a regulation of the Commission, or (3) that it seeks to raise an issue outside the jurisdiction of the Board to decide, after it has decided over the objections of the Staff and the Applicant either that the contention is wholly-based on new information and timely-filed with respect to the availability of that information to the public or that the factors in 10 CFR 2.714(a)(1) balance in favor of admitting the contention and thus that the contention is admissible unless it is inadmissible on other grounds. In granting an opportunity to an Intervenor to reply to such specific challenges by the Staff and the Applicants the Board should stress that portions of an Intervenor's reply addressing matters other than the specific matters on which the opportunity to reply is granted will not be considered by the Board in deciding whether to admit the contentions to litigation.

In the view of the Staff a procedure that (1) requires an Intervenor adequately to demonstrate why its motion for admission of late-filed contentions should be entertained, (2) restricts any opportunity to reply to challenges to the admissibility of late-filed

contentions to allow an Intervenor to address only specific portions of those challenges, and (3) provides for disallowed portions of an Intervenor's reply to be stricken, unlike the Board's present mandatory reply procedure, would be fair to all parties.

III. CONCLUSION

For all of the reasons set forth above, the Staff believes that the Applicants' motion should be granted.

Respectfully submitted,



James M. Cutchin IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of October, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANTS' MOTION TO REVISE PROCEDURES FOR LATE-FILED CONTENTIONS" 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 4th day of October, 1982:

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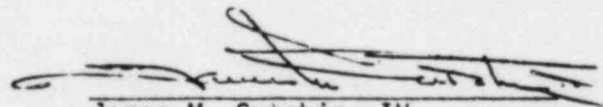
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