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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 OHIO CITIZENS
FOR RESPONSIBLE ENERGY "MOTION TO
SEVER THE PNPP UNIT 2 OL
PROCEEDING FROM THAT OF UNIT 1"

By Motion of September 7, 1982, Ohio Citizens for Responsible Energy ("OCRE") requests the Licensing Board to sever Unit 2 from this proceeding. OCRE bases its Motion on four arguments: that the "completion date" of Unit 2 has been delayed until 1991; that new legal and technological developments may occur; that additional construction deficiencies may be discovered in Unit 2; and that Unit 2 has not been considered by the Advisory Committee on Reactor Safeguards ("ACRS").

Each of these arguments is without merit. Moreover, OCRE in effect asks the Licensing Board to initiate a new and independent licensing proceeding - something the Licensing Board lacks authority to do. Finally, OCRE's Motion seeks to have the Licensing Board preempt the Commission on an issue that is now being considered by the Commission in a rulemaking proceeding. For these reasons, the Motion should be denied.

Although the Motion is conspicuously silent on the history of this issue, this is the third time that intervenors have asked the Licensing Board to sever Unit 2 from this proceeding. In its petition for leave to intervene, Sunflower Alliance, Inc. ("Sunflower") challenged the tandem licensing of Units 1 and 2 as "improper" and "contrary to safety considerations." As in OCRE's Motion, Sunflower contended that the delay between completion of construction of Unit 1 and Unit 2 required that the units be licensed in separate proceedings.

The Licensing Board rejected Sunflower's argument, observing that "a license would not be issued for Unit 2 until the Director of Nuclear Reactor Regulation determined that it had met the standards of 10 C.F.R. § 50.57; and that those findings require, among other things, that the facility be 'substantially completed.'" Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 N.R.C. 175, 209 (1981) (Special Prehearing Conference

Memorandum and Order). The Licensing Board also noted that if there were any issues specific to Unit 2 that remained pending, the Licensing Board could retain jurisdiction of the licensing proceeding.

Sunflower objected to the Licensing Board's ruling on tandem licensing and asked for reconsideration. By Memorandum and Order of September 9, 1981, the Licensing Board denied the objection with the following explanation.

Sunflower has not persuaded us that it is necessary to divide this proceeding into two at this time. However, as the proceeding draws to a close, Sunflower will be provided with the opportunity to argue that it has pending contentions which must be resolved before the Board can recommend that an Operating License be issued for Perry Unit 2, which is still in early stages of construction. At that time, issues which are unique to Unit 2 will not have been adjudicated and Sunflower will have a full and fair opportunity to prevail on this argument.

Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 N.R.C. 682, 685 (1981). OCRE now asks the Licensing Board to consider the issue of tandem licensing a third time. Like the preceding attempts, this one too should be rejected. The same logic which warranted denial the first two times compels denial again.

The first basis which OCRE cites as support for its motion is Applicants' July 21, 1982 application to amend the construction permits for the Perry reactors. The application

requested that the latest dates for completion of construction specified in the permits be changed from December, 1982 and June, 1984 for Units 1 and 2, respectively, to November, 1985 and November, 1991. OCRE apparently misunderstands the nature and purpose of this application. The requested extension does not mean that completion of the units has been deferred until the requested dates. All that the applications seek is to extend the latest date for completion of each of the units.^{1/} This is being done to account for possible time contingencies that may extend the completion dates beyond Applicants' present estimates.

Applicants are not predicting (or conceding) that Unit 2 will not be completed until 1991. Indeed, as stated in the application, Applicants' scheduled date of commercial operation for Unit 2 remains May, 1988. The fuel load date for Unit 2 remains May, 1987. OCRE's suggestions that Unit 2 may be delayed beyond 1991 or even cancelled, Motion at 1, are sheer speculation.

Even assuming that OCRE's reading of the application to amend the construction permits is correct - which it is not - the relief which OCRE requests is wholly inappropriate. The

^{1/} Section 185 of the Atomic Energy Act, 42 U.S.C. § 2235, requires construction permits to specify the earliest and latest dates for completion of construction. See also 10 C.F.R. § 50.55.

scope of this proceeding has been defined by the Commission to include both Perry Units 1 and 2. The Notice of Opportunity for Hearing, by which this proceeding was commenced, provided for an opportunity for hearing on Perry Nuclear Power Plant, Units 1 and 2. 46 Fed. Reg. 12372 (February 13, 1981). See also Notice of Establishment of Atomic Safety and Licensing Board to Preside in Proceeding. 46 Fed. Reg. 20340 (April 3, 1981). The Licensing Board's jurisdiction is governed by the notice of opportunity for hearing^{2/} That notice calls for a proceeding on both Perry units, not two separate proceedings. A licensing board's actions "can neither enlarge nor contract the jurisdiction conferred by the Commission." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 A.E.C. 645, 647 (1974). Bifurcating the two dockets and establishing a separate operating license proceeding for Unit 2 is outside the scope of the Licensing Board's jurisdiction.^{3/}

2/ Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 N.R.C. 558, 565 (1980); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 N.R.C. 18, 24 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 170-171 (1976).

3/ "[L]icensing boards have no independent authority to initiate any form of adjudicatory proceeding." Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-381, 5 N.R.C. 582, 592 (1977).

OCRE's requested relief - bifurcation of the proceeding - is also inconsistent with well established NRC practice. It has been the Commission's long-standing practice to afford a single opportunity for hearing with respect to multi-unit plants at the operating license stage. This practice dates back at least as far as the Federal Register Notice published in connection with the proposed issuance of operating licenses for Florida Power & Light Company's Turkey Point Units 3 and 4, 36 Fed. Reg. 20,906 (1971).

This long-standing practice is perfectly appropriate in this case. As is clear from the Final Safety Analysis Report and the Safety Evaluation Report (as well as comparable construction permit stage documents), Perry Units 1 and 2 are identical. Any safety issues presented are equally applicable to both units. OCRE has failed to suggest one litigable issue that would more appropriately be considered in two separate proceedings.

OCRE nonetheless insists that it is "improper" to conduct a licensing proceeding for Unit 2 at this time because of possible intervening changes in technology, new Commission regulations, yet-to-be-enacted Congressional legislation, and future court cases. Of course, some or all of these may occur. Such changes cannot be ruled out with any more certainty than they can be predicted. But nowhere does Commission regulation

or practice suggest that these possibilities justify a separate proceeding for Unit 2.

Indeed, it would be a tremendous waste of the Commission's and Applicants' (and even intervenors') resources for there to be two separate proceedings. OCRE's suggestion that severing Unit 2 from the proceeding will save "a great amount of expense and effort for all parties" is simply incredulous. Such duplication of effort is particularly unjustified where the only harms alleged by OCRE are grounded in mere speculation.

OCRE also maintains that bifurcation is necessary because "[u]ndoubtedly deficiencies in [future Unit 2] construction will occur"^{4/} and "these problems must be addressed publicly within the hearing structure provided by NRC's rules of practice." Motion at 2. This argument evidences a misunderstanding of the purpose of an operating license hearing. It is not intended as a device to monitor the construction of the plant. Intervenors are neither equipped nor empowered to function as quality assurance inspectors. To the extent that OCRE alleges deficiencies in Applicants' quality assurance program, it already has the opportunity available to raise those issues.

^{4/} While considerable construction remains, Unit 2 is now over 43% complete. See "Final Environmental Statement Related to the Operation of Perry Nuclear Power Plant, Units 1 and 2," NUREG-0884 (August, 1982), p.v.

If new issues were to arise during the interval between the in-service dates of the two Perry units, several mechanisms exist for their consideration. The Licensing Board has already identified one mechanism in twice denying bifurcation of this proceeding. The motion to reopen is, as recognized by OCRE, another option. (If the future problems with Unit 2 are as dire as OCRE predicts, it should have no difficulty meeting the Commission's standards for reopening.) A request for an order to show cause pursuant to 10 C.F.R. §2.206 is another possibility. All of this is in addition to the Staff's statutory and regulating responsibilities. The operating license for Unit 2 cannot be issued until the Commission has determined that the plant has been properly constructed and substantially completed, and that all current safety and environmental requirements have been met.

OCRE's final argument for severing Unit 2 is that the ACRS did not issue an evaluation of Perry Unit 2. OCRE argues that, according to Duke Power Company (McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 N.R.C. 680 (1977), the Board cannot decide any safety issues for Unit 2 until the ACRS letter is issued, and that this will unnecessarily delay the proceeding for several years.

OCRE misunderstands the import of the McGuire ruling, at least in part due to the decision's lack of clarity. In

that case, Applicants moved for summary disposition on two safety issues at a time when neither the Staff's Safety Evaluation Report nor the ACRS letter had been issued. The motion was denied. As stated by the licensing board,

It is denied on the safety related issues because the Staff's safety review is not complete.

5 N.R.C. at 683. OCRE's reading of the case apparently stems from an earlier statement by the board.

As the Staff has noted in its argument, contentions 3 and 4 are safety matters involving operations under the proposed operating license and the financial ability of the Applicant to operate the facility safely. The Staff Safety Evaluation Report (SER) and the opinion of the Advisory Committee on Reactor Safety (ACRS Report) have not been issued. Accordingly, these two matters involving safety issues are not appropriate for summary disposition at this time. However, if changed circumstance can be shown, such matters are open for reexamination at the operating licensing stage, though previously litigated between the parties. Power Reactor Development Co. v. Int. Union of Electrical Workers, 367 U.S. 396 (1960).

5 N.R.C. at 681. It is also worth noting that the McGuire licensing board subsequently characterized its denial of summary disposition in yet a third way.

Applicant's motion for summary disposition on the safety-related issues was denied because such issues may be reexamined at the operating license stage though previously litigated between parties, if changed circumstances can be shown. Power Reactor Development Company v. International Union of Electrical Workers, 367 U.S. 396 (1960).

Duke Power Co. (McGuire Station, Units 1 and 2), Initial Decision, LBP-79-13, 9 N.R.C. 489, 491 (1979). Based on this history, one cannot draw any conclusion from the decision cited by OCRE. Since the Perry SER has been issued and since the ACRS letter addresses the substance of Unit 2 (since the two units are identical), there is no justification for arbitrarily splitting this proceeding in half.

OCRE's argument concerning the ACRS letter merely presumes that the ACRS letter for Unit 2 will not be forthcoming "until 1991 or beyond." Motion at 3. Here again OCRE is engaging in sheer speculation. At the very least, the Board should, as it suggested in its September 9, 1981 Order, wait until the proceeding draws to a close before deciding whether the matter of the ACRS letter or any other issue still is pending with respect to Unit 2.

In any event, the Licensing Board can decide Unit 2 safety issues (if there were any) in the absence of a Unit 2 ACRS letter. The limited status of the ACRS report is well established. It is procedural step in the licensing process. A licensing board may rely on the ACRS' conclusions only in uncontested cases and in contested cases with respect to uncontroverted issues. 10 C.F.R. 2, App. A, §§ V(f)(1) and (2). As the Appeal Board has explained:

[S]ince the persons responsible for the report (the members of the ACRS) are not subject to being examined by the parties or the Board with reference to its contents, the report cannot be treated as having been admitted into evidence for the truth of any of the statements therein. Rather, its introduction into the record must be deemed to be for the limited purpose of establishing compliance with the requirements of the statute.

Arkansas Power and Light Company (Arkansas Nuclear One Unit 2), ALAB-94, 6 A.E.C. 25, 32 (1973). Accord, Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-217, 8 A.E.C. 61, 75 (1974). Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 A.E.C. 331, 339-40 (1973). Thus, nothing in the regulations requires that the ACRS report be admitted into evidence at any particular time in an operating license proceeding. See 10 C.F.R. §§ 2.102(b) and (c), 2.743(g), and 50.58.

Finally, Applicants point out that there is pending before the Commission a petition for rulemaking concerning tandem licensing. Docket No. PRM-2-11. See Notice of Petition for Rulemaking, 47 Fed. Reg. 4310 (Jan. 29, 1982). It would be inappropriate for the Licensing Board to grant OCRE's Motion to sever this operating license proceeding before the Commission has disposed of the petition. A determination on the petition will undoubtedly shed light on the question of conducting separate operating license hearings for each unit at a nuclear

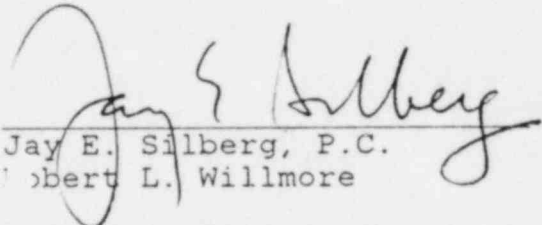
plant site. OCRE's concern with the tandem licensing of Unit 2 applies equally to any other multiple-unit nuclear plant. If OCRE's arguments were adopted, the NRC could never conduct multi-unit proceedings; and that is a question for the Commission to decide.

For all of the above reasons, Applicants respectfully request that the Board deny OCRE's motion.

Respectfully submitted,

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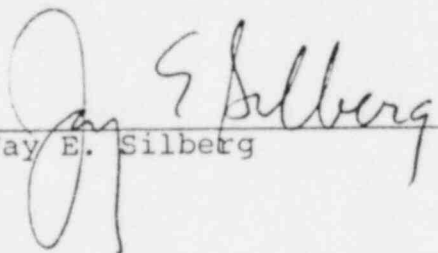
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer to Ohio Citizens for Responsible Energy 'Motion to Sever the PNPP Unit 2 OL Proceeding from that of Unit 1'", were served by deposit in the United States Mail, First Class, postage prepaid, this 22nd day of September 1982, to all those on the attached Service List.



Jay E. Silberg

Dated: September 22, 1982

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