

September 27, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board SEP 30 P1:13

In the Matter of)
)
CLEVELAND ELECTRIC ILLUMINATING)
COMPANY, Et Al.)
)
(Perry Nuclear Power Plant,)
Units 1 and 2))
_____)

Docket Nos. 50-440
50-441
(Operating License)

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OCRE REPLY TO APPLICANTS' MOTION TO
REVISE PROCEDURES FOR LATE-FILED CONTENTIONS

On September 13, 1982 Applicants filed a motion requesting the Licensing Board to rescind its August 4, 1981 Procedural Order requiring intervenors to file responses to Staff and Applicants' answers to late-filed contentions. Pursuant to 10 CFR 2.730(c), OCRE hereby replies to said motion. As they did in their July 28, 1982 letter to the Licensing Board,^{1/} Applicants allege that intervenors are misusing the reply briefs to the prejudice of Applicants and Staff. OCRE believes that this argument is entirely without merit and that the motion should be denied.

The argument that intervenors' reply briefs have put Staff and Applicants in an unfair position is simply incredible when one considers the vast disparity in resources available to Staff and Applicants as opposed to intervenors. Applicants consist of 5 utility companies, each with its own considerable technical and legal staff, and are represented by a law firm with 93

1/ See also OCRE's reply to that letter, dated July 31, 1982.

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attorneys listed on its letterhead. Staff likewise has considerable personnel available. Intervenors, on the other hand, are all volunteers with limited resources. The Licensing Board's order requiring reply briefs enhances justice by permitting intervenors to have the last word on new contentions. Rather than being unfair to Applicants, the procedure merely gives intervenors an even chance.

Indeed, rescinding this procedure would put intervenors in the impossible position of having to predict all Staff and Applicants' responses in advance and to respond to same in the original filing. The regulations in themselves place a substantial burden on intervenors for the admission of late-filed contentions. This burden should not be increased by depriving intervenors of the opportunity to refute opposing arguments.

Even if this procedure has resulted in the improper admission of contentions (OCRE believes it has not), Applicants are not truly prejudiced by this. Mechanisms exist whereby this can be corrected. Applicants can move for summary disposition on issues which they believe are not genuine. If Applicants believe that the Board has made a truly serious error, they can move the Appeal Board for directed certification, as they have done concerning the admission of Issue #8. Of course, the usual appeal mechanisms are available at the conclusion of the proceeding. Numerous avenues thus exist which can resolve any prejudice which might occur to Applicants.

Applicants' complaint that they were unable to point out the numerous deficiencies in the reply brief filed by Sunflower

Alliance concerning the low-level radiation contention is rather ironic, since it is obvious that Applicants are using the motion as an unauthorized reply to Sunflower's filing.^{2/} As such, the Licensing Board should strike the motion.

Finally, the rescission of the August 4, 1981 Procedural Order would fundamentally distort the Licensing Board's precedential standards for the conduct of this proceeding. The Board has adopted a special procedure in this case (see Special Prehearing Conference Memorandum and Order, LBP-81-24, slip op. at 12) which requires that the full procedural context be considered in the admission of contentions. This context includes the responses to contentions. Since the Board has held "that there must be reason or authority supporting the proposition that the responses did not completely dispose of the contentions" (Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2) LBP-81-55, 14 NRC 1017, 1022), intervenor reply briefs are necessary to supply such reason or authority.

OCRE believes that it is not improper to raise new legal or factual arguments in the reply briefs. Indeed, it would serve no purpose to have intervenors merely repeat their original arguments in the reply brief. Applicants' allegations of the impropriety of this are without grounds.

^{2/} Even if the Licensing Board should agree with the Applicants' assessment of deficiencies in those filings, this should not serve as grounds to rescind the August 4, 1981 Procedural Order. OCRE (and Sunflower in its future filings) should not be penalized on the basis of one Sunflower reply brief.

For the reasons stated above, OCRE requests that the
Licensing Board deny Applicants' motion. ^{3/}

Respectfully submitted,

Susan L. Hiatt

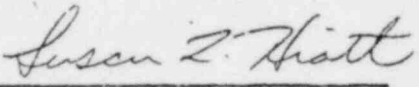
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^{3/} In the unlikely event that the Licensing Board grants Applicants' motion, intervenors should retain the right to file reply briefs for those new contentions already submitted, as these were filed with the assumption that reply briefs would be required.

CERTIFICATE OF SERVICE

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This is to certify that copies of the foregoing OCRE SEP 30 P1:11
REPLY TO APPLICANTS' MOTION TO AMEND SEPTEMBER 16, 1982
MEMORANDUM AND ORDER and OCRE REPLY TO APPLICANTS' MOTION
TO REVISE PROCEDURES FOR LATE-FILED CONTENTIONS were served
by deposit in the U.S. Mail, first class, postage prepaid,
this 27th day of September 1982 to those on the service list
below.


Susan L. Hiatt

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