

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))

Docket No. 50-440 OL
50-441 OL

NRC STAFF'S RESPONSE TO MOTION OF OHIO CITIZENS FOR RESPONSIBLE
ENERGY TO COMPEL DISCOVERY OF THE STAFF AND APPLICANTS

INTRODUCTION

On September 20, 1982 Intervenor Ohio Citizens for Responsible Energy (OCRE) moved the Licensing Board for an Order compelling the NRC Staff and the Applicants to answer certain interrogatories arguably related to Issue #6 and identified in its motion to compel.^{1/} As the basis for its motion, OCRE asserts that, although it has attempted to do so, it has not been able to reach an agreement with the Staff and the Applicants on the scope of Issue #6, and "[i]t therefore becomes necessary for the Licensing Board to resolve these disputes." OCRE Motion at 2. For the reasons set forth below OCRE's motion should be denied.

^{1/} "Ohio Citizens for Responsible Energy Motion to Compel Discovery on Staff and Applicants" dated September 20, 1982 ("OCRE Motion"). The interrogatories that are the subject of the motion to compel were filed by Intervenor Sunflower Alliance, Inc. (Sunflower). However, the Licensing Board on September 17th approved the designation of OCRE as lead intervenor on Issue #6, and OCRE has apparently adopted the Sunflower interrogatories.

DESIGNATED ORIGINAL

Certified By DSM

DISCUSSION

The interrogatories to which OCRE seeks to have the Licensing Board compel answers were the subject of an oral ruling by the Licensing Board against the Intervenors, who at the time were seeking to compel answers only to those interrogatories addressed to the Applicants, in the conference call of August 13, 1982.^{2/} Tr. 723. (Chairman Bloch). Intervenors were directed to rephrase their interrogatories on Issue #6 (ATWS) to address only the contention admitted by asking about the differential advantages and disadvantages associated with using a manual rather than an automatic standby liquid control system and to resubmit them. Order (Concerning a Motion to Compel) dated August 18, 198[2] at 7 and Tr. 723-725. (Chairman Bloch). However, OCRE states that it considers "the resubmission of those interrogatories to be a rather pointless exercise" and that it believes the comments of the Chairman during the conference call of August 13, 1982 (Tr. 723-724) provide a basis for expanding discovery (and thus presumably the contention) on Issue #6 to include the consequences of an unmitigated ATWS and the reliability of other ATWS mitigation features. OCRE motion at 2 and 7. To support its view that discovery should be expanded OCRE sets forth almost five pages of "bases". OCRE's actions appear to the Staff to be an admission by OCRE

^{2/} Both OCRE and Sunflower participated in that conference call. Tr. 660 (Wilt and Hiatt).

that the scope of the discovery it seeks is broader than the contention that was admitted to litigation. That alone is reason enough to deny OCRE's motion.

That the scope of the ATWS contention (or any other) admitted to litigation remains at this stage of the proceeding a subject of controversy among the parties who will litigate it is unfortunate. The Licensing Board in admitting the ATWS contention stressed the fact that it was to be interpreted to raise a narrow point -- that Applicants should install an automated standby liquid control system to mitigate the consequences of an ATWS. LBP-81-24, 14 NRC 175, 220 (1981). It is also unfortunate that OCRE apparently does not realize that at this stage of the proceeding a contention may not be broadened unless the broadening is wholly-based on new information and timely-requested with respect to the availability of that new information to the public or the five factors in 10 CFR 2.714(a)(1) balance in favor of permitting the scope of the contention (and thus the scope of allowable discovery on the contention) to be broadened. See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ____, (August 19, 1982), Slip Opinion at 7-16. Thus OCRE has not attempted to make a showing that either criterion is met. In addition, OCRE may not realize that in spite of the fact that a Licensing Board may reword an Intervenor's contentions to narrow their scope, as the Licensing Board did in admitting Issue #6 to litigation in this proceeding, a Licensing Board does not by simply rewording a contention make it broader in scope. For that reason, the reach of a reworded contention normally can be no broader in scope than the

specific basis supplied by the Intervenor in raising the contention. In other words, a Licensing Board in merely rewording an Intervenor's contentions to make them admissible to litigation does not expand them beyond the limitations imposed by the bases supplied by the Intervenor. To expand them beyond those self-imposed limitations a Licensing Board must supply additional bases of its own, an action that constitutes the raising of new issues sua sponte and that is now subject to special procedures. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC ____, (May 17, 1982), Slip opinion at 18. The Chairman of the Licensing Board has indicated that in rewriting the Intervenor's contentions to make them admissible in this proceeding the Board did not intend to raise any issues sua sponte. Tr. 696 (Chairman Bloch). Therefore, by making the comments referred to by OCRE at pages 2 and 3 of its motion as providing the basis for expanding the scope of discovery on Issue #6, the Staff does not believe that the Chairman was inviting OCRE to attempt to broaden the ATWS contention or the scope of discovery on Issue #6. Moreover, the Licensing Board cannot have intended the reach of the discovery by Intervenor to be broader than the scope of the admitted contentions because the Commission's regulations (See 10 CFR 2.740(b)(1)) limit the scope of discovery to the scope of the contentions and because Intervenor are not entitled to discovery to assist them in formulating new contentions or in broadening the scope of contentions already admitted to litigation in a proceeding. See ALAB-687, supra, at 11-12 and particularly n.12.

Finally, it is obvious that OCRE does not realize that formal discovery against the Staff is on a different footing than that against other parties. The Commission's Rules of Practice relating to motions to compel discovery do not provide for such motions against the Staff. 10 CFR 2.740(f)(3). Rather, they require interrogatories to be answered by the Staff only upon a finding by the Licensing Board that answers to the interrogatories are both necessary to a proper decision in the proceeding and not reasonably obtainable from any other source.^{3/} 10 CFR 2.720(h)(2)(ii); Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980). OCRE has not attempted to show, nor does the Staff believe it can show, that the interrogatories directed to the Staff satisfy the criteria of 10 CFR 2.720(h)(2)(ii).^{4/}

^{3/} The interrogatories to the Staff, that are the subject of OCRE's motion to compel, seek information far beyond the limited scope of issue 6 and such information, therefore, is not necessary to a proper decision in the proceeding. Moreover, interrogatories seeking information similar to that sought from the Staff were addressed to the Applicants. Thus, it does not appear that the Staff is the sole source of any information required for a proper decision in the proceeding should OCRE's interrogatories not be found to seek information beyond the scope of the ATWS contention.

^{4/} The Staff believes that it generally has been cooperative in voluntarily responding to reasonable discovery requests by the Intervenors. It intends to continue voluntarily to respond to unobjectionable requests as completely and as rapidly as possible.

In sum, the interrogatories that are the subject of OCRE's motion to compel are beyond the limited scope of the admitted contention to which they are purportedly directed and are, therefore, impermissible and objectionable. In addition, OCRE has failed to demonstrate that an order compelling the Staff to respond to the interrogatories is warranted under the criteria of 10 CFR § 2.720(h)(2)(ii).

CONCLUSION

For the reasons set forth above the Staff believes that OCRE's motion to compel discovery of the Staff and the Applicants should be denied.

Respectfully submitted,



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Dated at Bethesda, Maryland
this 5th day of October, 1982