October 19, 1982

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, ET AL.	)	50-441
	)	
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

APPLICANTS' ANSWER TO "OCRE REPLY TO STAFF AND APPLICANTS' RESPONSES TO OCRE'S MOTION FOR LEAVE TO FILE ITS CONTENTIONS 21 THROUGH 26"

On October 12, 1982, Ohio Citizens for Responsible Energy ("OCRE") filed a reply to the answers of Applicants and the NRC Staff to OCRE's motion for leave to file its contentions 21 through 26. This "reply" -- half as long again as OCRE's initial motion to admit -- makes a number of new and incorrect legal and factual arguments. Applicants hereby respond to those arguments.

The Burden of Proof

OCRE begins its legal analysis with the extraordinary assertion that Applicants have the burden of proof on OCRE's motion for leave to admit its new contentions. OCRE cites no

case law for this proposition, but cites NRC Rule of Practice 10 C.F.R. § 2.732, which, interestingly, stands for precisely the contrary principle. It is true that Applicants have the ultimate burden of proof on issues admitted into this proceeding. But that does not mean, nor has it ever been construed to mean, that Applicants have the burden of proof as to every disputed matter, particularly as to procedural issues such as whether intervenors have complied with the requirements of 10 C.F.R. § 2.714. NRC Rule of Practice 10 C.F.R. § 2.732 clearly states that the burden of proof lies on "the proponent of an order." OCRE is moving for an order granting it leave to file its new contentions. It is the proponent of the order. Therefore, it has the burden of proof.

Moreover, as to the basis and specificity requirement of § 2.714(b), it is well established that it is intervenor's obligation to demonstrate the requisite basis and specificity at the time it seeks to have an issue admitted. If it cannot demonstrate such basis and specificity, it has not complied with the Commission's Rules of Practice, and the contention cannot be admitted. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687 (Aug. 19, 1982) (reaffirming basis and specificity requirement); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 N.R.C. 175, 181-84 (1981) (discussing basis and specificity criteria).

To the extent that OCRE believes that Applicants also have the burden of proof on the timeliness factors of 10 C.F.R. § 2.714(a)(1), Applicants cite OCRE to Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-353, 4 N.R.C. 381, 388-89 (1976), in which the Appeal Board held that not only does intervenor have the burden as to all five factors, but that the burden is considerably greater as to the factors other than "good cause" where intervenor has no excuse for its tardy filing.

The burden of proof on OCRE's motion for leave to admit new issues thus clearly is on OCRE.

The Application to Extend the Latest Dates for Completion of Construction

OCRE again contends that the Licensing Board should not be concerned about delaying this proceeding because Applicants have filed an application with the Commission to extend the latest dates for completion of construction of units 1 and 2. Applicants have now twice explained that OCRE misunderstands the purpose and the nature of the application, and will not burden the Licensing Board with a repetition of this discussion. See Applicants' Answer to Ohio Citizens for Responsible Energy "Motion to Sever the PNPP Unit 2 OL Proceeding From that of Unit 1," dated September 22, 1982, at 3-4; Applicants' Answer to Ohio Citizens for Responsible Energy Motion for Leave

to File Its Contentions 21-26, dated September 16, 1982, at 4-6.

Delay of the Proceeding

Citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358 (1973), OCRE appears to argue that delay of the proceeding should not be considered by the Licensing Board. Such a construction of Vermont Yankee, however, is flatly inconsistent with Commission regulation, which expressly requires the Licensing Board to consider delay. 10 C.F.R. § 2.714(a)(1)(v). Moreover, this simply is not what Vermont Yankee Appeal Board held. All the Appeal Board there stated is that where an intervenor can show "good cause" for a late filing, delay of the proceeding, in and of itself, does not preclude consideration of the issue.

Objection to OCRE's Untimely Filing

OCRE contends that even if its motion is untimely, because no one objected to OCRE's notice that it was planning to make a late filing, there is no justification for complaining about OCRE's tardiness. This is incorrect. By letter to the Licensing Board of July 19, 1982, Applicants stated that timeliness of the filing can be considered only once the exact contentions are identified. OCRE cannot "toll" the Commission's timeliness requirements simply by filing a notice that it plans to file unspecified new contentions.

Turbine Missiles

OCRE contends that, despite the fact that the turbine missile issue has been known for over six years, its turbine missile contention is timely raised because the PNPP Safety Evaluation Report ("SER") lists the issue as an open item.

The fact that the NRC Staff lists the turbine missile issue as an open item means nothing more than that the Staff intends to review the issue one more time. The Staff has arrived at no conclusion that turbine missiles represent a serious unresolved safety problem for PNPP, nor has there been any suggestion by the Staff to that effect. All the Staff's position indicates is that the Staff intends to take a second look at the issue. This, OCRE asserts, is "good cause" for its untimely filing.

OCRE, of course, is playing both sides of the street on this issue. It argues on the one hand that it is not precluded from raising this contention by the Staff's review of the turbine missile issue. OCRE Reply at 5. But it contends on the other hand that because the Staff has decided to take a second look, OCRE's untimeliness in raising the issue is cured. Id. The simple fact of the matter, however, is that OCRE could have raised this issue when it initially intervened. All the relevant facts were available to OCRE at that time. And as OCRE correctly observes, OCRE was not precluded by the Staff's

earlier review of the issue. Yet OCRE chose not to raise the issue until a year and a half after its intervention.

It is readily apparent from OCRE's Reply that OCRE's concern is with the asserted discrepancy between the Gilbert Turbine Missile Report and Regulatory Guide 1.115 (Rev. 1). It speaks for itself, however, that the Gilbert Report was available in 1976, the Regulatory Guide was published in 1977, and the Staff review noting the discrepancy, and cited by OCRE in its Reply, was done during the Construction Permit stage.2/ There is nothing new that in any way justifies OCRE's untimely filing.

Humphrey Concerns

OCRE concedes that it does not know which of the Humphrey Concerns apply to PNPP. Nevertheless, it argues that the contention should be admitted because Applicants and the NRC Staff have not met their burden of showing which of the concerns apply to PNPP and are unresolved. As noted supra, OCRE misstates the burden of proof. It is not Applicants' or the Staff's burden to show which of OCRE's contentions have basis and specificity and which do not. It is up to OCRE to demonstrate the requisite basis and specificity.

2/ See Supp. 4 to PNPP Construction Permit SER, § 10.2 (Jan. 1977). Despite the discrepancy, the NRC Staff concluded that the independently derived probability was within the Staff's acceptance criteria and that the proposed design was acceptable. Id.

OCRE is in the same position as the intervenor in Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 N.R.C. 760 (1977). There, intervenor simply submitted a checklist of concerns without any attempt to establish a nexus between those concerns and the plant in question. The Appeal Board held that this was insufficient and that intervenor had to demonstrate basis and specificity as to each concern. See generally Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 N.R.C. 555, 557-60 (1982). There is no distinction between the facts in River Bend and the situation at hand. OCRE has not even attempted to show a nexus between any one of the Humphrey Concerns and PNPP. None of the concerns, therefore, is supported by the requisite basis and specificity.3/

OCRE also for the first time argues that some of the Humphrey Concerns should be litigated as part of Issue #8 (Hydrogen Control). OCRE Reply at 8 n.3. This is completely inappropriate. All the Humphrey Concerns related to hydrogen

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3/ In this regard, it is worthwhile noting the recent licensing board decision in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), Docket Nos. 50-443, 50-444, Memorandum and Order of September 14, 1982. There, the licensing board denied admission of several contentions because the intervenors had failed to show that a problem at another facility or a generic issue applied to the equipment or design of the Seabrook plant. See, e.g., slip op. at 14-16 (environmental qualification of safety related equipment), 68-69 (steam generators), 71-72 (seismic qualification).

generation are predicated on design basis accident scenarios. Issue #8, however, is based on a TMI-2 type accident scenario -- an entirely different accident scenario from that of any of the design basis accidents. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, slip op. at 19 ("the [hydrogen control] contention is predicated on the assumption of a TMI-2 type accident"). None of the Humphrey Concerns, therefore, can be litigated as part of Issue #8.

Core Thermal-Hydraulics

OCRE concedes that its core thermal-hydraulics contention is untimely. It, nevertheless, contends that it was not aware of Dr. Webb's argument until early this year. This is no justification, of course, for OCRE's lack of reasonable diligence. Moreover, it begs the question of why, if OCRE was aware of Dr. Webb's book early this year, it waited until August to submit its contention. OCRE's concession that "good cause" does not exist, OCRE Reply at 8, coupled with its failure to make any showing of substance on the remaining timeliness factors, requires denial.

In-Core Thermocouples

OCRE contends that it was relying on the Staff's position

in the Grand Gulf SER, and that such reliance justifies its untimely filing. But OCRE cannot, on the one hand, cite the Grand Gulf SER as justification for its untimeliness, and, on the other hand, claim that it should not be held responsible for the more recent statement of the Staff's position contained in the supplement to the Grand Gulf SER and the other SERs that document the Staff's present requirement.4/ Applicants also note that OCRE's reliance on the Grand Gulf SER (to the extent such reliance ever truly existed) was completely unreasonable in light of the well documented disagreement between Applicants and the NRC Staff regarding the need for in-core thermocouples. See Applicants' Answer, at 28-29. OCRE does not deny that it was aware of Applicants' long-standing position on this issue. In this regard, see Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687 (Aug. 19, 1982), at 13 (intervenors are under ironclad obligation to examine the public record to uncover any information that could serve as the foundation for a specific contention).

OCRE's citation to the recent AEOD case study is completely inapposite. The AEOD case study which was reported in January, 1982, and which OCRE admits it has not yet reviewed, is concerned with instrumentation and control systems interaction -- that is, how control systems are affected by the

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4/ The other SERs are listed in Applicants' Answer, at 28.

failure of an instrumentation system. For example, in the context of vessel level instrumentation, the AEOD report is concerned with how the failure of a vessel instrumentation device would affect other systems, and, specifically, what control and protection system actions would follow from such a failure. The AEOD report is not concerned with whether the failure of one vessel level instrumentation device will cause other redundant devices serving the same function to fail or cause a failure to detect inadequate core cooling. Indeed, such concerns are wholly beyond the scope of the report. OCRE's speculation that the AEOD case study undermines the cited General Electric Company report simply is wrong. In fact, the AEOD case study is wholly irrelevant to the need for in-core thermocouples.

Steam Erosion

OCRE contends that Applicants' still to be submitted inservice inspection program meeting ASME requirements will be inadequate because "presumably" the plants experiencing steam erosion problems had inspection programs meeting ASME requirements. This comparison of Applicants' still to be submitted inspection program with the inspection programs of operating plants is the sheerest of speculation.5/ How can Applicants'

5/ OCRE has not alleged, for example, that the ASME code standards used by those plants are identical to the standards

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inspection program be allegedly deficient when it has not yet been developed? As noted by Applicants in their Answer, to admit this contention would fly directly in the face of the Catawba Appeal Board's prohibition of conditional contentions.

OCRE asserts that Applicants' MSIV leakage control system is inadequate because it is only rated for 100 scfh, while there are documented leakages in excess of 3,000 scfh. OCRE's concern obviously stems from the fact that it does not understand the function of a MSIV leakage control system. The purpose of a MSIV leakage control system is not to prevent all leakages, whatever their magnitude. Applicants will submit a maintenance and surveillance program that will prevent major leakages. No maintenance and surveillance program, however, can eliminate all the small leakages that take place. The purpose of the MSIV leakage control system is to control smaller leakages that will not be eliminated by the maintenance and surveillance program. A rating of 100 scfh is more than adequate for this purpose, and OCRE has demonstrated nothing to the contrary.

(Continued)

that will apply to PNPP. Nor has OCRE shown that the steam erosion problems at those plants were the result of inadequate standards rather than inadequate programs to enforce those standards.

Control Room Fire Suppression

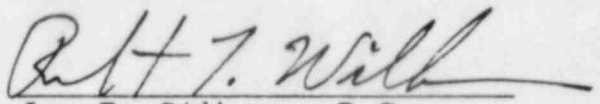
OCRE now contends that the purpose of its contention is to require the Staff "thoroughly [to] evaluate all the advantages and disadvantages of both systems [Halon versus CO_2]." OCRE Reply at 12. As OCRE observes, this would be accomplished through some sort of analysis similar to a cost/benefit analysis. Presumably, the Staff then would select the system with the greatest benefit and the lowest cost.

OCRE here is asking the Licensing Board to require the NRC Staff to conduct an alternatives analysis. For a safety issue such as this, such an analysis is wholly inappropriate. It is well established that the Atomic Energy Act does not require that the "best" alternative be selected. The Act only requires that a chosen system provide reasonable assurance that the public health and safety is protected. Anything more is legally irrelevant. See, e.g., Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit 2), ALAB-188, 7 A.E.C. 323, 339 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 A.E.C. 319, 330 (1972); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-35, 4 A.E.C. 711, 712 (1971); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-31, 4 A.E.C. 689, 693 (1971); cf., Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 N.R.C. 451, 456-58

(1980) (alternatives analysis only applicable to environmental issues). Because OCRE is asking the Licensing Board to require an alternatives analysis as to a safety issue, the contention is legally improper and cannot be admitted.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 

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Dated: October 19, 1982

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Motion For Leave to File Answer to "OCRE Reply to Staff and Applicants' Responses to OCRE's Motion For Leave to File Its Contentions 21 Through 26," and "Applicants' Answer to "OCRE Reply to Staff and Applicants' Responses to OCRE's Motion For Leave to File Its Contentions 21 Through 26," were served by deposit in the U.S. Mail, First Class, postage prepaid, this 19th day of October, 1982, to all those on the attached Service List.

Robert L. Willmore

Dated: October 19, 1982

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