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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket Nos. 50-440 50-441
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

MOTION FOR DIRECTED CERTIFICATION OF THE LICENSING BOARD'S MEMORANDUM AND ORDER OF OCTOBER 29, 1982

On October 29, 1982, the Atomic Safety and Licensing Board ("Licensing Board") entered a Memorandum and Order admitting three late-filed contentions submitted by Intervenor Ohio Citizens for Responsible Energy ("OCRE").[1/] The contentions deal with turbine missiles, in-core thermocouples, and steam erosion. For the reasons stated below, Applicants move the Atomic Safety and Licensing Appeal Board ("Appeal Board"), pursuant to its authority under 10 C.F.R. §§ 2.718(i) and 2.785(b)(1), to direct the Licensing Board to certify to it for immediate appellate review that portion of the Memorandum and Order admitting these contentions. Applicants request that the

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1/ Memorandum and Order (Concerning Ohio Citizens for Responsible Energy's Late-Filed Contentions 21-26), dated October 29, 1982 ("Memorandum and Order").

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Appeal Board reverse the Memorandum and Order and deny their admission.

I. The Nature of the Exceptional Circumstances of this Case Requiring the Appeal Board's Discretionary Review

Applicants have carefully considered the oft-repeated admonitions of the Appeal Board on this and other dockets that interlocutory appeals are not favored. Only in exceptional circumstances, such as those in which a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner, will the Appeal Board entertain an interlocutory appeal. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687 (August 19, 1982), slip op. at 4-5. See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 N.R.C. 1105, 1110 (1982); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 N.R.C. 693, 694-5 (1979); and Public Service Co. of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 N.R.C. 1190, 1192 (1977). Applicants do not come before the Appeal Board at this time merely to redress what we view to be the improvident admission of three late-filed contentions. See Catawba, ALAB-687, supra, slip op. at 4-6. A disagreement with a licensing board order admitting a late-filed contention is unlikely to fundamentally alter the shape of an on-going proceeding. See Perry, ALAB-675, supra, at 1113.

In the present situation, however, we believe that the Appeal Board's discretionary review is necessary in order to restore the basic structure of this proceeding. As a result of the Memorandum and Order and prior Licensing Board decisions, the very nature of this case has been seriously undermined by the admission of late-filed contentions.

With the Memorandum and Order, there are now more late-filed contentions to be litigated than admitted contentions which were timely filed. The July 1981 Special Prehearing Conference Memorandum and Order admitted a total of seven contentions.[2/] As of October 29, 1982, fifteen contentions have now been admitted.[3/] And more may be in the wings.[4/] This is certainly not the typical pattern for NRC licensing proceedings. There are few, if any, other proceedings where late-filed contentions have become the rule rather than the

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2/ See LBP-81-24, 14 N.R.C. 175 (1981). One of these seven (financial qualifications) was subsequently dismissed. Memorandum and Order (Concerning Motion to Dismiss Financial Qualifications Contention), dated April 28, 1982.

3/ Issue No. 8 (hydrogen control) was admitted by Order dated March 3, 1982. Issues No. 9 (polymer degradation), No. 10 (psychological stress) and No. 11 (local economic benefits) were admitted by Order dated July 12, 1982. (Issue No. 10 was dismissed shortly thereafter by Order dated July 19, 1982.) Issue No. 12 (economic costs of accidents) was admitted by Order dated October 8, 1982. On November 11, 1982, intervenor Sunflower Alliance, Inc. filed a notice withdrawing Issue No. 11.

4/ The Licensing Board has invited OCRE to refile (upon the availability of Applicants' answers to Staff questions) a sixty-six part late-filed contention based on BWR containment issues. Memorandum and Order at 8.

exception. Nor would this state of events have come about if the Licensing Board had correctly applied the good cause, basis and specificity requirements of 10 C.F.R. § 2.714(a) and (b). It now appears that, unless the Appeal Board takes action, this hearing will continue to be subjected to untimely contentions, and that many will be admitted which should not be. Instead of a forum to resolve issues raised by intervenors in a timely fashion, the proceeding will -- indeed, already has -- become an unending procession of late contentions. The reasoning adopted in the Memorandum and Order presents the specter that the proceeding may never reach its conclusion.

The Memorandum and Order alters the structure of the proceeding through unique interpretations of the good cause, basis and specificity requirements of 10 C.F.R. §§ 2.714(a) and (b), as applied to late-filed contentions. The Licensing Board's treatment of these requirements contravenes what appear to us to be clear-cut directives from the Appeal Board in Catawba, supra, and Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 N.R.C. 760, 772-73 (1977). With the § 2.714 requirements held in such low esteem, the likely effect will be that additional late-filed contentions will continue to be offered and accepted, to the extreme prejudice of Applicants.[5/]

5/ The current schedule of the proceeding is set forth in the Licensing Board's Memorandum and Order (Concerning Scheduling), dated September 16, 1982. Under the current schedule, discovery responses were to have been completed by November 15, 1982; direct testimony is to be filed by January 31, 1983; and

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We thus believe that the licensing Board's decision, as it applies § 2.714, contains "error [which] fundamentally alters the very shape of the ongoing adjudication." Perry, ALAB-675, supra, at 1113. Without correction by the Appeal Board, the Licensing Board's logic will continue to pervasively -- and adversely -- affect this proceeding. We further believe that the Licensing Board's novel determinations regarding late-filed contentions raise significant legal and policy questions on which Appeal Board guidance is needed, and that the practices "have immediate recurring importance but, for practical reasons, will escape appellate scrutiny once the initial decision has issued." See Catawba, supra, at 6-7.6/

The Licensing Board's interpretations of the § 2.714 good cause, basis and specificity standards, as applied to OCRE's three late-filed contentions, are discussed below.

II. Issue No. 13 -- Turbine Missiles

A. The Licensing Board's "Conclusions on Lateness"

Perhaps the clearest example of significant error in the Memorandum and Order is its treatment of good cause in

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the hearing on all but one of the original contentions is to commence February 15, 1983. Needless to say, the new contentions are not likely to be heard at the initial evidentiary hearings.

6/ Once Applicants have expended their time, money and resources to litigate all of intervenors' late-filed contentions, the pervasive effect on the proceeding, and the resulting financial harm and scheduling delays to Applicants, will have been etched in stone.

admitting Issue No. 13.[7] OCRE's turbine missile contention was premised entirely upon a report on turbine missiles furnished by Applicants to the Staff in 1976,[8] and a 1977 Regulatory Guide.[9] The Licensing Board, however, accepted OCRE's claim that the May 1982 Staff Safety Evaluation Report for the Perry facility (NUREG-0887) ("SER"), constituted its first notice of the issue.[10]

7/ Issue 13 reads as follows (Memorandum and Order at 15):

> Issue No. 13: Applicant has not demonstrated that the placement and orientation of the Perry Nuclear Power Plant turbine-generators is in compliance with regulatory requirements that limit the risk that low trajectory turbine missiles will strike safety related targets, thereby endangering the safe operation of the facility.

8/ Gilbert Associates, Inc. Report No. 1848, "An Analysis of Low Trajectory Turbine Missile Hazard to the Perry Nuclear Power Plant, Units 1 and 2" (October 8, 1976), referenced in the Preliminary Safety Analysis Report, § 3.5.3.1, the Safety Evaluation Report at the construction permit stage (Supp. 4, § 10.2, January 1977; Supp. 5 § 10.2, February 1977), as well as the Final Safety Analysis Report, § 3.5.1.3. See Ohio Citizens For Responsible Energy Motion For Leave To File Its Contentions 21 Through 26, dated August 18, 1982, ("Motion"), at 1 and 7; and Applicants' Answer To Ohio Citizens For Responsible Energy Motion For Leave To File Its Contentions 21-26, dated September 16, 1982 ("Applicants' Answer"), at 2-9.

9/ Regulatory Guide 1.115 (Rev. 1), "Protection Against Low-Trajectory Turbine Missiles" (July 1977). See OCRE Reply To Staff and Applicants' Responses To OCRE's Motion For Leave To File Its Contentions 21 Through 26, dated October 12, 1982, ("OCRE Reply"), at 4-6; and Applicants' Answer To "OCRE Reply To Staff and Applicants' Responses To OCRE's Motion For Leave To File Its Contentions 21 Through 26", dated October 19, 1982 ("Applicants' Reply"), at 5-6).

10/ See Motion at 7. The SER did no more, however, than list turbine missiles as an "open item", with no suggestion that the Staff considered there to be a significant unresolved safety problem. SER at 3-10. OCRE's motion also referenced the July 1982 ACRS letter on Perry. But that letter only expresses the Committee's concern with the Staff's "progress" in resolving

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In a marked and serious departure from Catawba, supra, the Memorandum and Order justifies OCRE's failure to timely identify the six year old turbine missile issue, and frame a suitable contention,

> because we do not consider it realistic to expect an intervenor to be conversant with the entire SER and the entire record of the construction permit stage when it first files contentions. A reasonable course for the intervenor to follow is to await scientific publications and key staff documents as a focus for its efforts. In that way, an intervenor can identify significant issues for trial, relying on professionals who spend full time on nuclear issues to identify the areas worth pursuing.

Memorandum and Order, at 4. The Licensing Board cites no authority for this holding, which Applicants view to be in direct conflict with NRC regulations and case law.

The Appeal Board's recent decisions in Perry, ALAB-675, supra, and Catawba, ALAB-687, supra, make the rule on good cause quite clear. First, as emphasized in Perry, "whether there is 'good cause' for a late filing depends wholly upon the substantiality of the reasons assigned for not having filed at an earlier date." ALAB-675, supra for at 1113, n. 9, (citations omitted) (original emphasis). OCRE gave no substantial reason for not having filed at an earlier date a contention

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the generic turbine missile issue. It makes no specific reference to Perry. See ACRS Tr. 55-60 (July 8, 1982). See Applicants' Answer at 3-9, Applicants' Reply at 5-6.

premised on Applicants' 1976 report and the 1977 Regulatory Guide. Thus, good cause should not have been found.

Furthermore, in Catawba, the Appeal Board reemphasized a fundamental principle underlying 10 C.F.R. § 2.714(a)(1)(i): "that an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention." ALAB-687, slip op., at 13. The Memorandum and Order is in direct conflict with this holding. Intervenors are expected, and indeed required, to review all available information and to frame contentions prior to the special prehearing conference. Id. at 9-14. See 10 C.F.R. § 2.714(b). The Licensing Board's determination that intervenors in an operating license proceeding need not review readily available documentation from the construction permit stage, but can instead "await scientific publications and key staff documents as a focus for its efforts," is directly contrary to Section 2.714(b), as interpreted in Catawba.

B. The Licensing Board's "Conclusions on Basis"

The determination that there is an adequate basis for Issue 13 is equally flawed. The Memorandum and Order identified three documents to support its determination that "OCRE has demonstrated that there are serious doubts" about the turbine missile issue. These three documents are "a portion" of the 1976 Gilbert Report, the ACRS letter and the SER.

Memorandum and Order at 3. None of these support a finding of basis. And the unstated premise underlying the Licensing Board's decision is in direct conflict with Appeal Board precedent.

As noted above, fn.10, neither the SER nor the ACRS letter identified any "serious doubts" about turbine missiles. The SER simply stated that the Staff had requested additional information to review.[11/] And, while the ACRS letter chided the Staff for the slow pace in resolving the generic turbine missile issue, it raised no substantive concerns either generically or with Perry. As for the remaining document, the "portion" of the Gilbert Report discussed in OCRE's Motion (at 1-2) did no more than identify plant structures in the potential strike zone for low trajectory turbine missiles. Applicants' Answer (at 8) pointed to the Gilbert Report's conclusion that the probability of a turbine missile striking a safety-related target was 1.5×10^{-8} per year per turbine. OCRE's Reply (at 5-6) sought to attack this part of the Gilbert Report by noting that the Staff (in the construction permit SER) had disagreed with the Gilbert probability calculation and had come up with a probability of 5.5×10^{-7} per year. OCRE compared this value with the guideline probability of 1×10^{-7}

11/ At one point in its Memorandum and Order, the Licensing Board suggests that the SER "may not be enough to create the basis for a contention." Memorandum and Order at 4. However, at another point the Licensing Board appears to rely on the SER in finding that a basis exists for the contention. Id. at 3.

in the 1977 Regulatory Guide 1.115, Rev. 1. However, OCRE ignored the Staff's conclusion in the construction permit SER that its calculated probability was within the Staff's acceptance criteria and that the design was acceptable. See Applicants' Reply at 6 fn.2.

Thus the only basis which the Licensing Board could have had in mind was that the calculated probabilities deemed acceptable by the Staff were higher than the guidelines in the Regulatory Guide. This elevates Regulatory Guides to a position above that which the Appeal Board has accorded them.

The Licensing Board should have subjected OCRE's contention to the test set forth in Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 N.R.C. 760 (1977), namely:

> To bring newly issued regulatory guides into play, it would have to be shown, e.g., that the means adopted by the applicant (as reflected in the application) for satisfying a regulatory requirement are either not efficacious or significantly less satisfactory than those recommended in the guide.

Id. at 773. OCRE did not allege that the Staff failed to assess the difference between its calculated probabilities and the Regulatory Guide (which was fully considered at the construction permit stage), nor did OCRE explain why the Staff's acceptance criteria for Perry were inadequate, not efficacious, or significantly less satisfactory than the probabilities set forth in the Regulatory Guide.

Moreover, the significance attached by OCRE (and apparently by the Memorandum and Order) to the Regulatory Guide is misplaced. As noted by the Appeal Board in the River Bend decision,

> For their part, and as their title suggests, regulatory guides are issued for the basic purpose of providing guidance to applicants with respect to, inter alia, acceptable modes of conforming to specific regulatory requirements. But they are not regulations per se and are not entitled to be treated as such. They need not be followed by applicants; and they do not purport to represent that they set forth the only satisfactory method of meeting a specific regulatory requirement. Indeed, quite the contrary is true; the cover page of each guide states that:
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> > Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission.
>
> In other words, a guide sets forth one, but not necessarily the only, method which an applicant may choose to employ in order to conform to a regulatory standard. While the staff will accept such method, an applicant is not precluded from utilizing some other method which it can demonstrate is appropriate in the particular case. Nor are other parties precluded from demonstrating that the prescribed method is inadequate in the particular circumstances of the case.

ALAB-444, supra, 6 N.R.C. at 732-733. In the context of the turbine missile issue at Perry, OCRE's burden in demonstrating basis is not carried by simply pointing out a difference with a Regulatory Guide, since the Staff has accepted an alternate method which it found to be consistent with its acceptance criteria.

III. Issue No. 14 - In-Core Thermocouples

A. The Licensing Board's Conclusions on Lateness

The admission of the in-core thermocouple issue is another case where the good cause requirements were cast aside. The essence of OCRE's good cause argument was that:

> Contention 24 was filed at this time because prior to the issuance of the SER, OCRE assumed that in-core thermocouples would be required at Perry. The Staff required them at Grand Gulf (Grand Gulf SER, NUREG-0831 at 22-22).

Motion at 7. However, the in-core thermocouple issue has existed for at least two years, Applicants' position on in-core thermocouples was on the record since August 1981, OCRE has had actual knowledge of the issue since at least December 1981, and OCRE had in its possession for some six months before it filed the contention the very documents on which its contention was based. See Applicants' Answer, at 24-29.

Under these facts, the Licensing Board excused OCRE's untimeliness as follows:

> [W]e have a clear case. OCRE knew of the existence of a dispute but chose to rely on a staff position. When it learned that staff changed its position, OCRE chose to file a contention. We find OCRE's behavior entirely rational. With limited resources, it may appropriately conserve its limited resources by relying on positions of the staff that are in agreement with their own position, even if the staff's position is disputed by applicant. Consequently, when staff changes its position and thereby affects OCRE's management decision, OCRE has good cause for late filing.

Memorandum and Order, at 12. No regulations or case authority is cited by the Licensing Board for this novel approach to 10

C.F.R. § 2.714(a)(1)(i). Applicants respectfully believe that the ruling cannot be supported.

There is no question here that there was sufficient, publicly available information for OCRE to formulate a contention on in-core thermocouples prior to the Special Prehearing Conference. OCRE was required to make such a search and timely identify a contention. The Appeal Board in Catawba has pointed out intervenors' "iron-clad obligation" to review publicly available information. ALAB-687, supra at 13. OCRE in fact acknowledged that it "has had knowledge of the in-core thermocouple issue for some time." OCRE Reply at 9. At the very minimum, OCRE was obligated to file its contention at the time it received information on the issue, over six months prior to the time the contention was filed.

Further, OCRE is not excused from sleeping on its rights by claiming reliance on the Staff. This case is no different from those situations in which a petitioner has sat back, observing a proceeding, and then attempted to intervene "upon deciding that its interest is not being adequately protected by existing parties." South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 N.R.C. 420, 421 (1981). See also Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-92-1, 15 N.R.C. 37, 39-40 (January 4, 1982); ALAB-444, supra, 6 N.R.C. at 796; and Puget Sound Power and Light Co., (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 N.R.C. 162 (1979). As the Appeal Board stated in Skagit:

> We once again must record our belief that the promiscuous grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. More specifically, persons potentially affected by the licensing action under scrutiny would be encouraged simply to sit back and observe the course of the proceeding from the sidelines unless and until they become persuaded that their interest was not being adequately represented by the existing parties and thus that their own active (if belated) involvement was required. No judicial tribunal would or could sanction such an approach and it is equally plain to us that it is wholly foreign to the contemplation of the hearing provisions of both the Atomic Energy Act and the Commission's regulations. Although Section 2.714(a) of the Rules of Practice may not shut the door firmly against unjustifiably late petitions, it assuredly does reflect the expectation that, absent demonstrable good cause for not doing so, an individual interested in the outcome of a particular proceeding will act to protect his interest within the established time limits.

Id. at 172-73 (citations and footnotes omitted). Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 885-86 (1981). Although these cases involved late-filed petitions, there is no logic which would support a different rule for late-filed contentions. As in Skagit, the instant case poses "a clear and unacceptable threat to the integrity of the entire adjudicatory process," id., and should be corrected through the discretionary exercise of the Appeal Board's review authority.

B. The Licensing Board's Conclusions on Basis

The Licensing Board's finding that OCRE had shown a basis for the in-core thermocouple issue was premised solely on the existance of a Regulatory Guide recommending in-core thermocouples.

> The existence of a Regulatory Guide suggests a staff preference. Although another approach may prove to be acceptable, it is permissible to use a Regulatory Guide to indicate expert opinion. When the expert opinion is that BWR reactors should have in-core thermocouples, this represents an opinion that these are necessary safety features. Hence, while the Regulatory Guide does not establish a requirement, this particular Regulatory Guide does provide the basis for a contention.

Memorandum and Order at 11 (emphasis added). The Memorandum and Order totally ignores the Staff's decision, reflected in the Perry SER, not to require generic installation of in-core thermocouples as contemplated by the Regulatory Guide. As in the case of turbine missile issue, the Licensing Board has given improper weight to a Regulatory Guide, and no weight to the alternative position adopted by the Staff. See River Bend, supra.

IV. Issue 15 - Steam Erosion

Admission of this contention involves what Applicants believe to be clear violations of the Appeal Board's decisions in Perry, Catawba and River Bend.

In Perry, the Appeal Board stated that it would be improper to expand a contention beyond the limitations imposed on it by the intervenor. ALAB-675, supra at 1115. Such action

> would be tantamount to the raising of a new issue sua sponte -- action that is now subject to immediate Commission oversight and that can be invoked only by observing special procedures.

Id. In this case, the contention as framed by OCRE cited the IE Information Notices on steam erosion and the fact that Applicants had not yet submitted an inservice testing program for pumps and valves and leak testing of valves.[12/] The Licensing Board, in admitting the issue, expanded OCRE's contention by deleting any reference to the Applicants' testing programs.[13/] This revision is not permitted under Perry.

Once OCRE's version of its contention is reinstated, its admission becomes inconsistent with Catawba. According to the contention, "Applicants' lack of an inservice testing program"

12/ The Memorandum and Order, at 12, states Sunflower's contention:

> Applicants are not prepared to prevent, discover, assess and mitigate the effects of steam erosion on components of PNPP which will be subjected to steam flow. Steam erosion has been identified as the cause of recent failures of valves and piping (MISVs and turbine exhaust lines: see NRC [Inspection & Enforcement] Information Notices 82-22 and 82-23). The staff has identified Applicants' lack of an inservice testing program for pumps and valves and leak testing of valves as an open item in Section 3.9.6 in the SER.

13/ The issue as admitted by the Memorandum and Order (at 15) reads:

> Applicant has not demonstrated that it is prepared to prevent, discover, assess and mitigate the effects of steam erosion on components of the Perry Nuclear Power Plant that will be subjected to steam flow.

demonstrates that Applicants are not prepared to deal with steam erosion. Yet, as is clear from the SER reference cited by OCRE,[14/] the program has not yet even been submitted. Under Catawba, there can be no possible basis for a contention which argues that an inspection program which has yet to be submitted is inadequate.

In addition, the Memorandum and Order is inconsistent with the admonition of River Bend that the basis for a contention is not established by the mere identification of a generic technical matter under study by the Staff. ALAB-444, supra at 773. The Information Notices cited by OCRE provide no nexus to Perry. And without the Perry inspection programs, OCRE cannot establish that nexus.

V. Conclusion

Applicants recognize the well-established principle that orders admitting or denying admission of contentions are rarely appropriate for review. Applicants also recognize that there are situations where late contentions are properly admitted. In this case, however, Applicants perceive that a fundamental shift in the nature of the proceeding is occurring. Late-filed contentions are overtaking the process. Late-filed contentions

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14/ Section 3.9.6 of the SER states,

> The Applicant has not yet submitted his program for the preservice and inservice testing of pumps and valves. Therefore, the staff's review of this program will be discussed in a supplement to this report.

are being accepted even though they raise issues which are years old. Late-filed contentions are admitted without a nexus to the proceeding. The character of the process is at stake. For these reasons, Applicants respectfully submit that discretionary review by the Appeal Board is appropriate and that the Memorandum and Order, as it admits Issues 13, 14 and 15, should be reversed.

Respectfully submitted,

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DATED: November 18, 1982

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Motion for Directed Certification of the Licensing Board's Memorandum and Order of October 29, 1982" were served by deposit in the United States Mail, First Class, postage prepaid, this 18th day of November, 1982, to all those on the attached Service List.

Jay E. Silberg

JAY E. SILBERG

DATED: November 18, 1982

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