March 15, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket No. 50-440 OL 50-441 OL
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

NRC STAFF OPPOSITION TO ADMISSION OF OCRE'S REWORDED ISSUE #8

I. INTRODUCTION

On February 23, 1983, Ohio Citizens for Responsible Energy ("OCRE") moved[1/] to reword Issue #8 and to obtain guidance from the Licensing Board regarding future litigation of Issue #8. Specifically, OCRE proposed that Issue #8 be revised to state:

> Applicant has not demonstrated that, given an accident entailing the generation of large amounts of hydrogen, the combustible gas control measures to be implemented at Perry can accomodate large amounts of hydrogen without a rupture of the containment and a release of substantial quantities of radioactivity into the environment.

OCRE also moved that any action on the specification of an accident scenario be deferred until after the expected final rule on hydrogen control in Mark III-type containments is published. Finally, OCRE asked the Licensing Board to respond to several questions as to whether,

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1/ OCRE Reply to NRC Staff Motion for a Deadline for the Specification of a Scenario for Issue #8 and Motion for the Rewording of Issue #8 and Specification of Guidelines for Its Litigation.

after publication of such final rule, a scenario would still be necessary, and if so, what the purpose and parameters of such a scenario would be.

The Staff opposes all of OCRE's requests except that request seeking deferral of further consideration of the hydrogen control issue. OCRE's proposed amended contention is not supported by a showing, under 10 CFR Section 2.714(a), that such amendment is proper, and, in any event, admission of such amended contention would obviate the specification of a credible accident scenario, contrary to the direction of the Commission in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980) ("TMI-1 Restart"). Alternatively, to the extent OCRE seeks to litigate its proposed amended contention in light of the expected new final rule on hydrogen control, such contention is premature, and should not now be admitted. Finally, OCRE's requests that the Licensing Board specify what a TMI-2 type scenario would be and how OCRE could establish such scenario improperly attempts to shift OCRE's burden to the Licensing Board. ALAB-675, 15 NRC 1105, 1107, 1114-1115 (1982).

II. DISCUSSION

A. OCRE's Amended Contention is Neither Timely Nor Admissible Under the Commission's TMI-1 Restart Ruling on Litigation of Hydrogen Control Measures

OCRE has reworded its original hydrogen control contention[2/] to incorporate two important substantive additions. First, the proposed

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2/ As admitted, Issue #8 states:

> Applicant has not demonstrated that the manual operation of two recombiners in each of the Perry units is adequate to assure that large amounts of hydrogen can be safely accommodated without a rupture of the containment and a release of substantial quantities of radioactivity into the environment.

amendment, by incorporating the phrase, "given an accident entailing the generation of large amounts of hydrogen," appears to assume, without the need for further proof, the existence of such an accident scenario; and second, the amendment's reference to "combustible gas control measures to be implemented at Perry" challenges the adequacy of the future hydrogen control measures at Perry.

At the outset, the regulations are clear that amendments to admitted contentions are subject to the requirements in 10 CFR Section 2.714. The Commission's Statement of Consideration accompanying the issuance of the current version of Section 2.714 is unequivocal:

> . . . § 2.714 is revised to specifically provide that late filed contentions (a contention or amended contention which is filed after 15 days prior to the special prehearing conference . . .) will be considered for admission under the clarified criteria set forth in subparagraph (a)(1).

43 Fed. Reg. 17798, April 26, 1978. (Emphasis supplied.) There can be no doubt that the subject amendment is not timely filed. Yet, inexplicably, OCRE has made no attempt in its motion to amend its contention to demonstrate that the criteria of Section 2.714(a)(1) for untimely amendment are satisfied. Nor are the amendments merely formal in nature. Rather, they introduce new substantive elements, which, as is the case with any new or revised contention, must be measured against the criteria for late contentions in Section 2.714(a)(1). The Licensing Board has had numerous occasions in this proceeding to apply these criteria, and there is no reason for taking a different course here. See e.g., Memorandum and Order (Concerning Motion to Submit a Late Filed Shift Rotation Contention), November 15, 1982; Memorandum and Order (Concerning Ohio Citizens for Responsible Energy's Late-Filed Contentions

21-26), October 29, 1982. Even if the original contention is interpreted as incorporating glosses put thereon by the Licensing Board and the Appeal Board, i.e., by reading into the admitted issue a reference to a "TMI-2 type" accident scenario, ALAB-675, supra, 15 NRC at 1115, the reworded contention proposed by OCRE, would assume, without the need for proof, the existence of such scenario, and eliminate an element of the issue currently admitted. On the other hand, the reference to "combustible gas control measures to be implemented" broadens the admitted contention in a manner which is uncertain, but could include compliance with the new final rule on hydrogen control. In any event, when a new or revised contention is proffered, the proponent must address and satisfy the criteria in Section 2.714(a)(1), with the one exception, not applicable here, as set forth in Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, slip op. (August 19, 1982).[3/] Intervenor has wholly failed to address the late filing criteria of Section 2.714(a) and its motion for admission of its amended hydrogen issue should be denied on that ground alone.

Apart from the lack of timeliness, admission of the proffered amendment, as mentioned above, would appear to allow the litigation of hydrogen control measures at Perry without requiring the establishment of a credible accident scenario entailing the generation of hydrogen in

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3/ Intervenor must affirmatively demonstrate that, on balance, the five factors of Section 2.714(a) favor tardy admission. A motion for admission of a late-filed substantive amendment to a contention which fails to address the five factors of Section 2.714(a) is patently deficient and a fit candidate for denial. See Duke Power Company (Perkins Nuclear Station, Units 1, 2, 3), ALAB-615, 12 NRC 350, 352-53 (1980).

excess of the values assumed by 10 CFR Section 50.44. Yet litigation of hydrogen control measures to deal with amounts of hydrogen beyond those assumed for purposes of Section 50.44 has been conditioned by the Commission upon a showing "that there is a credible loss-of-coolant accident [LOCA] scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation in excess of [10 CFR] Part 100 guideline values." ALAB-675, supra, at 1107-08, citing TMI-Restart, CLI-80-16, supra. While the Licensing Board has not directly ruled that TMI-Restart binds the Board to require such a scenario to be established, Memorandum and Order, dated December 23, 1983, at 4, the Licensing Board's most recent Memorandum and Order, dated March 3, 1983, at 2, in effect assumes that establishment of such a scenario would otherwise constitute an element of the admitted Issue #8. The Staff continues in its view that without such a scenario, a hydrogen control contention contemplating combustion, breach of containment, and offsite radiation in excess of Part 100 values is not admissible. To the extent OCRE's proffered amendment could assume, without proof, the existence of such a scenario and thereby obviate the need for any specific scenario to be postulated, the Staff would urge its rejection as contrary to both TMI-1 Restart and ALAB-675.[4/]

B. To the Extent OCRE Seeks to Litigate Compliance With the New Final Rule on Hydrogen Control, Its Reworded Contention Is Premature, and Should Not be Admitted at This Time

By asking the Board both to defer action on the specification of a detailed hydrogen generation scenario until after publication of the new

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4/ As the Appeal Board makes clear, "[i]n order to litigate meaningfully the adequacy of such a [hydrogen control] system, a particular accident or accidents should be specified." ALAB-675, 15 NRC 1105, 1115.

hydrogen control rule for Mark III-type containments, and to indicate whether under such new rule, such specification is indeed required at all, OCRE has, in effect, requested that its hydrogen control contention be litigated not in light of TMI-1 Restart, but in light of the requirements which the expected rule will mandate in the future. The Staff believes this entirely alters the procedural posture of this proposed amendment. Whereas, in the context of litigating Issue #8 under the current regulatory regime for hydrogen control, the proffered amendment is late, if what OCRE actually seeks is to litigate its contention under the new rule, the Staff would urge rejection of the amendment as premature. This is because the adequacy of the combustible gas control measures to be implemented at Perry under the new rule cannot be litigated without knowing what the requirements of the new rule will be. OCRE's amended Issue #8 is a factual assertion of inadequacy of hydrogen control measures without a specification of the legal requirements which hydrogen control measures must meet. As such the proffered amendment fails to state a claim for which relief can be granted -- a ground for determining that the contention lacks the requisite basis. LBP-81-24, 14 NRC 175, 184, 204, 219, 226-227 (1981). If what OCRE seeks to do is to litigate Applicants' compliance with the new rule on hydrogen control, any new or revised contention should await publication of the rule. At that time, OCRE would have an opportunity to reintroduce its contention, attempt to provide basis, and to satisfy the criteria for late-filed contentions.

Since OCRE appears to be satisfied to wait for publication of the expected rule in order to litigate its safety concerns with respect to hydrogen control, it makes eminent practical sense to defer consideration

of Issue #8, including discovery concerning accident scenarios, and allow the rulemaking to be completed. In a recent Catawba unpublished Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference, dated December 1, 1982, at 27-28), the Licensing Board determined that since the publication of the rule would come well before the licensing of the plant, litigation of the generic issue of hydrogen control was not warranted. The Board there observed:

> The basic criterion is safety -- is there a substantial safety reason for litigating the generic issue as the rulemaking progresses? In some cases, such as TMI Restart, such litigation probably should be allowed if it appears that the facility in question may be licensed to operate before the rulemaking can be completed. In such a case, litigation may be necessary as a predicate for required safety findings. In other cases, however, it may become apparent that the rulemaking will be completed well before the facility can be licensed to operate. In that kind of case there would normally be no safety justification for litigating the generic issues, and strong resource management reasons not to litigate.
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> The present case is clearly in the latter category. The pertinent rulemaking directly addresses the Intervenors' hydrogen concerns. It now appears that a final rule will be adopted in the next several months. (Footnote omitted.) Given the present status of this proceeding, no operating licenses for Catawba are likely to issue before sometime in 1984, a year or more after the final rule. Thus we see no safety justification for litigating the Intervenors' hydrogen scenarios in this case, and we are rejecting them as proposed contentions.

The Staff believes the Catawba Board's reasoning is equally applicable to the instant case.[5/]

5/ The Licensing Board's March 3, 1983 Memorandum and Order denying the Staff's motion to establish a deadline for OCRE's submission of a hydrogen generation scenario appears to favor suspension of further proceedings on Issue #8 in light of the pendency of hydrogen control rulemaking. The Board cited the reason for not setting a deadline as follows:

> To divert [the parties'] time to litigation of a "scenario", an issue that is likely to become moot in the near future, does not seem a wise use of their time.

(FOOTNOTE CONTINUED ON NEXT PAGE)

It is the Staff's view that OCRE's proposed amendment and request for deferral of action on specification of hydrogen generation scenarios, and its request to litigate its proffered amended contention under the new hydrogen control rule, represent the abandonment of its attempt to litigate the generic question implied in OCRE's original contention, and the substitution of a new contention seeking to litigate compliance with the new rules. Under these circumstances, the Staff believes it is appropriate to suspend further consideration of OCRE's original contention pending publication of the new rule, and possible re-submission of a reworded Issue #8.

C. OCRE's Request That the Licensing Board Itself Specify A Credible "TMI-2 Type" Accident Scenario Improperly Attempts to Shift OCRE's Burden Under CLI-80-16.

As the Staff has previously noted, OCRE has misapprehended the import of the language in ALAB-675 which alludes to "the Licensing Board's function to determine what a TMI-2 type accident is, insofar as the Perry facility is concerned." ALAB-687, supra, 15 NRC at 1115, footnote 13. While it is for the Board to decide the issue of what a TMI-2 type accident is for Perry, the Licensing Board certainly has no burden of going forward or of proof to make such a showing. The Commission, in requiring the showing of a credible LOCA scenario,

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5/ (FOOTNOTE CONTINUED)
However, in light of OCRE's motion to amend Issue #8 to refocus OCRE's concerns on control measures under the new rule, consideration of any amended or new contention after publication of the new rule appears to be the appropriate course of action, as the Staff argues in the body of this response. As the Staff has previously indicated, final publication of the new rule is expected in May of 1983. By letter dated March 8, 1983, the Perry applicants announced a delay in the fuel load date for Perry Unit 1 of up to 12 months (with a new fuel load date as late as December 1984.)

placed the burden of going forward with such scenario on the proponent of the issue. TMI-1 Restart, supra. 11 NRC at 674-675. Indeed, this was the understanding of the Licensing Board in Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ASLBP No. 82-471-02 OL, slip opinion, September 13, 1982 at 66:

> The Commission has provided guidance with these rulings.
>
> The interpretation is that Petitioner must prove the credible accident that will give rise to the production of excessive hydrogen; the credible condition wherein the core is inadequately cooled for a sufficient period of time. Petitioner is considered to have the burden to establish a credible accident scenario involving hydrogen production resulting in offsite doses in excess of 10 C.F.R. Part 100 limits.

To the extent that OCRE's request that the Licensing Board take over OCRE's burden is still a live issue, that request is based upon a misinterpretation of TMI-1 Restart requirements regarding hydrogen control litigation, and should be rejected.

III. CONCLUSION

OCRE's motion to amend Issue #8 should be rejected as untimely and as an attempt to obviate the requirements for litigating hydrogen control contentions under TMI-1 Restart. Alternatively, in light of OCRE's motion to defer action on specification of an accident scenario until after the new hydrogen control rule is published, OCRE's amended Issue #8 is a challenge to Applicants' compliance with such rule and should be rejected as premature and lacking in basis. The Staff does not object to OCRE's request, however, that further consideration of the hydrogen control issue be deferred for a reasonable period of time until issuance of the new hydrogen control rule now expected in May 1983. Finally,

OCRE's request that the Board specify a credible TMI-2 type accident scenario for Perry improperly seeks to shift OCRE's burden of specifying a credible accident scenario, and should be rejected.

Respectfully submitted,

George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of March, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO ADMISSION OF OCRE'S REWORDED ISSUE #8" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of March, 1983:

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