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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, <u>et al.</u>)	50-441
)	
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

APPLICANTS' ANSWER TO OHIO CITIZENS
FOR RESPONSIBLE ENERGY MOTION FOR
THE REWORDING OF ISSUE #8 AND
SPECIFICATION OF GUIDELINES FOR ITS
LITIGATION

I. Introduction

By filing dated February 23, 1983,^{1/} Ohio Citizens For Responsible Energy ("OCRE") has moved the Licensing Board to take the following actions:

^{1/} See "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," dated February 23, 1983 ("OCRE Reply and Motion").

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- "1. Reword Issue #8, since the current wording does not accurately reflect the scope of the issue. OCRE proposes the following wording:

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 accommodate large amounts of hydrogen without a rupture of the containment and a release of substantial quantities of radioactivity into the environment.

2. Defer any action on the specification of a scenario until after the final rule on hydrogen control in the Mark III containment is published (see proposed rule, 46 Fed. Reg. 62281, December 23, 1981).
3. Determine whether a scenario is still necessary after the issuance of the final rule, and, if so, set the following guidelines for its specification:
 - (a) the purpose of the scenario, i.e., to fulfill the requirements of TMI-1 Restart or to meaningfully litigate (as to rate and quantity of hydrogen production) the adequacy of Applicants' hydrogen control measures;
 - (b) what a "TMI-2 type" accident is;
 - (c) what the Licensing Board considers to be a credible scenario, i.e., is there a numerical probability used for defining "credible," and if so, what is its legal or regulatory basis?

- (d) what constitutes an acceptable basis for an accident scenario? I.e., does the Licensing Board expect OCRE to perform a probability risk assessment for Perry?"

Id. at 5-6. The motion is without basis and should be denied in toto.

II. OCRE's Motion to Amend Issue #8

OCRE's proposed rewording^{2/} is objectionable on several grounds. First, it assumes as a "given an accident entailing the generation of large amounts of hydrogen."^{3/} Presumably this rewording would relieve OCRE of indicating the particular credible TMI-2 type LOCA scenario behind its Issue #8. OCRE's rewording thus would remove "the very premise for the legitimate litigation of a hydrogen control contention"^{4/}

^{2/} Issue #8, as admitted, states as follows:

"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."

Memorandum and Order (Concerning Late-Filed Contentions: Quality Assurance, Hydrogen Explosion, and Need For Increased Safety of Control System Equipment), LBP-82-15, 15 N.R.C. 555, 563 (March 3, 1982).

^{3/} OCRE Reply and Motion, at 5 (emphasis added).

^{4/} Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 N.R.C. 1105, 1114 (May 17, 1982).

required under Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 N.R.C. 674 (1980) ("TMI-1 Restart"). The Board has previously indicated that OCRE would be required "to specify a particular type of credible accident scenario in order to litigate meaningfully the adequacy of a hydrogen control mechanism."5/ OCRE cannot sidestep its obligation by simply rewording the issue to assume a scenario.

OCRE's proposed rewording of Issue #8 would also remove the current reference to the Perry recombiner system and replace it with a reference to "the combustible gas control measures to be implemented at Perry."6/ The only justification given by OCRE is that "the current wording of Issue #8 does not accurately reflect the scope of the issue."7/

If OCRE wants to challenge Applicants' "combustible gas control measures", it must provide a basis for such a contention. OCRE has not done so. In the meantime, the present wording of Issue #8 has not impeded OCRE from obtaining the information it has sought through discovery concerning Applicants' hydrogen prevention and control plans.8/ For the

5/ Memorandum and Order (Concerning Reconsideration and Dismissal of Hydrogen Control Contention), dated December 13, 1982, at 2. See also "Notes of Telephone Conference of December 9, 1982" (attached to letter from Staff Counsel to Licensing Board dated December 13, 1982), at 3.

6/ OCRE Reply and Motion, at 5.

7/ Id. at 5.

8/ Cf. LBP-82-15, supra, 15 N.R.C. at 11-13 (denying Sunflower Alliance, Inc. motion to enlarge Issue #3).

foregoing reasons, OCRE's motion to amend Issue #8 should be denied.

III. OCRE's Motion to Suspend Litigation of Issue #8

In addition to rewording Issue #8, OCRE's motion would suspend the litigation of Issue #8 until the Commission issues a final rule on hydrogen control requirements. Applicants oppose any further delay of this issue. One year ago, OCRE prevailed on the Licensing Board to admit Issue #8 for litigation notwithstanding the pendency of the Commission's proposed rule. The Board indicated that it would not adopt "a wait-and-see attitude on this important matter."^{9/} The Appeal Board agreed that

[t]he very point of TMI-1 Restart [] is that hydrogen control can be litigated in an individual licensing proceeding, under certain conditions, notwithstanding the then-forthcoming rulemakings on the issue.^{10/}

^{9/} LBP-82-15, supra, 15 N.R.C. at 561. The Licensing Board has followed a similar approach with respect to Issue #6, see Memorandum and Order (Concerning Motion to Dismiss ATWS Contention), LBP-82-1A, 15 N.R.C. 43 (1982); and Issue #9, see Memorandum and Order (Concerning Motions to Admit Late Contentions), dated July 12, 1982, at 5; Letter, Staff Counsel to Licensing Board, dated December 13, 1982 (summarizing Licensing Board determination requiring particularization of Issue #9 by OCRE notwithstanding pending environmental qualification rulemaking).

^{10/} ALAB-675, supra, 15 N.R.C. at 1112 (emphasis in original).

The parties have now spent a year litigating this issue. OCRE has conducted extensive discovery against both Staff and Applicants. Having thoroughly canvassed Applicants and Staff in an effort to particularize its own issue, and still being unable to do so,^{11/} OCRE now seeks to bring any progress in resolving this issue to a halt. Thus, after successfully arguing that Issue #8 is a proper subject for litigation despite on-going rulemaking proceeding, OCRE now argues in effect that the same rulemaking proceeding bars litigation. OCRE cannot have it both ways.

The Board has previously indicated that the parties would have an opportunity to file summary disposition motions on Issue #8 after OCRE completes discovery and is given an opportunity to particularize its issue.^{12/} Applicants are preparing to proceed to summary disposition, and should be

^{11/} OCRE readily admits that it still does not know "what constitutes an adequate basis" for Issue #8. OCRE Reply and Motion, at 3.

^{12/} Memorandum and Order (December 13, 1982), supra, at 2. This is consistent with the Commission's instruction that

"[i]n exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues."

Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 457 (1981).

allowed to do so notwithstanding the pendency of the proposed rule.

IV. OCRE's Motion for Guidance Under the Final Hydrogen Rule

Point 3 of OCRE's motion seeks a ruling which would apply "after the issuance of the final rule."^{13/} The motion is not ripe. Whether, when and to what extent the final hydrogen rule might impact on Issue #8 are matters of speculation.^{14/} At such time as the final rule may issue, if OCRE decides to submit a new contention based on "Applicants' degree of compliance with the new regulation,"^{15/} such a new contention would have to meet the test for late-filed contentions under 10 C.F.R. § 2.714(a), and the basis and specificity requirements of § 2.714(b).^{16/}

OCRE's motion seeks further guidance on the various elements of TMI-1 Restart. However, OCRE has already identified what it considers to be a TMI-2 type accident for a BWR 6/Mark III reactor such as PNPP and has given its understanding of the

^{13/} OCRE Reply and Motion, at 5.

^{14/} See letter from Staff Counsel to the Licensing Board, dated March 3, 1983; Memorandum and Order (Staff's Motion to Establish a Deadline Concerning a Hydrogen Generation Scenario), dated March 3, 1983.

^{15/} OCRE Reply and Motion, at 4.

^{16/} See p. 4, supra.

term "credible accident scenario."^{17/} Further guidance by the Board is not required. Neither the Board nor the other parties to this proceeding are obliged to supply OCRE with the basis for OCRE's issue.

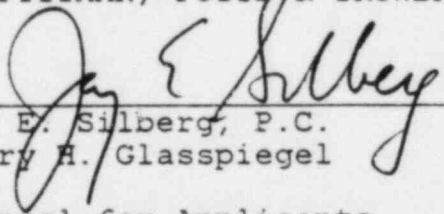
V. Conclusion

For all the above reasons, the Licensing Board should deny OCRE's motion, which merely seeks to frustrate and further delay the litigation of Issue #8.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: March 14, 1983.

^{17/} See OCRE Response to Applicants' Interrogatories and Request for Production of Documents to Intervenor Ohio Citizens For Responsible Energy (Second Set), dated November 15, 1982 (responses to Applicants' interrogatories 5 and 6).

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing
"Applicants' Answer to Ohio Citizens For Responsible Energy
Motion For The Rewording Of Issue No. 8 and Specification Of
Guidelines For Its Litigation" were served by deposit in the
United States Mail, first class, postage prepaid, this 14th day
of March, 1983, to all those on the attached Service List.


HARRY H. GLASSPIEGEL

Dated: March 14, 1983

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