

9/24/82

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 FOR SEVERANCE OF THE PROCEEDING

I. INTRODUCTION

On September 7, 1982 Intervenor Ohio Citizens for Responsible Energy (OCRE) moved the Licensing Board to sever the operating license proceeding for Unit 2 of the Perry Nuclear Power Plant from that for Unit 1.^{1/} As the primary ground for its motion OCRE cites the fact that the Applicants recently have requested that the latest date for completion of construction in the construction permit for Unit 2 be extended from June 30, 1984 to November 30, 1991.^{2/} For the reasons set forth below the NRC Staff opposes the OCRE motion.

II. DISCUSSION

OCRE argues that, because construction of Unit 2 may not be completed until 1991, (1) nuclear technology may change, (2) new regulations may be promulgated by the NRC, (3) new statutes may be

^{1/} "[OCRE] Motion to Sever the PNPP Unit 2 OL Proceeding from That of Unit 1" dated September 7, 1982.

^{2/} "Application for Amendment of Construction Permit Nos. CPPR-148 and CPPR-149 to Extend Construction Completion Dates" dated July 21, 1982.

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enacted by the Congress, and (4) additional decisions interpreting the law and the NRC's implementation of the law may be handed down by the courts; and thus that to continue consideration of Unit 2 now would be inappropriate. In addition, OCRE states its belief that, because much construction of Unit 2 is yet to be done, deficiencies in that construction undoubtedly will occur. In OCRE's view such "new information" would require reopening of the record, and, because that may be difficult for a party such as OCRE to justify, OCRE prefers to separate the OL proceedings for the two units.

OCRE's arguments for severance are based on pure speculation, and its "delayed construction" theory appears to be similar to that advanced by Intervenor Sunflower Alliance (Sunflower) and dealt with by the Licensing Board in its Special Prehearing Conference Memorandum and Order of July 28, 1981 as the "Tandem Licensing Concern." LBP-81-24, 14 NRC 175, 209 (1981). The OCRE position should be rejected for the same reason as was the Sunflower position - no specific issues related to the licensing of Unit 2 that cannot be decided now rather than later are pending.

OCRE also argues that the Advisory Committee on Reactor Safeguards (ACRS) has not issued its report on Unit 2 and that safety issues related to Unit 2 cannot be decided by the Licensing Board until the ACRS issues that report. In support of its position OCRE cites a Licensing Board's ruling in the McGuire case^{3/} that denied an Applicant's motion for summary disposition, arguably at least partially, on the

^{3/} Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680, 681 (1977).

ground that the ACRS had not issued its report. Aside from the fact that a Licensing Board's decision in another case is not controlling, to the extent that Licensing Board may have based its decision to deny summary disposition on the fact that the ACRS had not issued a report it would have erred, albeit harmlessly in that the unavailability of the ACRS report was not its sole basis for the denial.^{4/} Although Section 182b of the Atomic Energy Act of 1954 and 10 CFR 2.102 of the Commission's regulations require that the ACRS report on an application be made a part of the record of the docketed application and 10 CFR 2.743(g) of the regulations requires that the Staff offer in evidence any such ACRS report that has been issued, there is no requirement that the ACRS report have been issued before a Licensing Board closes the hearing record and issues its initial decision. Moreover, even if the ACRS report is received in evidence in a hearing record, it may be received only for the limited purpose of demonstrating compliance with the statutory requirement for the ACRS to review the application and submit a report.^{5/} It may not be received in evidence for the truth of any statement made in it and thus may not serve as a basis for findings on any of the safety issues that are in controversy in this operating license proceeding.^{6/} Clearly, the unavailability of the ACRS report

^{4/} The reason stated by the Board for its denial was that the NRC Staff's review of the safety issues [of which summary disposition was sought] had not been completed. McGuire, supra, at 683.

^{5/} Arkansas Power and Light Company (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).


^{6/} Id.

on Unit 2 is no justification for deferring the Licensing Board's decision on any issues in controversy that are related to Unit 2 or for severing the operating license proceeding for Unit 2 from that for Unit 1.

III. CONCLUSION

For all of the reasons set forth above the OCRE motion for severance of the operating license proceeding for Unit 2 from the operating license proceeding for Unit 1 should be denied.

Respectfully submitted,



James M. Cutchin IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of September, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NOTICE OF APPEARANCE OF JAMES M. CUTCHIN IV" and "NRC STAFF'S RESPONSE TO MOTION OF OHIO CITIZENS FOR RESPONSIBLE ENERGY FOR SEVERANCE OF THE PROCEEDING" 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 24th day of September, 1982:

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NOTICE OF APPEARANCE OF JAMES M. CUTCHIN IV

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 CFR § 2.713(b), the following information is provided:

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James M. Cutchin IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of September, 1982.

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Certified By DSO 7/2