December 3, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

OHIO CITIZENS FOR RESPONSIBLE ENERGY RESPONSE TO APPLICANTS' "MOTION FOR DIRECTED CERTIFICATION OF THE LICENSING BOARD'S MEMORANDUM AND ORDER OF OCTOBER 29, 1982"

I. Introduction

On November 18, 1982 Applicants moved the Atomic Safety and Licensing Appeal Board ("Appeal Board") to direct the Atomic Safety and Licensing Board ("Licensing Board") to certify to it for immediate appellate review the portion of the Licensing Board's October 29, 1982 Memorandum and Order (Concerning Ohio Citizens for Responsible Energy's Late-Filed Contentions 21-26) admitting contentions on turbine missiles, in-core thermocouples, and steam erosion. Applicants request that the Appeal Board reverse the Licensing Board's Order and deny the admission of these contentions. Intervenor Ohio Citizens for Responsible Energy ("OCRE"), in accordance with 10 CFR 2.730(c), hereby files its response opposing Applicants' Motion.

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II. Applicants Have Not Met the Standard for Directed Certification

Applicants again come before the Appeal Board seeking interlocutory review of a Licensing Board Order admitting late-filed contentions.[1] As Applicants amply indicate, interlocutory review under such circumstances is not favored.[2]

Directed certification is to be used only in the most "exceptional circumstances" (Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977)) and is granted "most sparingly" (Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697 (1978)). At a minimum, a party seeking directed certification must establish that, without immediate appellate review, the public interest will suffer or unusual delay or expense will be encountered. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975). The particular standards for directed certification

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1/ On March 23, 1982, Applicants moved for directed certification of the Licensing Board Order admitting a contention on hydrogen control. The Appeal Board denied Applicants' motion in ALAB-675, 15 NRC 1105 (1982).

2/ It should especially be noted that the Appeal Board does not favor certification on the question of whether a contention should have been admitted into the proceeding. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406 (1976). See also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687 (August 19, 1982), slip op. at 4-6.

are that the ruling in question either (1) threatens the party adversely affected with immediate and serious irreparable impact, which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). Applicants' Motion meets none of these criteria.

The circumstances of this proceeding are not exceptional. Only fifteen issues have been admitted into this proceeding, and, since Issues 2, 10, and 11 have either been dismissed or withdrawn, only twelve issues require litigation.[3] This is not an unusual or unwieldy number. Furthermore, the schedule for hearing these issues is such that Issues 3, 4, 5, 6, 7, and 9 will be decided within a few months. (See the Licensing Board's Memorandum and Order (Concerning Scheduling) of September 16, 1982; evidentiary hearing on these issues is set for February 15, 1983.) Thus, the three contentions in question, along with Issues 1, 8, and 12, will be litigated at some future hearing, the date for which has not been set. The deferment of Issues 1 and 8 from this first hearing session was at Applicants' request. (See Transcript of the August 13, 1982 conference call at 736 and 754.) The litigation of these additional

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3/ The statement (Applicants' Motion at 3) that "there are now more late-filed contentions to be litigated than admitted contentions which were timely filed" is erroneous. Seven contentions were admitted following the Special Prehearing Conference (LBP-81-24, 14 NRC 175). Only six late-filed contentions require litigation.

contentions will not adversely affect either the conduct of this proceeding or the interests of any party. Since an additional hearing session will be required later anyway, Applicants' complaints of unusual delay and/or expense caused by the litigation of the three contentions in question would seem unfounded. Applicants might instead consider the delay wrought by their untimely appeal.

Indeed, the public interest will suffer if important safety issues are not litigated. The Appeal Board has held that the delay in the operation of a nuclear facility is unimportant (and may even be proper) when an intervenor raises significant safety issues. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 (1973). Similarly, OCRE believes that any alleged financial harm incurred by Applicants[4/] pales in comparison to the potential harm to society posed by the operation of an unsafe facility. Applicants took the risk, when planning and building the Perry facility, that the plant might be completed and they might not be able to obtain an operating license (or the OL might not be issued in accordance with their schedules and preferences). The public, on the other hand, must bear the risks to health and safety posed by the plant's operation. Applicants accepted their risks voluntarily; the public did not. This fundamental difference demands the public litigation of issues such as those which Applicants seek to have dismissed.

4/ OCRE suspects that delay may even be beneficial to Applicants. One of the lessons of the TMI-2 accident which all utilities should have learned well is that the economic consequences of an accident far outweigh the incremental costs of additional safety requirements.

As for the Marble Hill (supra) standards for directed certification, Applicants have met neither. The admission of these contentions does not threaten them with immediate or irreparable harm.[5] Clearly, other remedies (e.g., summary disposition under 10 CFR 2.749 or a timely appeal under 10 CFR 2.762) exist by which any "harm" can be mitigated. Nor has the Licensing Board's ruling affected this proceeding in an unusual or pervasive manner. Indeed, as their discussion of each of the three contentions in question indicates, Applicants merely disagree with the Licensing Board's reasoning. Such disagreement is not sufficient to trigger directed certication.

III. The Licensing Board's Reasoning in Admitting Issues 13, 14, and 15 is Not at Odds with the Commission's Regulations and Rulings

The standards for the admission of late-filed contentions are found in 10 CFR 2.714, which requires that late contentions, in addition to meeting the "basis and specificity" criteria, be judged according to the five factors listed in Section 2.714 (a)(1). The balancing of these factors is left to the discretion of the Licensing Board.[6] The basis and specificity

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5/ Litigation expense is not irreparable injury. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977).

As an aside, OCRE finds Applicants' sudden preoccupation with cost control to be curiously uncharacteristic. E.g., as those living in their service area can attest, Applicants have no dearth of funds to spend on promotional advertising. However, when it comes to the public litigation of important safety issues, their purse strings are suddenly tightened.

6/ Licensing Boards enjoy broad discretionary powers. 10 CFR

(continued next page)

requirements were further defined in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980) and Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). Applicants' quarrel with these contentions is mainly concerned with the question of whether adequate basis and specificity has been demonstrated. OCRE believes that, if the Licensing Board were to follow Applicants' suggestions and probe too deeply into the merits of these contentions before admitting them, the Licensing Board would be violating the directives of Allens Creek and Grand Gulf.[7]

A few of Applicants' objections to the admission of these contentions deserve comment.[8] A central question raised by Applicants with regard to both Issues 13 and 14 is the sig-

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6/ continued.

2.718. Indeed, Licensing Boards may even allow petitioners who do not meet the judicial standing criteria to intervene in a proceeding on a discretionary basis. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

7/ It should be noted that the NRC Staff found that all three of the contentions in question met the specificity and basis requirements. See "NRC Staff Response to Motion of Ohio Citizens for Responsible Energy for Leave to File its Contentions 21-26," dated September 21, 1982.

8/ OCRE will not repeat herein all of the arguments favoring or opposing the admission of these contentions but rather refers the Appeal Board to the briefs filed by OCRE, Applicants, and the Staff concerning OCRE's contentions 21 through 26.

nificance to be accorded to Regulatory Guides. Applicants cite the Appeal Board decision in Gulf States Utilities (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977), yet they ignore the fact that the Commission determined that Regulatory Guides are entitled to considerable prima facie weight. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974). Thus, the Licensing Board's finding that the Regulatory Guides form a basis for the contentions is not at odds with Commission precedent.

Applicants also ignore the background of the turbine missile issue. The NRC Staff at the construction permit stage considered this issue resolved. Thus, a person reviewing the CP-stage SER for Perry would not find cause to inquire further. Now, however, the Staff has marked this issue as an open item. This unexplained shift in position, along with the ACRS letter, prompted OCRE's investigation of this issue and is the basis of OCRE's "good cause" for late filing. The fact that the Staff has now changed its mind on the significance of the turbine missile issue for Perry also provides basis for rejecting the Staff's CP-stage conclusion, contrary to Applicants' assertions (Motion at 10).

As to Applicants' arguments against the Licensing Board's finding "good cause" concerning Issue 14, OCRE believes that the change in the Staff's position on in-core thermocouples provides good cause for late filing. One of the factors in 10 CFR 2.714(a)(1) is "the extent to which the petitioner's

interest will be represented by existing parties." If OCRE had submitted this contention while the Staff still required in-core thermocouples in BWRs, presumably its admission could be denied on this factor alone. OCRE would also point out that the Appeal Board has ruled that new regulatory developments and the availability of new information may constitute good cause for a delay in seeking intervention. Duke Power Company (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146 (1979). OCRE maintains that the Staff's shift in policy on this issue (and on Issue 13, as well) does constitute a new regulatory development and therefore provides good cause for late filing.

As for Issue 15, on steam erosion,[9] OCRE filed this contention shortly after the issuance of the IE Information Notices, even without knowledge of Applicants' inservice testing program, to avoid accusations of laxity in filing. As it is, the Staff considered OCRE's submission of this contention to be unjustifiably late. Furthermore, the mere fact that an issue may have generic implications does not preclude its consideration in individual proceedings. See Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978).

9/ Applicants' Motion at 16, footnote 12, erroneously refers to this as "Sunflower's contention." It should read "OCRE's contention."

IV. Conclusion

OCRE finds that Applicants' second attempt to seek directed certification of a Licensing Board decision admitting late-filed contentions is as deficient as their first. Although Applicants set forth a variety of allegations as to the impropriety of the Licensing Board's actions, they would not, even if true (OCRE believes that they are totally unfounded), compel directed certification. Indeed, if all unsatisfied parties in NRC proceedings were to seek interlocutory review with no more substantial grounds than those cited by Applicants, the Appeal Board would be so burdened that it would have little time for much else. For these and all the reasons set forth above, OCRE concludes that Applicants' Motion must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing OHIO CITIZENS FOR RESPONSIBLE ENERGY RESPONSE TO APPLICANTS' "MOTION FOR DIRECTED CERTIFICATION OF THE LICENSING BOARD'S MEMORANDUM AND ORDER OF OCTOBER 29, 1982" were served by deposit in the U.S. Mail, first class, postage prepaid, this 3rd day of December, 1982 to those on the service list below.

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