

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.

(Perry Nuclear Power Plant,  
Units 1 and 2)

Docket No. 50-440 OL  
50-441 OL

NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS'  
MOTION FOR DENIAL OF CERTIFICATION OF THE LICENSING  
BOARD'S MEMORANDUM AND ORDER OF OCTOBER 29, 1982

James M. Cutchin IV  
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December 8, 1982

DESIGNATED ORIGINAL

Certified By

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I. INTRODUCTION

On November 18, 1982 the Cleveland Electric Illuminating Company, et al. (CEI or Applicants) filed a motion pursuant to 10 CFR § 2.718(i) and 2.785(b)(1) before the Atomic Safety and Licensing Appeal Board (Appeal Board) requesting the Appeal Board to direct the Atomic Safety and Licensing Board (Licensing Board) to certify to it that portion of the October 29, 1982 Licensing Board Order (Order) admitting three late-filed contentions and to reverse the Order and deny admission of the contentions. The Staff supports, and urges the Appeal Board to grant, the Applicants' motion.

II. BACKGROUND

This proceeding began in February, 1981 when the Commission issued a notice of opportunity for hearing concerning the application by CEI for an operating license for the Perry Nuclear Power Plant, Units 1

and 2. (PNPP). Several petitioners were admitted as parties in April, 1981 and seven timely proffered issues were admitted for litigation in July, 1981.<sup>1/</sup> Since then the Intervenor has submitted many more contentions, and to date eight additional contentions have been admitted by the Licensing Board.<sup>2/</sup> Three were admitted by the Memorandum and Order of October 29, 1982 that is the subject of Applicant's current motion.<sup>3/</sup> That Order also denied a contention without prejudice for refiling.<sup>4/</sup> The Licensing Board found that Intervenor has shown good cause for late filing of the three contentions and that the balancing of factors to be considered regarding untimely contentions in 10 CFR § 2.714(a)(1) weighed in favor of their admission. The Board found good cause for untimeliness because one issue was listed as an open item in

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<sup>1/</sup> Issue #1 was dismissed in an unpublished Memorandum and Order dated April 28, 1982.

<sup>2/</sup> Issue #8 was admitted by a Memorandum and Order dated March 3, 1982 and was the subject of an earlier appeal by Applicants. See LBP-82-15, 15 NRC 555, 560-563 (1982) and ALAB-675, 15 NRC 1105 (1982). Issues #9, #10, and #11 were admitted by a Memorandum and Order dated July 12, 1982. LBP-82-\_\_\_\_, 16 NRC \_\_\_\_ (1982). Issue #12 was admitted by a Memorandum and Order dated October 8, 1982. LBP-82-\_\_\_\_, 16 NRC \_\_\_\_ (1982). Issue #10 was dismissed in a Memorandum and Order dated July 19, 1982. LBP-82-\_\_\_\_, 16 NRC \_\_\_\_ (1982).

<sup>3/</sup> These issues concern turbine missiles (#13), in-core thermocouples (#14), and steam erosion of components (#15).

<sup>4/</sup> The Board ruled that good cause for the late filing had been shown and that the contention rested on sufficient basis but denied admission, without prejudice to refiling, until such time as Intervenor can show a nexus between PNPP and the "Humphrey Concerns" raised in the contention. Order at 7, 8. The "Humphrey Concerns" refer to a letter written to Mississippi Power and Light Company by Mr. John Humphrey, a former employee of General Electric Company, which listed his safety concerns regarding the design of the Mark III containment.

the Staff's May 1982 SER for PNPP (Order at 2, 4), for another issue because the PNPP SER showed a change in Staff position on a generic issue on which Intervenor alleged it had relied, and for the third issue because of OIE Information Notices regarding steam erosion of components.<sup>5/</sup> The Order briefly states that the four remaining factors regarding untimely contentions have been met and that little delay will result because the issues are specific. Order at 4, 12, 14.

Applicant now seeks directed certification of these Licensing Board rulings on late-filed contentions on the ground that these rulings have altered the basic structure of the proceeding and establish a pattern of action which, if not corrected, will continue pervasively and adversely to affect the proceeding.

### III. DISCUSSION

#### A. The Requirements for Directed Certification

The Staff is well aware of the Appeal Board's reluctance to undertake interlocutory review.<sup>6/</sup> Clearly, before interlocutory appeals

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<sup>5/</sup> In regard to the third issue admitted, Intervenor originally submitted a contention alleging simply that the application for PNPP is deficient since it does not contain an inservice testing program and consequently, does not address steam erosion of components. The Licensing Board admitted this contention as Issue #15 and interpreted the issue to mean that "... a subsequent filing of the applicant's [inservice testing programs] cannot be expected to cure the deficiency" and that "... broadening of the contention is commensurate with the need to determine the merits of the controversy." Order at 13, 14.

<sup>6/</sup> This long standing rule of practice is thoroughly discussed and illustrated in Puget Sound Power and Light Co., et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693 (1979) especially at p. 695, n. 5.

will be entertained, there must be a demonstration that either (a) immediate and serious irreparable harm not remediable by later appeal will result from the action appealed or (b) the action below affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980). Staff also is well aware that this is the second motion for directed certification in this proceeding. See Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105 (1982). However, it is Staff's considered judgment that the Licensing Board has improperly found good cause for admitting Issues #13, #14 and #15 to litigation in this proceeding, because such a finding is not supported by the justifications offered by the Intervenor and indicates that a lesser standard than is mandated by the Rules of Practice has been applied or that the standard has been waived.<sup>7/</sup> The Licensing Board, in ruling, based on wholly insubstantial reasons, that good cause for the untimely contentions has been shown, has provided a precedent for admission of future untimely contentions without good cause and without a genuine consideration of the five factors set out in 10 CFR § 2.714(a)(1). The Licensing Board's

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<sup>7/</sup> In addition, the Board by its interpretation of the Intervenor's "steam erosion" contention has improperly broadened Issue #15 sua sponte. As the Appeal Board in this proceeding has noted, expansion of a contention by a Licensing Board beyond the contention's own self-imposed limitations 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. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1115 (1982).

failure properly to apply the Commission's Rules of Practice when considering late-filed contentions clearly has altered the basic structure of this proceeding. More late-filed than timely-filed contentions have been admitted to litigation, and, based on the Board's statements regarding the "Humphrey Concerns,"<sup>8/</sup> more are likely to be admitted. The Board's improper rulings if not corrected, will cause an unnecessary and substantial lengthening of the hearing and a delay in issuance of the Board's Initial Decision that cannot be remedied by appeal after the improperly admitted issues are litigated. Thus the Staff believes that the Licensing Board's rulings affect the basic structure of this proceeding in a pervasive or unusual manner and warrant interlocutory review.

B. The Licensing Board Improperly Found Good Cause for Admitting Issues #13, #14 and #15

The Commission has directed that its adjudicatory Boards balance the five factors in 10 CFR 2.714(a)(1)(i)-(v) in considering whether to admit late-filed contentions to a proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). The showing of good cause, factor (i), is very important, because failure to show good cause for the untimely filing of a contention places a heavy burden on a party to justify admission of its contention based on the other factors. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977).

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<sup>8/</sup> As noted previously, the Licensing Board's Order invites refiling of the "Humphrey Concerns" contention, thus supporting the view that additional untimely contentions will be favorably received.

Whether there is good cause for the untimely filing depends wholly upon the substantiality of the reasons assigned for not having filed at an earlier date. South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n. 5 (1981). The Licensing Board has not properly applied the Commission's Rules of Practice and has abused its discretion by finding as good cause for untimeliness that a subject is an open item in the SER and by finding, contrary to established principle, that Intervenor could rely on Staff to pursue an issue. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448 (1980); Duke Power Company (Cherokee Nuclear Station, Units 1, 2, 3), ALAB-440, 6 NRC 643, 644 (1977); See also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC \_\_\_\_ (August 19, 1982), Slip op. at 13. Neither an open item in the SER nor a change of Staff position can properly be viewed as good cause for untimely filing since even Intervenor's filings show prior notice of the matters sought to be raised by their contentions.<sup>9/</sup> In addition, the Licensing Board failed to give careful consideration to the delay of the proceeding that will result from the admission of three contentions nearly 1½ years after

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<sup>9/</sup> For example, Intervenor indicated prior knowledge of the contents of a document dated October 1976 and cited as the basis for Issue #13 but stated that it didn't realize the matter was important until it noticed an open item in the SER and read an ACRS report noting the long-standing generic issue of turbine missiles. Ohio Citizens for Responsible Energy Motion for Leave to File Its Contentions 21 through 26 dated August 18, 1982 at 1. The Board in admitting Issue #13 states that intervenors cannot be expected to be conversant with the entire SER or docket materials but can await scientific publications and key staff documents, relying on professionals to identify areas "worth pursuing." Order, at 4. But see ALAB-687, Slip op. at 13.

the seven original contentions were admitted. The Order admitting Issues #13, #14 and #15 should be reversed because their admission without good cause is, in effect, a waiver of the standards in 10 CFR 2.714(a)(1)(i)-(v) for admission of late-filed contentions in this proceeding.

C. The Licensing Board's Interpretation of OCRE's Contention Constitutes Improper Sua Sponte Broadening of Issue #15

The "steam erosion" contention, including its basis, as submitted by Intervenor Ohio Citizens for Responsible Energy (OCRE) read as follows:

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 (MSIVs 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.<sup>10/</sup> Order at 12.

As reworded and admitted by the Licensing Board OCRE's contention (Issue #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. Order at 15.

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<sup>10/</sup> Except for the discussion of good cause for the untimely filing of the contention, the contention and its basis constituted all of Intervenor's discussion specifically addressing admissibility of this contention. As good cause for this late-filed contention OCRE offered merely that the contention "in addition to referring to the Staff's finding as stated in the SER, is based upon two recently issued NRC Information Notices" and "[t]hus there exists good cause for this late filing." See "Ohio Citizens for Responsible Energy Motion for Leave to File Its Contentions 21 through 26" dated August 18, 1982 at 5 and 7.

As submitted by OCRE the contention alleges simply that, because Applicants have not submitted an inservice testing program for pumps and valves and leak testing of valves and because steam erosion has been identified as the cause of recent failures of valves and piping, Applicants are not prepared to prevent, discover, assess and mitigate the effects of steam erosion on components of the Perry Nuclear Plant that will be subjected to steam flow. The reference to the OIE Information Notices simply provides an arguable nexus between the missing inservice testing programs and detection of steam erosion problems. Thus, OCRE provided a basis only for its assertion that the Perry application is presently incomplete. It did not, and of course could not, provide a basis for any speculation that the inservice testing programs, when they are submitted, will not cure the asserted incompleteness of the application.

However, the Licensing Board interpreted the contention more broadly. It stated that "OCRE has not only asserted a deficiency in the application with specificity but has indicated why it believes that a subsequent filing of the applicant's [sic] cannot be expected to cure the deficiency" and that "[s]ince the contention is specific, broadening of the contention is commensurate with the need to determine the merits of the controversy." Order at 13 and 14. The Board's interpretation is a sua sponte broadening without any basis. In fact there is not even a controversy regarding the incompleteness of the application. As the Commission has plainly stated, a Licensing Board has limited authority

to shape the issues in an operating license proceeding and has an obligation to make an affirmative finding that a serious safety, environmental, or common defense and security matter exists prior to exercising its sua sponte authority over a contention. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981). The open item in the Staff's SER and the generic OIE Information Notices clearly do not provide an adequate basis for a conclusion that a serious "steam erosion" safety issue exists at Perry. Thus, the Licensing Board's broadening of the "steam erosion" contention "commensurate with the need to determine the merits of the controversy" is totally unwarranted.<sup>11/</sup>

#### IV. CONCLUSION


As has been shown by the discussion above, the Licensing Board's failure properly to apply the Commission's Rules of Practice when considering late-filed contentions has altered the basic structure of this proceeding. More late-filed than timely-filed contentions now have

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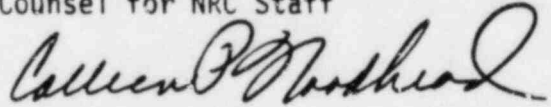
<sup>11/</sup> The Licensing Board's sua sponte broadening of Issue #15 is not its only sua sponte broadening of a contention in this proceeding. The Board earlier broadened another late-filed contention, Issue #12, to allege that an analytical technique different from that used by the Staff should be used to assess economic impacts discussed in the Perry FES. The Intervenor in its late-filed contention had alleged simply that the FES analysis was cursory and referenced a Bureau of Economic Analysis (BEA) study as its basis for alleging that greater impacts than discussed in the FES would occur. The Licensing Board ruled in admitting Issue #12 that the FES analysis was adequate but "reworded" and admitted the contention. See Memorandum and Order dated October 8, 1982 at 2, 3 and 5 and Ohio Citizens for Responsible Energy Motion for Leave to File Its Contention 20 dated August 9, 1982 at 1.

been admitted, and, based on the Board's statements regarding the "Humphrey Concerns," more are likely to be admitted as a result of the Board's erroneous rulings. The Board's improper rulings if not corrected now will cause an unnecessary and substantial lengthening of the hearing and a commensurate delay in the issuance of the Licensing Board's Initial Decision that cannot be remedied by appeal after the improperly admitted issues are litigated. Thus, the Appeal Board should grant the Applicants' motion for directed certification and reverse the Order of the Licensing Board admitting Issues #13, #14 and #15 to litigation in this proceeding.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 8th day of December, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTION FOR DIRECTED CERTIFICATION OF THE LICENSING BOARD'S MEMORANDUM AND ORDER OF OCTOBER 29, 1982" 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 8th day of December, 1982:

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