UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. John H. Buck
Gary J. Edles

In the Matter of	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket Nos. 50-440 OL 50-441 OL
(Perry Nuclear Power Plant, Units 1 and 2)	)	

Jay E. Silberg and Harry H. Glasspiegel, Washington, D.C., for applicants, The Cleveland Electric Illuminating Company, et al.

Susan L. Hiatt, Mentor, Ohio, for intervenor Ohio Citizens for Responsible Energy.

James M. Cutchin, IV, and Colleen P. Woodhead for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

December 15, 1982

(ALAB-706)

Applicants, the Cleveland Electric Illuminating Company, et al., have moved for directed certification [1/] of the Licensing Board's October 29, 1982, order (LBP-82-98, 16 NRC __) admitting three late-filed contentions of intervenor Ohio Citizens for Responsible Energy (OCRE). The

1/ See 10 CFR §§ 2.718(i), 2.785(b)(1).

D502

contentions concern turbine missiles, in-core thermocouples, and steam erosion. [2/] Applicants contend that our discretionary, interlocutory review is "necessary in order to restore the basic structure of this proceeding." Applicants' Motion (Nov. 18, 1982) at 3. The NRC staff supports the motion, while OCRE opposes it.

As explained below, applicants have failed to establish that our intercession here is warranted at this time. Consequently, we deny their motion.

1. This is the second time in this operating license proceeding that applicants have invoked the directed certification procedure as a means to secure interlocutory review of the Licensing Board's admission of a late-filed contention. In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105 (1982), we declined review of the Board's admission of a contention concerned with hydrogen control. There (id. at 1110) we reminded applicants that

> [r]eview of an interlocutory licensing board ruling via directed certification is discretionary and granted infrequently. A party invoking review by this means must demonstrate that the board's action "either (a) threatens the party adversely affected with immediate and serious irreparable

---

2/ The Licensing Board originally admitted seven contentions in July 1981. See LBP-81-24, 14 NRC 175, 232-33. On August 18, 1982, OCRE moved for leave to file a total of six late contentions, including the three here at issue.

> harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980), and cases cited.

Subsequently, in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC __, __ (Aug. 19, 1982) (slip op. at 4), we emphasized that "[a] ruling that does no more than admit a contention . . . has a low potential for meeting that standard."

Applicants accordingly acknowledge that requests for interlocutory review are disfavored. They contend, however, that the Board's October 29 ruling has "seriously undermined" the basic structure of this proceeding so as to warrant directed certification. Applicants' Motion at 3. They principally complain that, to their "extreme prejudice," the Licensing Board has embarked on a course unlike that in other NRC licensing proceedings by admitting more late-filed contentions than timely ones. Id. at 4, 3. Further, they speculate that the Board will admit still more late-filed contentions in the future. Ibid. Applicants argue that this action is the result of the Board's incorrect application and "unique interpretations" of 10 CFR § 2.714(b), which requires "the bases for each contention [to be] set forth with reasonable specificity" and late-filed contentions to satisfy the criteria enumerated in

10 CFR § 2.714(a)(1). Id. at 4. [3]

We are unable to accept applicants' view, endorsed by the staff, that the admission of more late-filed than timely contentions necessarily affects the basic structure of the proceeding in a pervasive or unusual manner. [4] In the first place, the Commission's Rules of Practice provide for the submission of late contentions. Further, neither the rules themselves nor the pertinent Statement of Consideration puts an absolute or relative limit on the number of such contentions that may be admitted. See 10 CFR § 2.714(a), (b); 43 Fed. Reg. 17798, 17799 (Apr. 26, 1978).

3/ These factors are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

4/ For the sake of clarification, the Board originally admitted seven contentions, one of which was later dismissed. It has since admitted eight more as late-filed, two of which have been dismissed or withdrawn. Thus, an equal number of timely and late contentions actually remain to be litigated.

Instead, 10 CFR § 2.714 lists five factors that a licensing board must balance in determining whether to admit one or more late-filed contentions. See note 3, supra. Among these is the extent to which their admission will broaden the issues or delay the proceeding. 10 CFR § 2.714(a)(1)(v). Thus, if a board has taken this into account along with the other four factors -- even though the admission of a significant number of late contentions might well broaden the issues or delay the proceeding -- it cannot be said that the board's ruling has affected the case in a pervasive or unusual manner. Rather, the board will have acted in furtherance of the Commission's own rules.

2. Here, of course, applicants attempt to buttress their request for directed certification with the argument that the Board has improperly weighed the criteria of 10 CFR § 2.714(a)(1) and erroneously found the basis for each contention to be sufficiently specific. In applicants' view, this reflects the "low esteem" in which the Board holds the requirements of 10 CFR § 2.714, with "the likely effect . . . that additional late-filed contentions will continue to be offered and accepted, to the extreme prejudice of Applicants." Applicants' Motion at 4 (footnote omitted).

We disagree with applicants' assessment of the Licensing Board's action. The Board considered individually each of the six contentions submitted by OCRE in its August 1982 motion. It determined whether each has a basis and whether the criteria governing late-filed contentions weighs in favor of the admission of each. As to three, the Board answered one or both questions in the negative and dismissed those contentions. 5/ With respect to the remaining three, however, the Board -- agreeing with the staff -- found a basis for each. See Staff Response to OCRE Motion (Sept. 21, 1982) at 3, 6, 7. Further, it made specific findings on the five factors of 10 CFR § 2.714(a)(1), determining, inter alia, that OCRE had good cause for tendering each of these contentions late and that intervenor was likely to aid in the development of a sound record. (We note, in this regard, that applicants conceded that the steam erosion contention was timely. Applicants' Answer to OCRE Motion (Sept. 16, 1982) at 34.) The Board thus concluded that on balance the five factors weighed in favor of admission of

---

5/ The Board dismissed the so-called "Humphrey concerns" contention without prejudice, inviting OCRE to refile it if it can produce previously unavailable information linking the subject matter of this proposed contention to the Perry facility. LBP-82-98, supra, 16 NRC at __, __ (slip op. at 1, 8). Cf. Catawba, supra, 16 NRC at __ (slip op. at 14-18). The Board noted, however, that "this extensive list of unsifted concerns raises grave questions concerning the broadening of issues and delay of the proceeding." LBP-82-98, supra, 16 NRC at __ (slip op. at 7).

the contentions dealing with turbine missiles, in-core thermocouples, and steam erosion.

Although we imply neither approval nor disapproval of its rulings, we are unable to conclude that the Licensing Board has effectively abandoned or fundamentally altered either the requirements of 10 CFR § 2.714 or Commission precedent. On the contrary, we believe its decision -- admitting some contentions and dismissing others -- reflects at the least a discriminating application of the rules. 6/ OCRE's suggestion that applicants' motion merely reveals disagreement with the Board's rulings, rather than showing a pervasive or unusual distortion of the proceeding occasioned by those rulings, is on the mark. Applicants may well be correct in their claim that the Board erred in its ultimate judgment to admit one or more of these contentions. That alone, however, does not provide a basis for our interlocu-

---

6/ We note that OCRE based all six of its late contentions on the staff's Safety Evaluation Report (SER), filed in May 1982. OCRE Motion for Leave to File Its Contentions 21 through 26 (Aug. 18, 1982) at 7. If the SER for Perry had been prepared and submitted in a more timely fashion, the Licensing Board might not have been confronted with the problems inherent in considering late-filed contentions -- particularly whether their acceptance will unduly delay the proceeding.

tory review. Perry, supra, 15 NRC at 1113. 7/

Applicants' motion for directed certification is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins
Secretary to the
Appeal Board

7/ Applicants imply that a grant of directed certification here would be as justified as our acceptance of the referred questions in Catawba, supra. Applicants' Motion at 5. We disagree. In Catawba we answered certain generic questions, rather than reviewing the Board's application of 10 CFR § 2.714 to the specific facts of the case, which applicants call upon us to do here. In doing so, we emphasized that "our general policy disfavoring interlocutory review of licensing board action on specific contentions" was to "remain[ ] intact." 16 NRC at __ (slip op. at 6, 7)

We also note that applicants have failed to substantiate their claim of "extreme prejudice" as a result of the Board's ruling. See Applicants' Motion at 4. They allude to possible delay in the already bifurcated hearings but provide no details. Id. at 4 n.5. Applicants point out, however, that, if they are required to litigate the three contentions here at issue, they will never be able to recoup the time and financial expense. Id. at 5 n.6. But we have previously stated in this proceeding (as well as in others) that this factor is present when any contention is admitted and thus does not provide the type of unusual delay that warrants our interlocutory involvement. Perry, supra, 15 NRC at 1114.