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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Mr. Glenn O. Bright

In the Matter of

Docket Nos. 50-440-OL
50-441-OL

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

(Perry Nuclear Power Plant, Units 1 & 2)

December 23, 1982

MEMORANDUM AND ORDER
(Concerning Discovery From Staff on Hydrogen Issue)

Ohio Citizens for Responsible Energy (OCRE) has requested that the Staff of the Nuclear Regulatory Commission (staff) answer a set of interrogatories allegedly relevant to Issue #8, the hydrogen contention. The motion was filed on November 30, 1982 and Staff's Answer was filed on December 20, 1982.

On December 13, 1982, we denied the staff's request to reconsider the admission of Issue #8. We denied the request on both procedural and substantive grounds. That decision is now a part of the law of the case. The admitted contention states:

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.

Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105 (1982) at 1110. At the time we admitted the contention, we found that "Sunflower has suggested several mechanisms [of hydrogen release], any one of which would do." Id. at 1114. In

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commenting on our decision, in the course of its denial of its own jurisdiction, the Appeal Board suggested that:

[T]he [Licensing] Board has chosen to explore the matter of hydrogen control rather than hydrogen generation. In so doing, it has assumed the existence of a credible accident. While we express no judgment on the propriety of such an assumption, we point out that this is not the same as disregarding the TMI-Restart requirement of a credible LOCA scenario.

As noted, the Board did not specify the particular type of "credible" accident it has assumed. Different types of accidents, however, result in different rates and quantities of hydrogen generation. A given hydrogen generating mechanism thus has obvious relevance to the efficacy of a hydrogen control system.

[Emphasis in original.] Id. at 1114.

In so many words, the Appeal Board already has suggested its answer to the staff arguments before us. The Appeal Board has found that "a given hydrogen generating mechanism . . . has relevance to the efficacy of a hydrogen control system." Hence, interrogatories designed to obtain information about hydrogen generation are relevant to the admitted contention. Since the staff has substantial expertise in this area plus a responsibility to the public to assure public safety, its response to relevant hydrogen generation interrogatories also is necessary. It must respond. 10 CFR §2.720(h)(2)(ii) and §2.744. (With respect to documents, the staff asserts that all relevant documents are in the public document room. Consequently, unless staff discovers additional documents in the course of responding to interrogatories, there do not appear to be any documents to discover.)

We note that staff has not cited any precedent that defines "necessary" in the procedural regulations. We know of no such precedent. Hence, this is a matter of first impression.

We reject staff's attempt to define "necessary" to prohibit OCRE from obtaining information that it "suspects" or believes may be helpful to it. OCRE may not be required to know what the staff's views are before it obtains them. To erect that requirement would make a mockery of the discovery process. Compare our Memorandum and Order of December 8, 1982, denying Sunflower's motion for discovery concerning quality assurance.

We consider the staff's views on hydrogen control to be so important that it must disclose those views, fully and completely, in response to a fair interpretation of these interrogatories. We need not decide the meaning of "necessary" in another context. The staff has done extensive work in the hydrogen release area and its views about this subject are "necessary" to a complete record in this context. That is the normal and accepted use of the term "necessary" and no more appropriate definition has been suggested to us.

We urge staff, in the interest of fairness and efficiency, to make its responses to OCRE's interrogatories complete, in light of the fact that OCRE'S questions were phrased by a non-lawyer, albeit a clever one. Under the circumstances, simple responses should be accompanied by a statement of reasons that responds to OCRE's intent as well as to its specific words. For example, OCRE asks about a "TMI-type accident". The phrase obviously is vague. One meaning that one could attach to the phrase is a loss of coolant accident accompanied by one or more operator errors. On the other hand, one might interpret the phrase to apply only to a LOCA in a pressurized water reactor accompanied by instrumentation problems, a failure of the PORV, a failure to close the manual block valve and a manual shut-off of the high pressure injection system. We believe that the staff should respond to the first of these possible meanings, as that meaning is sympathetic to OCRE's intent and to its limited litigation experience.

This proceeding is not a game. Its purpose is to provide OCRE and the public answers to OCRE's questions about the safety of the Perry plant. Particularly when the intervenors have demonstrated their sense of responsibility by dropping contentions after adequate information is supplied to it, as OCRE and Sunflower have done in this proceeding, staff evasiveness in responding to interrogatories is destructive of public confidence.

I OCRE'S QUESTIONS

In this section of our memorandum, we will discuss each of OCRE's

questions, as they have been grouped by OCRE. Motion at 4-8. We will do our best to rule on the relevance of each of the interrogatories even though the staff has not bothered to reach that level of detail because of its firm view that none of the interrogatories is proper.

A. Interrogatories 6-1, 6-2 and 6-25

Each of these questions should be answered pursuant to the provisions of 10 CFR §2.740b(b). Staff has admitted the relevance of 6-1. Interrogatory 6-2 requests information on hydrogen generation without respect to its connection to a TMI-2 accident.

The relevance of 6-2, which inquires about worst-case hydrogen generation, is more difficult to decide. A possible interpretation of the Appeal Board's non-binding directions to us is that we are adjudicating control of hydrogen and are looking to hydrogen generation only as an indication of how much and how rapidly hydrogen would be generated. Another possible interpretation of the Appeal Board's non-binding directions to us is that we must limit our concerns to specific credible scenarios of a TMI-2 type. Since we have not yet decided which of these views to take, the staff should answer this interrogatory both generally, without respect to the method of hydrogen generation, and then in a more limited fashion, answering solely with respect to a small-break loss of coolant accident accompanied by one or more operator errors. We expect, because the Commission is considering promulgating a hydrogen rule for Mark III containments, that staff's response either will supply a basis for believing that hydrogen generation would exceed 10 CFR §50.44 standards or that it would provide us with a discussion of the basis for the Commission's proposed rule on this subject and the staff's reason for concluding that hydrogen generation would not exceed the existing standard under §50.44.

6-25 may be unnecessarily complex. Staff may answer this interrogatory by referring to its answer to 6-2 and by explaining generally why the listed scenarios are either of concern or not of concern. For those scenarios that are of concern, of course, staff should answer more completely.

B. Interrogatories 6-3 and 6-4

Interrogatory 6-3 is relevant. However, 6-4 was withdrawn by letter of December 14, 1982.

C. Interrogatories 6-5, 6-12, 6-13, 6-26 and 6-30

These questions deal with the strength of the Perry containment and appear to be irrelevant to the admitted contention. This conclusion is based on the Board's belief that neither applicant nor staff will rely on the strength of the containment as a line of defense against a hydrogen explosion. If either of the parties will rely on this line of defense, then we request prompt notification. If we receive notification, these questions must be answered. Otherwise, they need not.

D. Interrogatories 6-6, 6-7 and 6-10

These questions are relevant only to the extent that they inquire into the adequacy of the distributed-igniter hydrogen control system currently planned for Perry. So interpreted, these interrogatories should be answered.

E. Interrogatories 6-8, 6-14, 6-15, 6-32 and 6-34

Interrogatory 6-8 was withdrawn by letter of December 14, 1982. Although the other questions apparently were developed with recombiners in mind, staff should do its best to reinterpret these questions as applicable to the current system, including the distributed-igniter system that is planned. With this modified understanding, 6-14, 6-15, 6-32 and 6-34 should be answered.

F. Interrogatories 6-9 and 6-11

Interrogatory 6-9 requests the status of the proposed hydrogen rule

for Mark III containments. This is a simple procedural request that ought to be accommodated so that OCRE will know whether impending legal changes affect its pending contention. Interrogatory 6-11 requests a list of on-going research on hydrogen generation and interim findings, if any. Given the staff's extensive involvement in the hydrogen generation question, access to a list of its research and of interim findings are necessary for OCRE to be fully informed about essential facts and opinions bearing on its contention. This information should be provided.

G. Interrogatories 6-16, 6-17, 6-18 and 6-24

In light of our interpretation of the recombiner interrogatories, above, these questions now seem redundant. However, staff should review these questions and provide any additional information about the distributed igniter system that has not been provided in response to other questions.

G. Interrogatories 6-19 and 6-21

These interrogatories relate to the adequacy, under the regulations, of the Perry hydrogen control system. Since the staff's views on this question must be published in the Safety Evaluation Report, these interrogatories should be answered. The additional information requested on regulatory non-conformances is entirely proper.

H. Interrogatory 6-22

This interrogatory attempts to clarify a relevant section of the SER that seems to OCRE to be incomplete. This is relevant and should be answered.

I. Interrogatories 6-23, 6-31 and 6-33

OCRE has explained in its Motion, p. 7, why it seeks an answer to these interrogatories. Staff should first respond to this explanation, as if it were an interrogatory. Then, if the mixers are essential to adequate hydrogen control in a core melt situation, the other interrogatories should

be answered. If the mixers are not essential, then the other interrogatories need not be answered.

J. Interrogatories 6-27, 6-28 and 6-29

These interrogatories need be answered only if the staff or applicant will rely on combustion analyses or data to assure the adequacy of the hydrogen control system.

K. Interrogatory 6-35

In response to this question, staff should first provide its understanding of whether the activation of the hydrogen control system is manual. Only if it is manual need the interrogatory be answered.

L. Interrogatory 6-37

This interrogatory is necessary for OCRE to evaluate staff responses to the other interrogatories. It should be answered.

II OUR QUESTIONS

In reviewing OCRE's questions, the Board has concluded that there are possible gaps in the information it will obtain. Because of the Board's interest in compiling a complete record, we have decided to ask some questions ourselves in order to fill these gaps.

Footnote 7 of staff's Answer seems particularly relevant to our authority to ask these questions. In that footnote, staff states:

Board questions necessary to assure a complete record on an issue that has survived summary disposition procedures may be appropriate. See Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 620 (2d Cir. 1965). However, the necessity of such questions cannot reasonably be determined until the Board has reviewed the evidence presented by the parties on that issue.

We note that the proposition that we may not ask questions during the discovery period is not supported by authority. That is a question for which no authority has been cited. Furthermore, we find that the proposition the

staff advances is not appropriate. When the Board notices possible gaps in the record at an early stage of the proceeding, there is every reason for it to raise its concerns promptly. Otherwise, when the Board raises its concerns at the hearing, it is apt to get an incomplete response or to find it necessary to continue the hearing. In the interest of expedition, questions that could be asked at the hearing may be asked earlier.

The only important contrary argument is that by asking questions now we may appear to be taking a position in support of OCRE. However, that contrary argument applies at any stage of the proceeding and is without merit at any stage. Board questions are asked for the purpose of eliciting the truth and completing the record. At times, answers may favor one or another party. There is no way to know in advance which party will be advantaged. We do not know at this time which position we will support and we do not even have a present inclination concerning the resolution of evidentiary questions we have not yet seen.

We conclude that we have the authority and responsibility to ask questions and we propound the following questions as our own:

1. What, if anything, has the staff done to develop different scenarios about a TMI-type accident (a loss of coolant accident, compounded by one or more human errors) that results in core uncovering and hydrogen generation?
2. What, if anything, has staff done to determine whether such scenarios are credible?
3. Discuss whatever doubts the staff has about whether a TMI-type accident could occur at Perry or at similar BWR reactors?
4. Provide documents and analyses that are not available in the docket room and have not been provided to OCRE in response to its Freedom of Information Act requests but that bear on the above 3 questions.
5. Provide the name of any staff person or NRC consultant who, in the course of work for the NRC, prepared a memorandum or other document suggesting that there are one or more credible TMI-type accident scenarios for Perry or for similar BWR reactors. Provide the memorandum or other document.

In answering these questions, staff may refer to answers to OCRE interrogatories. The purpose of the questions is to make sure that important gaps in the record will not be left open, not to require the production of redundant information.

We do not consider our propounding of questions relevant to admitted contention to be equivalent to the raising of a sua sponte issue. A sua sponte issue is a question that lies outside the admitted contentions. See 10 CFR §2.760a concerning the authority to raise issues not raised by parties. Hence, we need not notify the Commission that we are propounding questions. We do not believe the Commission intends to receive notification every time a Board asks a question, either at a hearing or prior thereto.

III. PROCEDURE

Staff should respond to the interrogatories and Board questions promptly. To the extent that it agrees with applicant's response to similar interrogatories, it may respond by an affidavit listing the answers with which it concurs and indicating whatever differences exist. It should negotiate with OCRE, which has demonstrated its willingness to act responsibly in these proceedings, concerning reasonable methods of making information available to OCRE. Within one week from the issuance of this decision, the staff should file its proposed schedule for compliance with this order.

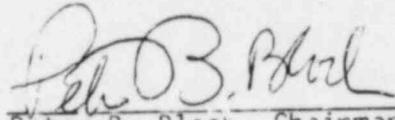
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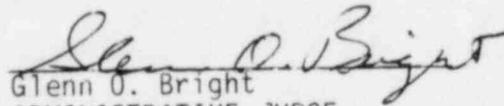
For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 23rd day of December, 1982,

ORDERED

The Staff of the Nuclear Regulatory Commission shall respond to interrogatories propounded to it by Ohio Citizens for Responsible Energy and and by this Licensing Board as directed in the accompanying memorandum.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD
(Jerry R. Kline, Administrative Judge, not participating)


Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE


Glenn O. Bright
ADMINISTRATIVE JUDGE

Bethesda, Maryland