January 24, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' ANSWER TO OCRE MOTION FOR CLARIFICATION OF THE LICENSING BOARD'S MEMORANDUM AND ORDER (JANUARY 4, 1983)

By motion of January 7, 1983, Intervenor Ohio Citizens for Responsible Energy ("OCRE") requests the Licensing Board to "[retain] jurisdiction over NEPA issues in this proceeding" until the United States Court of Appeals for the Sixth Circuit has ruled on Intervenor Sunflower Alliance Inc., et al.'s ("Sunflower's") petition to review the Nuclear Regulatory Commission's Statement of Policy on psychological stress. OCRE's "motion for clarification" is in effect a motion for reconsideration of the Licensing Board's Order dismissing Issue No. 10, concerning psychological stress, from this proceeding. As such, the motion is both untimely and without merit, and should be denied.

OCRE characterizes its motion as a "motion for clarification", yet expresses no uncertainty about the meaning of the Licensing Board's January 4, 1983, Memorandum and Order (Concerning Motion for a Stay). Since OCRE is simply disputing the substance of the

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Licensing Board's ruling, rather than asking for clarification, its motion is more in the nature of a motion for reconsideration.

The significance of this discrepancy lies in the fact that OCRE asks for entirely different relief than Sunflower did in its December 29, 1982 Motion To Stay Proceedings. Whereas Sunflower asked for a stay of this proceeding as a whole pending the Sixth Circuit's decision, OCRE asks that the Licensing Board allow Issue No. 10 to continue to be litigated even if all other issues in the proceeding have been decided. In effect, OCRE is requesting that the Licensing Board reconsider its decision to dismiss Issue No. 10. This relief would be improper for a number of reasons.

First, the request is untimely in the extreme. In its July 19, 1982 Memorandum and Order (Concerning Psychological Stress Contention), the Licensing Board required that any motions for reconsideration must be filed within 20 days of receipt of the order. Sunflower timely filed a motion for reconsideration[1/] and OCRE filed an answer in support of the motion.[2/] Sunflower's motion for reconsideration was denied by the Licensing Board. See Memorandum and Order (Motion for Reconsideration or Certification), dated August 30, 1982. OCRE's latest filing on this issue is for all practical purposes a motion for reconsideration of the Licensing Board's denial of Sunflower's motion for reconsideration.

1/ Motion by Sunflower Alliance Inc., et al., for Reconsideration or in the Alternative Motion to Certify to the Commission, dated August 4, 1982.

2/ OCRE Reply to Motion by Sunflower Alliance Inc. et al. for Reconsideration or in the Alternative Motion to Certify to the Commission, dated August 12, 1982.

This process cannot be permitted to go on ad infinitum. Both OCRE and Sunflower have had ample opportunity to be heard on the issue of whether psychological stress can be litigated in this proceeding. As the Licensing Board has recently said: "If motions for reconsideration may be filed at any time, then the work of the Board could be unduly hindered." Memorandum and Order (Concerning Reconsideration and Dismissal of Hydrogen Control Contention), dated December 13, 1982, at 2.

Second, it is doubtful whether OCRE even has standing to file its Motion for Clarification. Sunflower was designated lead intervenor on Issue No. 10 by the Licensing Board. See Memorandum and Order (Concerning Motions to Admit Late Contentions), dated July 12, 1982, at 12. Sunflower apparently saw no need for the Licensing Board to clarify its decision not to stay the proceedings, let alone to reconsider its original decision not to retain jurisdiction over Issue No. 10. OCRE's action, therefore, surely violates the intent, if not the letter, of the Licensing Board's rules for allocating responsibilities between the intervenors. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 N.R.C. 175, 231 (1981).

Third, for the Licensing Board to retain jurisdiction over Issue No. 10, even after all other issues have been decided, would create the same kinds of procedural problems raised by OCRE's

Motion to Stay Dismissal of Issue #2, dated April 20, 1982. See Applicants' Response to Motion to Stay Dismissal of Issue #2, dated April 26, 1982. See Applicants' Response to Motion to Stay Dismissal of Issue #2, dated April 26, 1982, at 2-3. The Licensing Board emphatically rejected OCRE's argument with respect to Issue No. 2 that the Licensing Board should stay dismissal "because of the possibility that a court may sometime in the future decide that [the Commission's final rule on financial qualifications] has been improperly promulgated." Memorandum and Order (Concerning Motion to Dismiss Financial Qualifications Contention), dated April 28, 1982. Precisely the same reasoning applies to Issue No. 10.

OCRE insists, nevertheless, that if the Licensing Board refuses to reconsider its decision to dismiss Issue No. 10, there may be no further opportunity to litigate the issue, even if the Sixth Circuit rules favorably on Sunflower's petition. If this proceeding has been concluded by that time, OCRE argues, it will have, at most, only two options in order to litigate psychological stress. One option might be to move to reopen the record, but OCRE says that it would face a "formidable burden" in doing so. Motion for Clarification at 2. OCRE also cites an Appeal Board decision, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 N.R.C. 694 (1978), for the proposition that "when the Board's jurisdiction is terminated on

all but a few issues . . . the Board should not entertain new or reopened issues even when there are supervening developments." Motion for Clarification at 2. Neither of OCRE's arguments withstand scrutiny.

First, although the standards for reopening the record may be more stringent than those for the original admission of a contention, there are good reasons why that should be so at such a late stage of the proceeding. In any event, the Appeal Board decisions establishing these tests are not subject to challenge here. If indeed psychological stress is as significant an issue as OCRE claims, Sunflower should easily be able to meet its burden for reopening the record.[3/]

Second, OCRE simply misinterprets ALAB-513. The Appeal Board in that decision did not limit intervenors' ability to reopen the record in the way OCRE claims. It ruled only that the Appeal Board lacks authority to reopen the record on an issue which has already been decided once the time for all appeal has run, including appeal to the Supreme Court of the United States. ALAB-513 does not speak to the question of whether the Licensing Board may reopen an issue at a point where most other issues have been decided. Of course, the Licensing Board may do so at any time prior to initial decision. 10 C.F.R. Sec. 2.718(j).

3/ Applicants fail to understand OCRE's cryptic remark that "the parochial attitudes of certain parties to this proceeding" would somehow prevent the record from being reopened. Motion for Clarification at 3.

The other procedural option which OCRE apparently considers to be unsatisfactory is a petition under 10 C.F.R. §2.206. OCRE does not explain why this is an unacceptable alternative. What OCRE does say is that this remedy "may be precluded" even with a favorable (to Sunflower) Court of Appeals ruling on psychological stress because Sunflower did not challenge that part of the Commission's Statement of Policy prohibiting §2.206 petitions based on psychological stress. Motion for Clarification at 2. While the Statement of Policy currently prohibits the application of §2.206 petitions to psychological stress issues, if the Statement of Policy is overturned by the Sixth Circuit, the §2.206 limitation would simply become moot. In any event, as OCRE acknowledges, "these proceedings are months from their conclusions." It is therefore highly likely that the Court of Appeals will have ruled long before any operating licenses have been issued. Motion for Clarification at 1.

For all of the above reasons, OCRE's Motion for Clarification should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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DATED: January 24, 1983

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer to OCRE Motion for Clarification of the Licensing Board's Memorandum and Order (January 4, 1983)" were served by deposit in the United States Mail, first class, postage prepaid, this 24th day of January, 1983, to all those on the attached Service List.

Jay E. Silberg

JAY E. SILBERG

DATED: January 24, 1983

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