September 26, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUQUESNE LIGHT CO., et al.	)	Docket No. 50-412 OL
	)	
(Beaver Valley Power Station, Unit 2)	)	

APPLICANTS' RESPONSE TO PROPOSED
CONTENTIONS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY

In its August 4, 1983 Memorandum and Order (Scheduling of a Special Prehearing Conference), the Licensing Board directed that each petitioner for leave to intervene file an amendment and/or supplement to its petitions setting forth, among other things, the contentions which it seeks to litigate. Petitioners were to file their amendments and/or supplements so that they were received by the Licensing Board and the parties by September 9, 1983. Ohio Citizens for Responsible Energy ("Petitioner" or "OCRE") filed its contentions in a document (dated September 6, 1983) entitled OCRE Amended Petition for Leave to Intervene, received by Applicants on September 9.

OCRE filed two contentions, one of which is in the form of a petition for a waiver of a rule pursuant to 10 C.F.R. § 2.758. The § 2.758 petition does not meet the Commission's standards for application of the waiver provision. The remaining contention

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is based on incorrect legal conclusions and lacks the basis and specificity required by 10 C.F.R. § 2.714(b). Accordingly, neither of the contentions should be admitted as issues to be litigated in this proceeding. Having failed to submit a valid contention, OCRE must be denied status as an intervenor.

II. OCRE Proposed Contentions

A. Need for Power

In its proposed contention Number 1, OCRE contends that there is no need for the generating capacity of Beaver Valley Unit 2 in the CAPCO system. OCRE correctly recognizes that this contention is a challenge to 10 C.F.R. § 51.53(c), and therefore petitions to waive that regulation in accordance with 10 C.F.R. § 2.758. An affidavit made by Susan L. Hiatt is attached in support of the petition.

For the reasons stated below, the petition should be denied and the contention should be rejected.

OCRE is seeking a waiver of the amendments to 10 C.F.R. Part 51 adopted by the Commission on March 22, 1982). See 47 Fed. Reg. 12940 et seq. Need for Power and Alternative Energy Issues in Operating License Proceedings (March 26, 1982). In part these amendments provide that, for National Environmental Policy Act (NEPA) purposes, need for power issues will not be considered in operating license proceedings for nuclear power plants.

Section 2.758(b) of the Commission's Regulations provides that any rule or regulation of the Commission is not subject to attack in an individual licensing proceeding unless a petition is first made to the Licensing Board for an exception or waiver.

> The sole ground for a petition for waiver or exception shall be that special circumstances with respect to the subject matter of the proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

10 C.F.R. § 2.758(b). The petition must be accompanied by an affidavit that states with specificity the special circumstances involved and why the rule or regulation would not serve the purposes for which it was adopted in this particular case. Opportunity is provided for other parties to respond to the petition, including the submission of reply affidavits. If the Licensing Board finds that a prima facie showing has been made in support of the waiver or exception, it shall, before ruling, certify directly to the Commission for a determination on the matter. If a prima facie showing is not made, the petition must be denied. 10 C.F.R. § 2.758(b); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). The prima facie showing must be persuasive, supported by proof sufficient to determine that a prima facie showing has been made, and set forth special circumstances with particularity. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 N.R.C. 2069, 2073, 2080 (1982).

When the Commission proposed the rule excluding need for power issues, it specifically referred to the § 2.758 procedures for obtaining a waiver of the exclusionary rule.

> An exception would be made to this rule if, in a particular case, special circumstances are shown in accordance with 10 C.F.R. 2.758 of the Commission's regulations. Such special circumstances could exist, for example, if it could be shown that nuclear plant operations would entail unexpected and significant adverse environmental impacts or that an environmentally and economically superior alternative existed.

46 Fed. Reg. 39441 (1981). The Commission restated these considerations when it promulgated the rule. 47 Fed. Reg. 12941 (1982) (consideration of need for power only in "very unusual cases, such as where it appears that an alternative exists which is clearly and substantially environmentally superior").

The sole question presented is whether the petition meets the appropriate standards for exception or waiver under 10 C.F.R. § 2.758, as explained and elaborated by the Commission in the rulemaking on the need for power rule.

It does not.

The test for whether a petition satisfies § 2.758 is a two-pronged one: (1) the affidavit must set forth with specificity the special circumstances that are present and (2) the affidavit must show that these special circumstances are such that the application of the challenged regulation would not serve the purposes for which the rule or regulation was adopted. If <u>both</u> prongs of this test are not satisfied, the petition fails.

Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-57, 14 N.R.C. 1037, 1038 (1981).

The special circumstances that are required under § 2.758 must involve a particular facility. Consolidated Edison Company of New York (Indian Point, Unit 2), CLI 72-29, 5 A.E.C. 20, 21 n.5 (1972). Where the issue is common to other reactors the proper response is not a waiver of the rule under § 2.758, because that issue would present no "special circumstances," but rulemaking to either amend or suspend the present rule. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1) CLI-80-16, 11 N.R.C. 674, 675 (1980).

The purpose of the amendments to Part 51, is, as the affiant suggests, "to afford unnecessary consideration of issues that are not likely to tilt the cost-benefit balance" at the operating license stage. Affidavit of Susan L. Hiatt, at 9, ¶ 16; 47 Fed. Reg. 12940 (March 26, 1982). The premise behind the rule is that "experience shows that completed plants are in fact used to their maximum availability for either purpose [i.e., to either meet increased energy needs or replace older less economical generating capacity]. Such facilities are not abandoned in favor of some other means of generating electricity." Id. See Dairyland Power Cooperative (La Crosse Boiling Water Reactor) LBP-82-58, 16 N.R.C. 512, 528 (1982).

The lengthy and confusing affidavit attached to OCRE's petition is deficient in several respects. First, the "special circumstances" which affiant alleges are not sufficiently

particularized to warrant a waiver or exception to Part 51. They constitute a general attack on the economics of nuclear power and on the findings of the Commission underlying the amendments. The proper response is to seek an amendment or recission to the rule, not a waiver. Second, even if, arguendo OCRE's allegations are sufficiently particularized, the thrust of the argument is that Beaver Valley Unit 2 would not be needed to meet increased energy needs. OCRE does not adequately address the other premise behind the amendment; that the plant would be used to replace older generating capacity. Finally, the affidavit does not constitute the kind of "proof" required to make a prima facie case. The deficiencies are discussed in more detail below.

1. "Special Circumstances"

A great deal of OCRE's affidavit deals with generic matters on need for power and economic considerations which are totally unrelated to Beaver Valley Unit 2. Indeed many, if not all, of these matters seem to be a direct attack on the validity of the rule itself, rather than an attempt to show special circumstances justifying a waiver of the rule for this particular plant.[1/]

a. Paragraph 17 cites an August 2, 1983 Wall Street Journal article (attached to the Affidavit) discussing the economics of nuclear power -- but totally silent on the economics of Beaver Valley Unit 2. In fact, the article seems to focus on the economics of "a nuclear

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1/ For example, see ¶ 17 ("the rule is vulnerable to challenge on several grounds...").

power plant ordered today." Paragraph 17 also cites a GAO study on purported "subsidies" to the nuclear industry, but fails to provide any relevance to Unit 2.

b. Paragraph 21 makes generalized claims on "environmental disadvantages" of fossil and nuclear plants" without a shred of a prima facie case.

c. Paragraph 22 purports to discuss information on nuclear and fossil operational costs. The paragraph is no more than an attack on the rule itself, citing a piece of testimony submitted in a state utility commission case four years prior to the Commission's promulgation of the rule (and which OCRE describes as considering only operating and maintenance costs, not fuel costs) and a reference in the Wall Street Journal article discussed above to a study by Exxon Corporation which purported to find coal cheaper than nuclear energy. Even if that study were a comparison of operating costs (which it does not appear to be, based on the article which OCRE attached), Exxon Corporation corrected the statements in the cited article, stating that its study showed "future nuclear generating costs were expected to be somewhat lower than coal costs ...." Wall Street Journal, August 17, 1983, at 23 (letter from Senior Vice President, Exxon Corporation).

d. Paragraph 26 makes a generalized conclusion on capacity factors based upon industry-wide data. The paragraph relies in part on an article by David Comey, published prior to the rule[2/] and dealing with 1973-1974 data. In any event, a waiver of the need for power rule cannot be based on capacity factor arguments. The underlying basis of the rule was the Commission's experience "that completed plants are in fact used to their maximum availability." 46 Fed. Reg. at 39441 (emphasis added). The actual availability is irrelevant, since the rule assumes that the plant is used as much as it can be used.

2/ The OCRE affidavit does not give the publication date for Mr. Comey's article. It had to have been published well before the Commission's rule, since Mr. Comey died several years before the rule was proposed. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Project, Units 1 and 2), CLI-79-1, 9 N.R.C. 1 (1979).

e. Paragraph 27 alleges that uranium prices will increase in the future, thus affecting the economics of Unit 2. The affidavit cites an article from Science magazine in support of this argument. However, that article, attached to the affidavit, deals only with uranium enrichment, not uranium, and indeed states that "prices [for enriched uranium] will remain depressed for the forseeable future." Science, Vol. 221, at 730. The discussion of foreign uranium is simply irrelevant. Again, the argument is totally general, and even if correct, has no relevance to Unit 2.

2. Purposes of the Rule

The remainder of the affidavit attempts to show that need for power forecasts in Applicants' service territories have changed in the last ten years and that there are alternatives to operating Unit 2. None of these arguments qualify as an adequate showing under § 2.758.

a. Paragraphs 4-14 represent OCRE's efforts to show that need for power forecasts have changed over the last decade. No one would argue with this conclusion. But it is simply irrelevant to a § 2.758 showing for a waiver of the need for power rule. The rule is based on the conservative assumption "that the plant is not needed to satisfy increased energy needs." 46 Fed. Reg. at 39441. Thus OCRE's mathematics is irrelevant.

b. Paragraph 11 contains (at p. 7) the statement that "it would be far cheaper for CAPCO to purchase power from other utilities than to continue building Beaver Valley 2." No basis for this statement is provided. The December 15, 1982 Wall Street Journal article on American Electric Power attached to the Affidavit is silent on the cost of any power which AEP might

have to sell, or even their willingness to make long-term sales.3/ The other document cited (and attached) by OCRE is an unauthenticated compilation of selected utility operating statistics, by an unidentified author. The document, regardless of weight to which it is entitled, is silent on the cost of operating Beaver Valley Unit 2 versus the cost of purchasing power elsewhere.

c. Paragraphs 12-13 provide population statistics for portions of the Applicants' service areas to demonstrate the lack of population growth. However, this information has no bearing on whether Unit 2 will be "used to its maximum availability".

d. Paragraph 14 cites 1980 testimony by a Dr. Richard Rosen in a state regulatory proceeding, in which he argued that Beaver Valley 2 and the Perry Nuclear Power Plant, Units 1 and 2 should be cancelled. This testimony, even if credible, does not address the criteria needed to support a waiver of the rule since the rule assumes that the plant is not needed to satisfy increased energy needs. In any event, Dr. Rosen's testimony was rejected in the state regulatory proceeding and rejected as the basis for a need for power contention (prior to the need for power rule) in the Perry proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 N.R.C. 175, 201, 202 (1981).

e. Paragraph 15 claims that Toledo Edison Company, one of the Applicants has,"stated that the need for Beaver Valley 2 should be re-evaluated." A newspaper article, attached to OCRE's affidavit, is cited as support of this claim. However, the article says that Toledo Edison believes that Unit 2 and Perry Nuclear Power Plant Unit 2 should be re-examined "to see if they need to be built as quickly as scheduled." The need for re-examination was said to be based, not on need or economics, but on "Toledo Edison's financial problems." Here, too, the reference has no bearing on the purposes behind the need for power rule.

3/ Indeed, the article quotes an "energy expert" as stating that the current relatively high capacity will only last five to ten years.

f. Paragraphs 18-19 purport to question the capacity factor assumption for Beaver Valley 2. However, as discussed in paragraph 1(d) above, capacity factors are not relevant to the question of a waiver of § 2.758.

g. Paragraphs 23-24 argue that Applicants are highly coal dependent and that it is more economical to operate Applicants' older coal plants than Beaver Valley 2. The only basis for this assertion is the testimony of Dr. Rosen. However, as indicated in Paragraph 2(d) above, Dr. Rosen's testimony has been rejected by state regulators and another licensing board. Such discredited testimony cannot form a prima facie case. In any case, that testimony was presented in 1980 (affidavit at ¶ 14) at a time when the sunk costs for Unit 2 were obviously much lower than they currently are. Thus, the testimony is out-of-date, even if not out-of-line.

3. Affidavit

OCRE's affidavit is by Susan L. Hiatt, identified only as "OCRE Representative." There is no indication as to her qualifications, either educational or based on professional experience, to provide the degree of proof needed to provide the prima facie case required by 10 C.F.R. § 2.758. The lack of stated qualifications certainly diminishes the weight to be attributed to OCRE's affidavit.

4. Summary

As shown above, OCRE's affidavit has failed to establish a prima facie case that operation of Unit 2 would "entail unexpected or significant adverse environmental effects" or that "an environmentally and economically superior alternative existed." 47 Fed. Reg. at 12941. OCRE, while attempting to attack the rule generically, has not shown the "special circumstances" called for by 10 C.F.R. § 2.758.

B. Floodplain Management

OCRE's second contention argues

> that operation of Beaver Valley 2 is an impermissible activity violating the requirements of Executive Order 11988.

OCRE further contends that "NRC has failed to meet its responsibilities as required by that Order by not, at the earliest possible time, evaluating the Beaver Valley 2 facility for compliance with that Order."

Petitioner complains that NRC has failed to adopt regulations implementing Executive Order 11988.[4/] To this extent, OCRE's contention is an attack on the Commission's regulations and is not a permissible contention in this licensing proceeding.[5/] Moreover,

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4/ Executive Order 11988 apperas at 42 Fed. Reg. 26591 (May 25, 1977). See also 42 U.S.C.A. § 4321 note. The Order was based on the National Environmental Policy Act, 42 U.S.C. §§ 4321-47, the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4127, and the Flood Disaster Protection Act of 1973, P.L. 93-128, 91 Stat. 1144, 1145, codified at 42 U.S.C. §§ 4003, 4106. "The order was prompted to some extent by the unsatisfactory federal experience with losses under the Flood Insurance Program. In addition, federal agencies had not properly observed flood protection precautions for their own installations...." Cape May Greene, Inc. v. Warren, 698 F.2d 179, 189 (3d Cir. 1983).

5/ Applicants note that it is far from clear that Executive Order 11988 is applicable to NRC. The Order defines "agency" to mean executive departments, government corporations or independent establishments, including the military departments. See Section 6(a) citing 5 U.S.C. § 105. NRC is an executive commission. In addition, it is far from clear that private parties have authority to enforce this Executive Order. See, e.g., Sierra Club v. Hassell, 636 F.2d 1095, 1100 (5th Cir. 1981)(enforceability of Executive Order 11988 questioned), citing Parkas v. Texas Instruments, Inc., 375 F.2d 629, 632-33 (5th Cir. 1967)(E.O. 10925 not privately enforceable). Applicants note that the President lacks legislative power under the Constitution; the Order is not specifically authorized

[footnote 5 continued next page]

such a complaint has no relevance to this proceeding and is precisely the kind of generic issue which is appropriate for a rulemaking, not a licensing proceeding.

Petitioner's contention is defective for additional reasons. First, petitioner's allegation that NRC has failed to meet its responsibilities by not evaluating Unit 2 "at the earliest possible time," is not supported by the terms of Executive Order 11988. Executive Order 11988 explicitly provided that the agency's evaluation "will be included in any statement prepared under Section 102(2)(C) of the National Environmental Policy Act." Executive Order 11988, § 2(a)(1); see also Water Resources Council Guidelines, 43 Fed. Reg. 6030, 6033 (1978). NRC has committed to make such an evaluation in preparing the environmental impact statement for the operating license for Beaver Valley Unit 2. See 43 Fed. Reg. 24489 (1983).[6/] In short, NRC is not in violation of Executive Order 11988.

5/Continued -- by statute; and the Order has not been subject to notice and comment rulemaking. Finally, it is not at all clear that E.O. 11988 is applicable to private construction projects such as that involved here. Instead, "Executive Order 11988 was designed to apply to federal facilities, as well as those constructed by other entities through the use of federal funds." Cape May Green, Inc. v. Warren, 698 F.2d 179, 189 (3d Cir. 1983).

6/ Petitioner suggests that NRC's compliance is insufficiently timely. However, the construction permit for Unit 2 was issued in 1974, some three years prior to the issuance of E.O. 11988. Nothing in E.O. 11988 is intended to apply retroactively to overturn past agency actions. Furthermore, the Executive Order requires that the flood plain evaluation take place in connection with "any actions it may take in a floodplain." The NRC is thus correct in tying its evaluation to its "action" of issuing an operating license.

Second, OCRE has failed to provide any specific allegations (let alone any basis for those allegations) that floodplain activities in connection with Unit 2 pose any risk of flood hazard or are in any way inconsistent with floodplain management. OCRE's allegations, Amended Petition at 4, that all phases of operation of Unit 2 are somehow involved is wholly inconsistent with the Executive Order. The Executive Order deals with "occupancy and modification of floodplains," introductory paragraph, and requires agencies to "evaluate the potential effects of any actions it may take in a floodplain," § 2 (emphasis added). OCRE provides no recognition that the nuclear reactor and virtually all of its supporting facilities are located outside the floodplain.[7/] ER-OLS, Fig. 2.1-5. Since they are not in the floodplain, they are not subject to the Executive Order. In any event, Unit 2 has been designed to withstand the "probable maximum flood" (the most severe flood reasonably possible, Regulatory Guide 1.59, at 1.59-11). See, e.g., FSAR § 2.4.2.2 and Table 1.8-1, p. 30.

Third, OCRE provides no basis, nor any specific reasons, for contending that there are "practicable alternatives" to the floodplain siting of those few Unit 2 facilities which are located there. See Executive Order 11988, § 2(a)(2). OCRE's unsupported claim that "operation of a nuclear power plant in a floodplain" (which Unit 2 in any case is not) is contrary to the Executive Order,

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7/ The floodplain is defined by the Executive Order as the area subject to a one percent or greater chance of flooding in any given year. E.O. 11988, § 6(c).

is legally incorrect. Nothing in Executive Order 11988 bars all federal actions in the floodplain. To the contrary, such actions are expressly permitted if they are reasonable. Cape May Greene, supra at 191-93 (overturning as arbitrary and capricious an EPA refusal, based in part on E.O. 11988, to allow development in a floodplain). OCRE has provided nothing to suggest that there are practicable alternatives. Indeed, the NRC regulations on consideration of alternate sites at the operating license stage, 10 C.F.R. §§ 51.21, 51.23(e), 51.26 and 51.53(b), establish definitively that alternate sites at the operating license stage are neither practicable nor reasonable.

For these reasons, OCRE's floodplain management contention should be rejected.

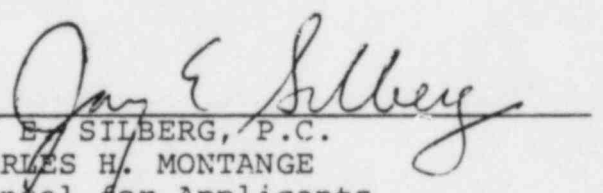
II. Conclusion

For the reasons set forth above, OCRE has failed to meet the tests for a waiver of the Commission's need for power rule. Its floodplain management contention has also failed to meet the tests of § 2.714. Having failed to submit at least one adequate

contention, OCRE's petition for leave to intervene must be denied, a conclusion that becomes even more clear given the particular scrutiny to be given to contentions at the operating license stage. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 A.E.C. 222, 226 N.10 (1974); Cincinnati Gas and Electric Co. (William Zimmer Power Station), ALAB-305, 3 N.R.C. 8, 12 (1976).

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

BY: 

JAY E. SILBERG, P.C.
CHARLES H. MONTANGE
Counsel for Applicants

1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

DATED: September 26, 1983

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Response to Proposed Contentions of Ohio Citizens for Responsible Energy" were served by deposit in the United States Mail, first class, postage prepaid, this 26th day of September, 1983, to all those on the attached Service List.

Jay E. Silberg

DATED: September 26, 1983

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SERVICE LIST

Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge Ernest E. Hill
210 Montego Drive
Danville, California 94526

Administrative Judge Paul W. Purdom
235 Columbia Drive
Decatur, Georgia 30030

Robert Perlis, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William A. Lochstet
119 East Aaron Drive
State College, Pennsylvania 16801

George S. White
Box 58
Shippingport, PA 15077

Ralph F. Walker
1518 Fifth Street
New Brighton, PA 15066

Susan L. Hiatt
8275 Munson Road
Mentor, Ohio 44060

Judith Johnsrud
433 Orlando Avenue
State College, PA 16801

Thomas D. Rees, Esquire
Deputy General Counsel
17th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17120

Maxine Woelfling, Esquire
Assistant Counsel
505 Executive House
Post Office Box 2357
Harrisburg, PA 17120