

October 25, 1983

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Before the Atomic Safety and Licensing Board

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

APPLICANTS' REPLY TO OCRE RESPONSE TO  
STAFF AND APPLICANT ANSWERS  
TO OCRE'S MOTION TO RESUBMIT ITS  
CONTENTION #2

On October 14, 1983, Intervenor Ohio Citizens for Responsible Energy ("OCRE") filed its Response to Staff and Applicant Answers to OCRE's Motion To Resubmit its Contention #2 ("OCRE's Response"). Pursuant to Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-89, 16 N.R.C. 1355 (1982), Applicants hereby respond to the new legal and factual issues raised in OCRE's Response. None of the new material supports OCRE's motion to resubmit its diesel generator contention.

The principal new factual material on which OCRE relies is an undated Newsday article which further discusses the problems with the Shoreham diesel generators discussed in earlier articles on which OCRE has relied. In fact, there is little new information in the article. OCRE cites the article for information concerning

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"a high rate of failures in Delaval engines used in ships." OCRE's Response at 3. The article states that "an informal survey found that 25 per cent to 35 per cent of Delaval ship diesels had cracked cylinder heads."<sup>1/</sup> Even assuming that the informal survey is representative, Applicants fail to see the slightest relevance to this proceeding of the diesel generator failure rate among Delaval ship diesels.

OCRE also cites the most recent reportable occurrence concerning the Perry Nuclear Power Plant ("PNPP") diesel generators as new evidence of their alleged unreliability. That reportable occurrence, however, is only a potential defect which was reported because of a break in an engine mounted fuel oil line at Grand Gulf and is not necessarily applicable to PNPP. See Attachment G to NRC Staff Response to OCRE Motion To Resubmit Rejected Proposed Contention 2, dated October 6, 1983 ("Staff Response").

Moreover, as Applicants pointed out in their Answer to Ohio Citizens for Responsible Energy Motion To Resubmit its Contention #2, dated October 3, 1983 ("Applicants' Answer"), at 15, this Licensing Board has made clear that "intervenor cannot fashion an admissible contention merely by filing deficiency reports without further explanation." Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 N.R.C. 175, 211 (1981). OCRE's argument that the "number and severity of the deficiencies discovered" from the testing of four out of the 15

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<sup>1/</sup> The article goes on to say that "LILCO attorney Anthony Earley said such problems are 'based on a very small sample' and are much too high."

nuclear power plants using Delaval diesel generators<sup>2/</sup> "substantiates OCRE's concerns," OCRE's Response at 3, hardly meets OCRE's burden required to fashion an admissible contention from deficiency reports.

In addition to its new factual arguments, OCRE also makes a number of new legal arguments concerning the factors of 10 C.F.R. § 2.714(a)(1) which are to be considered in determining whether a petition for a late-filed contention should be granted. OCRE's argument with respect to the third factor, the extent to which OCRE may reasonably be expected to assist in developing a sound record on diesel generators, see 10 C.F.R. § 2.714(a)(1)(iii), contains a number of inaccurate legal assertions.

First, OCRE attempts to respond to Staff and Applicants'<sup>3/</sup> point that OCRE's original diesel generator contention was rejected in part because OCRE demonstrated no special competence on diesel generators. OCRE states that "OCRE believes that its competence now, not at the start of this proceeding, should be evaluated here." OCRE's Response at 5. Applicants do not dispute this assertion. However, OCRE does not even purport to show that it has any greater competence now than it did originally.

Instead, OCRE falls back on the legal argument that to provide any specific showing of its competence "would violate the precedent set in Houston Lighting and Power (Allens Creek Nuclear Generating

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<sup>2/</sup> See Attachment G to Staff Response.

<sup>3/</sup> See Applicants' Answer at 8; Staff Response at 10.

Station, Unit 1), ALAB-590, 11 NRC 542 (1980): that an intervenor need not prove its case at the outset, when submitting contentions." OCRE's Response at 5. OCRE's reliance on Allens Creek here is misplaced. Allens Creek involved an interpretation of the "basis and specificity" requirement of 10 C.F.R. § 2.714(b). The Appeal Board ruled in that case that an intervenor need only set forth the basis for its contention with "reasonable specificity." 11 N.R.C. at 548-49.

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, Docket No. 50-322-OL-3 (September 29, 1983), on the other hand, and the other cases cited by the Staff<sup>4/</sup> which OCRE implicitly questions, involve an interpretation of 10 C.F.R. § 2.714(a)(1)(iii). Allens Creek is not in conflict with this established line of cases. OCRE can "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony," Shoreham, supra, slip op. at 22, without setting forth the factual bases of its case.

Finally, OCRE notes that the Appeal Board in other licensing proceedings has held that intervenors have played a positive role. OCRE's Motion at 6. This general observation does not help OCRE meet its burden of proving that it has the special expertise to litigate a contention on the reliability of the PNPP diesel generators and contribute to the development of a sound record in this particular proceeding.

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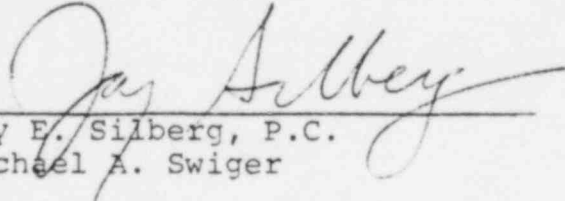
<sup>4/</sup> See Staff Response at 9.

For all of the above reasons, Applicants respectfully request that OCPE's Motion To Resubmit its Contention #2 be denied.

Respectfully submitted,

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DATED: October 25, 1983

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Reply to OCRE Response to Staff and Applicant Answers to OCRE's Motion to Resubmit its Contention #2" were served by deposit in the United States Mail, first class, postage prepaid, this 25th day of October, 1983 to all those on the attached Service List.

Michael A. Swiger  
Michael A. Swiger

DATED: October 25, 1983

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