March 4, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

OCRE RESPONSE TO APPLICANTS' ANSWER TO OCRE MOTION FOR THE APPOINTMENT OF BOARD WITNESS

Intervenor Ohio Citizens for Responsible Energy ("OCRE") hereby responds to the new arguments and cases cited by Applicants in their Answer to OCRE's Motion seeking the appointment of Mr. George Dennis Eley as the Board's witness on Issue #16, on Transamerica Delaval diesel generator reliability.

Applicants cite Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984) as extending the Appeal Board's Summer decision, ALAB-663, to witnesses sought by an intervenor and not just to a licensing board's sua sponte appointment of a witness. This case must be interpreted in the context of the situation. TMI at 1247 states that "in TMIA's view, the Board should have appointed independent experts to assist both TMIA and the Board in presenting and understanding the evidence on Contention 5." The Appeal Board then stated that the Board was prohibited from appointing anyone to assist the intervenor, and the Board's

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appointment of an
expert to assist the Board was limited by Summer.

Although the TMI intervenor's exact request for assistance is not revealed, it is apparent from the sentence quoted above and from the entire case that TMIA was seeking far more in the way of assistance than what OCRE seeks. OCRE does not seek Mr. Eley's appointment to assist OCRE in understanding the evidence; OCRE merely wants to ensure that the record on Issue #16 is a complete reflection of all technical evaluations of the TDI DGs.

It is also relevant to consider the issue with which TMIA sought help. OCRE has attached page 1283 of the TMI case, which reveals TMIA's Contention 5. This contention hardly compares with Issue #16 in terms of technical complexity. Thus, while it might be argued that the TMI intervenor was seeking impermissible intervenor funding, because of the wide-ranging assistance sought on a non-technical issue, that claim clearly falls in OCRE's case, where all that is sought is a complete record on which to base a reasoned and fair decision on a complex technical issue.

Applicants argue that the record can be completed by having Staff and/or Applicant witnesses address "the Board's concerns", and presumably, OCRE's. This is simply preposterous. Applicants will not adduce evidence that is contrary to its own interests. And, unfortunately, the NRC Staff also will not adduce evidence contrary to Applicants' interest. This is

demonstrated by the Staff's response in support of Applicants' motion for summary disposition of Issue #16. This is further demonstrated by Exhibits 11 and 12 of OCRE's Response to Applicants' Motion for Summary Disposition of Issue #16, which demonstrate the Staff's willingness to rescind its own requirements at the utilities' request.

Applicants clair that the Licensing Board's technical expertise will "bear upon a proper resolution of Issue No. 16." OCRE certainly recognizes that, unlike most judicial tribunals, the Licensing Board does posses technical knowledge and training. However, it is not apparent that any of the members of this Board have expertise in the design and operation of large-bore, medium speed diesel engines, especially TDI engines.

Indeed, the Commission's rules of practice recognize that the members of a particular licensing board may not possess the technical expertise needed to address any particular issue which the Board may face. 10 CFR 2.722 permits the appointment of technical interrogators and Special Masters to assist the Board in matters beyond the Board's expertise. However, such assistants are to be appointed from the ASLB Panel. OCRE is not aware of any members of that Panel possessing Mr. Eley's expertise.

Applicants imply that cross-examination is sufficient to ensure completeness of the record and to protec: OCRE's interests. While a valuable tool, cross-examination is no

substitute for direct testimony. An adversary witness cannot be forced under cross-examination to perform complex and detailed calculations e.g., on crankshaft design, if the witness had never done so previously.

Applicants attempt to contrast the situations in the court cases cited by OCRE concerning due process with the circumstances of this proceeding. While it is true that OCRE is a voluntary participant in this proceeding, its participation is permitted because it has interests adversely affected by this proceeding. The cases cited establish that due process is a right, not a privilege. OCRE is no less entitled to due process than are American Indians facing "resettlement and disruption of their community" or welfare recipients.

Applicants attempt to mischaracterize Union Bag-Camp Paper Corp. v. FTC, 233 F.Supp 660 (SDNY, 1964). That case clearly states "in order for plaintiff to prevail in this argument [denial of due process], it must be shown that by reason of the Commission's action, plaintiff was denied the right to present its evidence and summon the witnesses of its choice." 233 F. p at 666. Union Bag is thus applicable here and supports OCRE's position, Applicants' verbiage notwithstanding.

Applicants cite Carolina Power & Light (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432 (1984), as "inapposite." OCRE did not cite this case because it was not clear whether the intervenor sought the appointment of the

witness. However, Applicants' explanation of this case demonstrates that it supports OCRE's position. The Harris licensing board interpreted a Commission decision as requiring an opponent of summary disposition of a radiation health effects issue to provide new and substantial evidence challenging the BEIR report. Using Applicants' reasoning, the board should have simply granted summary disposition if the intervenor did not present the necessary evidence.

Calling a witness sua sponte (without the intervenor's request) to supply the necessary proof to deny summary disposition would seem to be exactly what Applicants so vehemently oppose - indirect assistance to intervenors. If the Harris licensing board found it necessary to call its own witness to ensure that the record did not by default demand summary disposition, then this Board should also see that the record on Issue #16 is complete so that Applicants do not gain the decision by default.

Respectfully submitted,

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9. The adequacy of Licensee's plans for improving the administration of future Licensee qualification examinations for licensed operators and candidates for operator licenses, including the need for independent administration and grading of such examinations.
10. The adequacy of the administration of NRC licensing examinations for TMI-1 personnel, including proctoring, grading, and safeguarding the integrity of examination materials; the adequacy of the Staff's review of the administration of Licensee's Category T examinations; and the adequacy of the Staff's plan for retesting operators and monitoring its NRC examinations to assure proper adherence to NRC testing requirements in order to assure that the purposes of the NRC examinations, because of the nature of the questions, cannot be defeated by cheating, the use of crib sheets, undue coaching or other evasive devices.
11. The potential impact of NRC examinations, including retests, and operator terminations on the adequacy of staffing of TMI-1 operations.
12. The sufficiency of management criteria and procedures for certification of operator license candidates to the NRC with respect to the integrity of such candidates and the sufficiency of the procedures with respect to the competence of such candidates.

APPENDIX C

TMI 's contention 5, in its final form, states (LBP-81-32, *supra*, 14 NRC at 479):

> It is contended that Licensee has pursued a course of conduct that is in violation of 10 CFR 50.57, 10 CFR 50.40, 10 CFR 50.36, 10 CFR 50.71 and 10 CFR 50 Appendix B, thereby demonstrating that Licensee is not "technically . . . qualified to" operate TMI Unit 1 "without endangering the health and safety of the public." This course of conduct includes:
>
> a. deferring safety-related maintenance and repair beyond the point established by its own procedures (see, e.g. A.P. 1407);
> b. disregarding the importance of safety-related maintenance in safely operating a nuclear plant in that it:
>
> 1. [deleted]
> 2. proposed a drastic cut in the maintenance budget,
> 3. [deleted]
> 4. fails to keep accurate and complete maintenance records related to safety items;
> 5. has inadequate and understaffed QA/QC programs related to maintenance;
> 6. extensively uses overtime in performing safety-related maintenance.

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 4th day of MARCH, 1985 to those on the service list below.

Susan L. Hiatt

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