

479

February 6, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

FEB -8 110:17

Before the Atomic Safety and Licensing Board

In the Matter of)
)
THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY, ET AL.)
)
(Perry Nuclear Power Plant,)
Units 1 and 2))

Docket Nos. 50-440 OL
50-441 OL

APPLICANTS' RESPONSE TO OHIO CITIZENS FOR RESPONSIBLE ENERGY MOTION TO REWORD ISSUE #8

On January 23, 1985, Ohio Citizens for Responsible Energy ("OCRE") served a Motion to Reword Issue #8, dated January 22, 1985 ("OCRE Motion"). OCRE's motion seeks

to revise the wording of Issue #8, on hydrogen control, so as to align its wording with its true intent and with the Commission's new hydrogen control rule for degraded core accidents.

OCRE Motion at 1. For the reasons below, Applicants respectfully request that the Licensing Board deny OCRE'S motion.

OCRE'S motion proposes a complete rewording of its Issue #8. Issue #8, as admitted, states as follows:

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

8502080546 850206
PDR ADOCK 05000410
G PDR

DS03

substantial quantities of radioactivity into the environment.

Memorandum and Order (Concerning Late-Filed Contentions: Quality Assurance, Hydrogen Explosion, and Need For Increased Safety of Control System Equipment), LBP-82-15, 15 N.R.C. 555, 563 (March 3, 1982). OCRE bases its proposed rewording^{1/} entirely

1/ OCRE proposes the following new language for Issue #8:

Applicants have not complied with 10 CFR 50.44(c)(3)(iv),(v), and (vi), in that:

A. the Perry hydrogen control system has not been justified by a suitable program of experiment and analysis;

B. the Perry hydrogen control system is not capable of handling the amount of hydrogen generated from a 75% metal-water reaction without loss of containment integrity;

C. structural integrity of the Perry Mark III containment has not been demonstrated by a technique that adequately describes the containment response to the structural loads involved:

D. systems and components inside the containment necessary to establish and maintain safe shutdown and to maintain containment integrity are not capable of performing their functions during and after exposure to the environmental conditions created by the burning of hydrogen, including those environmental conditions caused by local detonations of hydrogen;

E. Applicants have not analyzed sufficient and appropriate accident scenarios involving hydrogen generation from a metal-water reaction (up to and including a 75% metal-water reaction), and their scenarios (and evaluations thereof) do not adequately describe the behavior of the reactor system during and following a degraded core accident.

OCRE Motion at 4.

on the Commission's new hydrogen control requirements for boiling water reactors (BWR's) with MARK III containments and pressurized water reactors (PWR'S) with ice condenser containments, published at 50 Federal Register 3498 (January 25, 1985) (effective February 25, 1985) ("Hydrogen Rule"). The language of each part of OCRE's reworded contention is taken directly from a corresponding subsection of the Hydrogen Rule.^{2/}

Thus, OCRE has proposed an entirely new contention which on its face bears no resemblance to the wording of Issue #8. OCRE's proposed new contention uses new language based upon a new Commission regulation. In these circumstances, OCRE is obligated to comply with the Commission's requirements for new and late-filed contentions, set forth in 10 C.F.R. § 2.714. OCRE must provide the basis, with reasonable specificity, for its new contention. 10 C.F.R. § 2.714(b). OCRE also must justify its late-filed contention with a discussion of each of the factors in 10 C.F.R. § 2.714(a)(1). See 10 C.F.R. § 2.714(a)(3) (applying the balancing factors in paragraph (a)(1) of § 2.714 to late-filed amended petitions).

OCRE's motion expressly denies that its "rewording of Issue #8" is a new, late-filed contention, subject to the

^{2/} Parts (A) and (B) of OCRE'S reworded contention are based on § 50.44(c)(3)(iv)(A) of the Hydrogen Rule. Part (C) of OCRE's reworded contention is based on § 50.44(c)(3)(iv)(B) of the rule. Part (D) of OCRE's reworded contention is based on § 50.44(c)(3)(v)(A) of the rule. Part (E) of OCRE's reworded contention is based on § 50.44(c)(3)(vi)(B)(3) of the rule.

requirements of 10 C.F.R. § 2.714. OCRE Motion at 4-5, 8. But OCRE provides no legal justification for introducing an entirely new contention into this proceeding -- three years after the admission of Issue #8 -- without meeting 10 C.F.R. § 2.714.

As OCRE notes in its motion at page 5, it tried unsuccessfully to reword Issue #8 in February 1983.^{3/} In response to OCRE's February 1983 motion, Applicants' answer^{4/} clearly stated:

At such time as the final rule may issue, if OCRE decides to submit a new contention based on "Applicants' degree of compliance with the new regulation," such a new contention would have to meet the test for late-filed contentions under 10 C.F.R. §2.714(a), and the basis and specificity requirements of § 2.714(b).

Id. at 7 (footnotes omitted). OCRE has now decided to submit a new contention testing Applicants' degree of compliance with the newly enacted Hydrogen Rule. As we stated in our March 14, 1983 answer, and as we have consistently stated since that time,^{5/} OCRE must first comply with 10 C.F.R. § 2.714. In

^{3/} See OCRE Reply to NRC Staff Motion for a Deadline for the Specification of a Scenario for Issue #8 and Motion for the Rewording of Issue #8 and Specification of Guidelines for its Litigation, dated February 23, 1983; Memorandum and Order (Applicant's Answer to Procedural Motion Concerning Hydrogen Control), dated March 31, 1983 (deferring a ruling on OCRE's motion to reword Issue #8 until after the NRC issues its rule on hydrogen control).

^{4/} Applicants' Answer to Ohio Citizens for Responsible Energy Motion for the Rewording of Issue #8 and Specification of Guidelines for its Litigation, dated March 14, 1983.

^{5/} See, e.g., Applicants' Reply to OCRE Response Regarding Specification of a Credible Accident Scenario Under Issue #8, dated October 12, 1984, at 3 n.5.

light of Applicants' previous statements, we do not understand OCRE's claim that Applicants' current position represents "a radical departure from previous . . . Applicant positions." See OCRE Motion at 4-5.

As OCRE points out, it has conducted broad discovery over the past three years on Issue #8. See December 7, 1984 telephone conference transcript, Tr. 2024-2025 (summarizing the extent of discovery on Issue #8). Although Applicants have been liberal in supplying information in response to OCRE'S interrogatories concerning Applicants' plans for installing a hydrogen ignition system, we have never agreed to a rewording or broadening of the scope of Issue #8 beyond its plain words.^{6/} The Licensing Board has never enlarged the scope of Issue #8, which speaks only to the adequacy of the manual operation of the recombiners to prevent rupture of the containment and release of radioactivity. Thus, it is OCRE'S position that "neglects the history of Issue #8."^{7/}

Even if OCRE were able to meet the standards of 10 C.F.R. § 2.714 and to justify a new, late-filed contention based on the Hydrogen Rule, OCRE would still be bound by the

^{6/} See the Licensing Board's December 20, 1983 Memorandum and Order (OCRE Motion to Reopen Discovery), at 4 (distinguishing the relevancy and materiality requirements for questions at a hearing with the standards for discovery; i.e. questions that "may lead to the discovery of relevant material".).

^{7/} See OCRE Motion at 4-5.

implementation provisions of the new rule. With the exception of the requirements of § 50.44(c)(3)(iv)(A), the requirements of the rule need not be met before operating license issuance. Sections 50.44(c)(3)(vii)(A) and (D) of the new rule provide that Applicants have until June 25, 1985, to submit to the staff a proposed schedule for meeting the requirements in paragraphs (c)(3)(iv), (v), and (vi) of the new rule. The staff then has 90 days to establish a final schedule for meeting the requirements of paragraphs (c)(3)(iv), (v) and (vi). Only with respect to the requirements of paragraph (c)(3)(iv)(A) is there an implementation deadline that necessarily precedes OL issuance. For this paragraph only, the rule provides that Applicants must submit "a preliminary analysis which the staff has determined provides a satisfactory basis for a decision to support interim operation at full power until the final analysis has been completed." 10 C.F.R. § 50.44(c)(3)(vii)(B). The rule places significant discretion with the staff to determine what constitutes a satisfactory preliminary analysis under 10 C.F.R. §§ 50.44(c)(3)(iv)(A) and (c)(3)(vii)(B).

Thus, while the Commission expressly applied the schedule requirements of § 50.44(c)(3)(vii)(A) and (D) to the substantive hydrogen control requirements of paragraphs (c)(3)(iv), (v) and (vi), it only applied the preliminary analysis requirement in § 50.44(c)(3)(vii)(B) to paragraph (c)(3)(iv)(A).

Under the legal doctrine "expressio unius est exclusio alterius" (expression of one thing is the exclusion of another),^{8/} it is clear that the Commission intended to exclude the detailed requirements of paragraphs (c)(3)(iv)(B), (c)(3)(v), and (c)(3)(vi) from the preliminary analysis requirement of paragraph (c)(3)(vii)(B). Accordingly, parts (c), (D) and (E) of OCRE's proposed new contention, which are taken directly from paragraphs (c)(3)(iv)(B), (c)(3)(v)(A), and (c)(3)(vi)(B)(3) of the Hydrogen Rule, respectively, are not admissible in any case, since Applicants are not required to demonstrate compliance with these requirements of the Hydrogen Rule prior to receiving a full power license from the Commission.

Nor has OCRE even attempted to demonstrate that Applicants will be unable to meet the preliminary analysis requirement for paragraph (c)(3)(iv)(A), upon which the remaining parts (parts (A) and (B)) of OCRE'S proposed new contention are premised. OCRE cites without any explanation a newly filed, updated response to Interrogatory No. 10 of Applicants' Second set of Interrogatories to OCRE. OCRE Motion at 4.^{9/} OCRE's updated interrogatory response is a selective discussion of information

^{8/} See D. Sands, 2A Sutherland Statutory Construction (4th ed. 1972), § 47.23, page 194 ("The force of the maxim is strengthened where a thing is provided in one part of the statute and omitted in another").

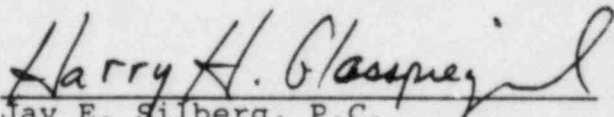
^{9/} OCRE's updated response was filed with OCRE Updated Responses to Applicants' Second Set of Interrogatories to OCRE, dated January 22, 1985 ("Updated Response").

gathered from bits and pieces of the massive quantity of hydrogen documentation acquired by OCRE after three years of discovery in this case, and after numerous Freedom of Information Act requests. OCRE's updated interrogatory response provides no explanation of why Applicants will be unable to meet the preliminary analysis requirements of the Hydrogen Rule.^{10/}

For all these reasons, OCRE has provided no basis for rewording Issue #8. OCRE's motion should therefore be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 
Jay E. Silberg, P.C.
Harry H. Glasspiegel

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

Dated: February 6, 1985

^{10/} Indeed, a number of OCRE's latest arguments in its updated response involve issues, such as manual initiation of the igniter system (Updated Response, page 10), and provision of a backup power supply (Updated Response, page 10), which challenge the new rule. See 50 Fed. Reg. 3504 ("manual actuation was concluded to be acceptable"); 50 Fed. Reg. 3502 ("Provision of a backup power supply is not required by the rule").

February 6, 1985

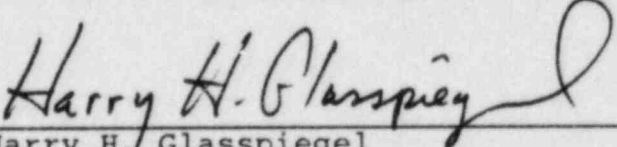
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing
"Applicants' Response to Ohio Citizens For Responsible Energy
Motion To Reword Issue #8" were served by deposit in the United
States Mail, first class, postage prepaid, this 6th day of
February, 1985, to all those on the attached Service List.



Harry H. Glasspiegel

Dated: February 6, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

SERVICE LIST

James P. Gleason, Chairman
513 Gilmore Drive
Silver Spring, Maryland 20901

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

Mr. Jerry R. Kline
Atomic Safety and Licensing Board
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

Mr. Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Colleen P. Woodhead, Esquire
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Christine N. Kohl, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Terry Lodge, Esquire
Suite 105
618 N. Michigan Street
Toledo, Ohio 43624

Dr. W. Reed Johnson
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Donald T. Ezzone, Esquire
Assistant Prosecuting Attorney
Lake County Administration
Center
105 Center Street
Painesville, Ohio 44077

Gary J. Edles, Esquire
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

John G. Cardinal, Esquire
Prosecuting Attorney
Ashtabula County Courthouse
Jefferson, Ohio 44047

Ms. Sue Hiatt
8275 Munson Avenue
Mentor, Ohio 44060