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February 12, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket No. 50-440 OL 50-441 OL
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

NRC STAFF RESPONSE TO OCRE'S
MOTION TO REWORD ISSUE #8

I. INTRODUCTION

By motion served January 23, 1985, Ohio Citizens for Responsible Energy (OCRE) asked the Atomic Safety and Licensing Board (the Board) for leave to reword Issue #8, to reflect provisions of the Commission's recently issued hydrogen control rule, 10 CFR § 50.44(c)(3)(iv)-(vii). For the reasons set out below, the Staff opposes this motion.

II. BACKGROUND

Issue #8 was admitted to this proceeding in 1982. 1/ The issue, originally submitted by Sunflower Alliance, Inc., was worded as follows:

> Petitioners allege that there is insufficient documentation of the ability of the containment structures of said facilities to safely inhibit a hydrogen explosion of the magnitude and

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1/ Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-15, 15 NRC 555 (1982).

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> type which occurred at Three Mile Island Unit 2, near Harrisburg, Pennsylvania and of which the Commission is aware. 2/

This contention was initially denied admission for failure to provide a hydrogen generation accident description as required by the Commission's decision in TMI-1 Restart 3/ (hereinafter termed CLI-80-16) where the Commission prescribed those showings necessary for admission of hydrogen generation issues which, otherwise, would constitute an attack on 10 CFR § 50.44. Sunflower later filed a motion for reconsideration of the decision by the Board and resubmitted the contention with a list of events alleged to result in a hydrogen explosion and breach of containment. 4/ The Board then reworded the contention to reflect the bases provided for it and admitted the contention. 5/ The reworded issue (#8) read 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 substantial quantities of radioactivity into the environment. 6/

Applicants appealed the Licensing Board's ruling on this contention, arguing that the Board erred in admitting the contention without

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2/ Id., at 560.

3/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980).

4/ LBP-82-15, supra, at 560-62.

5/ Id., at 561-63.

6/ Id., at 563.

conforming to the requirements for admission of a hydrogen control contention specified by the Commission in CLI-80-16. The Appeal Board denied the appeal and stated:

> We assume that, although the Licensing Board did not specify the particular credible accident that, in its view, provides the premise for Sunflower's reframed contention, it did not intend to expand improperly Sunflower's contention beyond its own self-imposed limitations.
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> * * *
>
> Applicants' concern about the admission of Sunflower's hydrogen control contention--and, consequently, what we say here--may well be for naught. That contention focuses specifically on the adequacy of Perry's recombiners. But according to a recent letter from applicants to the NRC's Division of Licensing, Perry's hydrogen mitigation and control system apparently will now rely principally on a distributed igniter system in the containment . . . . [7/]

Subsequently, NRC Staff filed a motion to require specification of an accident scenario in accord with TMI-1 Restart, and the new lead intervenor, OCRE, [8/] filed a motion to reword the contention. The Board deferred ruling on both motions in the belief that a new hydrogen control rule would soon be issued. [9/] The new hydrogen control rule was issued January 25, 1985 (50 Fed. Reg. 3498). The Staff filed a motion for summary disposition of Issue #8 on January 28, 1985 on the basis noted by the Appeal

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7/ Cleveland Electric Illuminating Co. et al., (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1115, 1116 (1982). The Appeal Board noted that because of a fundamental difference between the pressurized water reactor at TMI and the Perry boiling water reactor, the consequences of a TMI-2 type accident would be significantly different and would need to be addressed in litigating the issue. 15 NRC 1115 at n. 13.

8/ By an unpublished Memorandum and Order (Concerning Procedural Motions) dated September 17, 1982, the Board granted the intervenors' request to change the lead intervenor for certain issues, including issue #8.

9/ Memorandum and Order, March 3, 1983, unpublished.

Board, that the recombiners at Perry are not intended to accommodate large amounts of hydrogen and thus, no issue of material fact exists for litigation. Thus, OCRE's motion to reword, and Staff's motion to summarily dispose of the issue were filed almost concurrently.

III. DISCUSSION

A. The Motion

OCRE's present motion to reword Issue #8 claims that the proposed revision is necessary "to align its wording with its true intent and with the Commission's new hydrogen control rule for degraded core accidents." Motion, p. 1. OCRE acknowledges that the language of the existing Issue #8 alleges the recombiners at the Perry plant are inadequate to accommodate large amounts of hydrogen and explains the genesis of this language as intervenor's analysis of the adequacy of the only hydrogen control systems identified in the FSAR at the time the contention was submitted. Motion pp. 1-2. OCRE goes on to explain that shortly after the issue was admitted, Applicants notified NRC of their intent to provide a distributed igniter system to control hydrogen generation; the Appeal Board directed the Licensing Board to determine the effect of this information on the issue, 10/ and thus, OCRE believed "the next move on issue #8 would be up to the Licensing Board." Motion, p. 2. However, as OCRE points out, no determination was made by the Board and a "controversy" arose over the need to specify a credible accident scenario which

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10/ ALAB-675 supra, 15 NRC 1105, 1116.

"overshadowed" this matter. Motion, p. 2. OCRE states that since the new hydrogen control rule has been issued, and the appropriate criteria defined, OCRE wishes now to change the wording of issue #8 to reflect the requirements of the new rule. Motion, pp. 2-4. OCRE then provides a five part contention, which alleges that Applicants do not comply with 10 CFR § 50.44(c)(3)(iv), (v), and (vi). Motion, p. 4. The contention recites verbatim, certain provisions of the new rule and alleges that the Applicants do not comply with the specified requirements. 11/ OCRE states that the bases for the assertion, that Applicants cannot or do not meet the indicated sections of the new rule, are contained in OCRE's response to Applicants' interrogatory #10, also served January 22, 1985. Motion, p. 4. 12/ OCRE states that the Licensing Board admitted the existing Issue #8 in anticipation that the new hydrogen control rule would impose more stringent requirements prior to operation of the Perry plant, so that OCRE's proposed rewording of Issue #8 "cannot possibly be construed as expanding the issue beyond what was originally intended." Motion, p. 5. OCRE asserts that the Board and parties understood that the previously admitted contention was not limited to recombiners because (a) OCRE previously attempted to reword the contention, (b) the Staff and Applicants

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11/ See 10 CFR § 50.44(c)(3)(iv)(A) [issues "A" & "B"]; 10 CFR § 50.44(c)(3)(iv)(B) [issue "C"]; 10 CFR § 50.44(c)(5)(v)(A) [issue "D"] and 10 CFR § 50.44(c)(3)(iv)(B)(3) [issue "E"].

12/ OCRE Updated Response to Applicants' Second Set of Interrogatories to OCRE, January 22, 1985, pp. 10-28. This response encompasses eighteen pages of references to multiple documents and letters produced by utilities, vendors, and NRC and its consultants during the course of the hydrogen control rulemaking.

failed to object to discovery questions about the igniter system; (c) Staff and Applicants failed to "raise the objection" in 1982 that Issue #8 is limited to recombiner adequacy, and (d) the description of Issue #8 provided by the Commission to the Congressional Sub-committee on Energy and the Environment was termed "hydrogen control measures." Motion, pp. 5-8. For these reasons OCRE asserts that the original admission of the contention was "tied to the Commission's rulemaking"; the motion to reword the issue is appropriate, and "cannot possibly be construed" as seeking admission of a new contention, thus making inapplicable the five factors to be considered in 10 CFR 2.714 for untimely contentions. Motion, p. 8. OCRE also claims rewording the contention is analogous to the Board's recent order requiring particularization of Issue #1, where the Board corrected erroneous wording in another contention. 13/ Motion, p. 9.

B. Staff's Response

OCRE's claim that rewording is necessary to align the issue with OCRE's "true intent" is hardly persuasive in view of the verbatim extraction of part of the new hydrogen control rule for the proposed "rewording." OCRE could not have had the intent in 1982 to raise issues based entirely on the rule issued in 1985. Nor could OCRE have intended to support the issue with the many documents produced during rulemaking

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13/ Memorandum and Order (Particularization of Emergency Planning Contention), LBP-84-28, 20 NRC 129 (1984). The Board corrected the wording of an issue to signify the intended challenge to state and local emergency plans rather than Applicants' onsite plan. See: p. 130, fn. 1.

referenced by OCRE in its recent response to interrogatories, which post-date the admission of the existing Issue #8. OCRE's other arguments, (1) that the FSAR did not contain information about any system of hydrogen control other than recombiners; (2) that the Appeal Board's comment on the validity of the issue was the Licensing Board's responsibility to resolve and (3) that there was a "controversy" concerning a credible accident scenario, do not demonstrate that something other than the words of the existing Issue #8 was intended or understood by the Board and parties. Although Sunflower and OCRE originally may have intended in Issue #8 to challenge the hydrogen control system and not just recombiners, the fact remains that the only basis provided for the existing Issue #8 was a specific assertion of inadequacy of the recombiners. No challenge to igniters or any other elements of a hydrogen control system was presented. In particular, no basis for the very specific contention now proposed by OCRE was ever given. Indeed, the reworded Issue #8 now proposed by OCRE so closely and specifically conforms to the new hydrogen control rule that it obviously is based on the new rule and is not merely a minor and insubstantial rewording of the original hydrogen control contention to correct erroneous wording.

In short, OCRE's proposed rewording of Issue #8 clearly constitutes the raising of a new contention with new bases. For admission of such

a late-filed contention, the five factors of 10 CFR 2.714(a) [14/] must be favorably balanced. Duke Power Company (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983). While the very recent issuance of the final hydrogen control rule (which forms both the substance of, and the basis for, OCRE's proposed reworded Issue #8) may provide good cause for OCRE's late filing, OCRE must affirmatively demonstrate that the late-filing factors weigh in favor of admission of this new contention. [15/] Duke Power Company (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-615, 12 NRC 350, 352 (1980). OCRE has not done so in the instant motion.

In sum, OCRE's proposed rewording of Issue #8 is not merely a minor, insubstantial correction of unintended errors in the existing contention, but constitutes a whole new late-filed contention. Although the Staff

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14/ The five factors are (1) Good cause, if any, for failure to file on time; (ii) The availability of other means whereby the petitioner's interest will be protected; (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (iv) The extent to which the petitioner's interest will be represented by existing parties; (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. 10 CFR § 2.714(a).

15/ Some measure of good cause for the late-filed contention may be provided by the recent issuance of the hydrogen control rule on which the proposed re worded Issue #8 is so specifically based. There appears to be no other means whereby OCRE's interests in the hydrogen control issue would be protected and no other party to represent OCRE's interests in these regards. Thus, late-filing factors (i), (ii) and (iv) would appear to weigh in favor of admission of this late-filed contention. However, there is no indication as to OCRE's ability to contribute to the development of a sound record on the proposed new hydrogen control issue and admission and litigation of the proposed reworded Issue #8 could result in some delay in the proceeding. Thus, a preliminary assessment of the late-filing factors in the absence of OCRE's demonstration thereon leads the Staff to conclude that the factors do not weigh clearly for or against admission of this late-filed contention.

does believe OCRE may have good cause for raising this untimely contention, it remains for OCRE to amend its present motion to address the five factors in 10 CFR § 2.714 for late-filed contentions. Since the revised fuel load date for Perry is June or July 1985, the five factors in 10 CFR § 2.714 must be carefully weighed in considering the admission of this late-filed contention. OCRE's present motion does not demonstrate that the late-filing factors weigh in favor of admission of this new contention.

IV. CONCLUSION

For the reasons stated, OCRE's present motion to reword Issue #8 should be denied.

Respectfully submitted,

Colleen P. Woodhead

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of February, 1985

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO OCRE'S MOTION TO REWORD ISSUE #8" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of February, 1985:

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