February 11, 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 REPLY TO APPLICANTS' RESPONSE
TO OCRE MOTION TO REWORD ISSUE #8

This brief is in response to the new information and arguments contained in Applicants' response (filed February 6, 1985) to OCRE's January 22, 1985 Motion to Reword Issue #8.

Applicants claim that the implementation provisions of the Commission's new degraded core hydrogen control rule preclude the consideration of any hydrogen control matters other than the preliminary analysis required in 10 CFR 50.44(c)(3)(vii)(B). Applicants state that the rule "places significant discretion with the staff to determine what constitutes a satisfactory preliminary analysis." Applicants further claim that the preliminary analysis only extends to paragraph (c)(3)(iv)(A), and that the Commission "intended to exclude" the requirements of paragraphs (c)(3)(iv)(B), (v), and (vi). Applicants' Response at 6-7.

Like Procrustes, Applicants have stretched the rule to fit their own interpretative bed. The new rule is not a model of clarity on this point; however, a careful reading will yield a conclusion just the opposite of Applicants'. Paragraph

(c)(3)(vii)(B) requires OL applicants to comply with paragraph (c)(3)(iv)(A) before exceeding 5% power. The latter paragraph requires a hydrogen control system, justified by a suitable program of experiment and analysis, capable of handling the amount of hydrogen generated from a 75% metal-water reaction without loss of containment structural integrity.

Paragraph (vi)(B) delineates further requirements for the analysis of the hydrogen control system, which it is to support. Basically, this section reiterates the requirements of paragraphs (iv) and (v), i.e., that a 75% metal water reaction be postulated, that containment integrity be maintained, and that equipment survivability be demonstrated. Paragraph (vii)(B) states that a complete final analysis is not necessary for a staff determination that the plant can operate safely at full power provided that a satisfactory preliminary analysis is completed before full power operation.

It is clear that the "analysis" mentioned in paragraph (iv)(A) is the same as the "analysis" of paragraph (vi) and the "complete final analysis" of paragraph (vii)(B). It is not clear exactly what the preliminary analysis must encompass, but it is logical to assume that it is an incomplete version of the final analysis, covering the same subjects, but not necessarily to the same degree. E.g., perhaps final experimental results might not be needed for the preliminary analysis, but some justification should be given for believing that the experiments will confirm the analytical conclusions.

There is no evidence that the preliminary analysis is to be limited to paragraph (iv)(A) and excludes the requirements of paragraphs (iv)(B), (v), and (vi), as Applicants claim. Rather, it is clear that the analysis of paragraph (iv)(A) is coupled to those in paragraphs (iv)(B) and (v) and that these together are the same as that in paragraph (vi). Applicants' assertion that they need not comply in any fashion to the requirements of paragraphs (iv)(B), (v), and (vi) is clearly false.

Applicants correctly state that the rule places great discretion with the staff to determine what is an adequate preliminary analysis. However, in a contested proceeding, the staff is not the trier of fact; the Licensing Board is. The staff's views are no more binding on the Board than are those of any other party, as the staff is just another party. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973); Consolidated Edison (Indian Point Nuclear Generating Station, Units 2 & 3), ALAB-04, 3 NRC 1, 6 (1976); Southern California Edison (San Onofre Nuclear Generating Station, 2 & 3), ALAB-268, 1 NRC 383, 389 (1975).

No acceptance criteria or other regulatory guidance has yet been developed by the staff, and even if it were available, it would not be binding on the Board. Porter County Chapter of the Izaak Walton League of America v. AEC, 633 F2d 1011 (1976) (and many Appeal Board decisions, ALAB-229, -217, -216, -188, -179, and -444). Thus, the adequacy of Applicants preliminary

analysis is a matter for the Licensing Board to decide. The Board may find this analysis so deficient that power operation must be denied until an acceptable complete final analysis is provided.

Applicants' assertion that no requirements of the rule other than the preliminary analysis need be met prior to OL issuance is circular reasoning, as the time and criteria for OL issuance are matters entirely within the control of the Licensing Board.

Indeed, the Licensing Board even has the authority, pursuant to the broad case management powers of 10 CFR 2.718, to direct the Staff in setting the schedule for the complete final analysis.[1] Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 208 (1978). "[D]ecisionmaking within the Commission should be both 'sound and timely.' If this is to be achieved, the boards and staff must coordinate their operations." 8 NRC at 203. "[In the] absence of any rigid scheduling criteria by statute or regulation,[the] responsibility for scheduling lies with the licensing boards. . . [and] although entitled to recognition, the convenience of the litigants cannot be deemed dispositive on scheduling matters. The paramount consideration is where the broader public lies." 8 NRC at 208, citing Potomac Electric Power Co. (Douglas Point, Units 1 and 2), ALAB-277, 1 NRC 539 (1975). Clearly the broader public interest lies in having a full and complete record of the adequacy of all facets of Applicants' hydrogen control system

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1. Note also that the times given in paragraph (vii) for submitting and setting schedules for compliance are maximum times, which the Board may shorten for good cause. 10 CFR 2.711.

for a sound decision before the Perry facility operates.

10 CFR 50.44(c)(3)(vii)(D) lists the factors the Staff (and in a contested proceeding, the Board, in accordance with ALAB-489) must take into account when setting the final schedule for compliance with the hydrogen control rule. These factors include the status of efforts to comply with the rule, the impacts of the schedule on other safety modifications, and the Commission's objective that compliance be achieved without undue delay. Given that Applicants have been faced with this issue for 3 years, and that they are part of the Hydrogen Control Owners Group, which is sponsoring research on a generic basis for the purpose of supporting Mark III licensing, it is not unreasonable to expect Applicants to submit a substantially complete analysis for the Board's consideration at the hearing. Such a schedule is consistent with the Commission's goal of prompt compliance.

To follow Applicants' suggestion would be to defer this issue to the Staff for post-hearing resolution. Such action is expressly prohibited by NRC precedent. The Commission has stated:

> As a general proposition, issues should be dealt with in the hearings and not left over for later (and possibly more informal) resolution. . . the mechanism of post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license - including a reasonable assurance that the facility can be operated without endangering the health and safety of the public. 10 CFR 50.57. In short, the "post-hearing" approach whould be employed sparingly and only in clear cases. In doubtful cases, the matter should be resolved in an adversary framework prior to issuance of licenses, reopening hearings if necessary.

Consolidated Edison (Indian Point, Unit 2), CLI-74-23, 7 AEC 951-52 (1974), citing Wisconsin Electric Power Co. (Point Beach Unit 2), CLI-73-4, 6 AEC 6 (1973). See also Cleveland Electric Illuminating Co. (Perry 1 &2), ALAB-298, 2 NRC 730, 736-7 (1975) (a board cannot delegate its obligations to the staff . . . the board's duties cannot be fulfilled by the staff, however conscientious its work may be); Washington Public Power Supply System (Hanford Unit 2), ALAB-113, 6 AEC 251, 252 (1973) (it was incumbent upon the licensing board to determine for itself at least whether statutory prerequisites for the issuance of the permit had been fulfilled; that determination could not rightly be
left to the staff); Public Service Co. of Indiana (Marble Hill), ALAB-461, 7 NRC 313, 318 (1978); Commonwealth Edison (Byron Station Units 1 and 2), LBP-84-2, 19 NRC 36, 210-12 (1984).

Removing this issue (or any facet thereof) from the hearing would also violate Section 189 of the Atomic Energy Act by removing an issue material to the licensing decision. This situation is entirely analogous to that in Union of Concerned Scientists v. NRC, Case No. 82-2053 (DC Cir. May 24, 1984), cert. denied ___U.S.___, which vacated the Commission rule providing that a licensing board need not consider the results of emergency planning excercises before authorizing a full power operating license. The court held that the NRC may not deny a hearing on an issue material to issuance of an operating license.

The UCS decision appears related to the principle of Indian Point and similar decisions concerning post-hearing resolution of an issue by the staff. It is clear that Congress exempted from formal hearing procedures decisions resting solely on inspections, tests, or elections. 5 USC 554(a)(3). Such matters might be appropriate for post-hearing resolution by the staff. But, when the decision involves a central decisionmaker's consideration and weighing of many other persons' observations and first hand experiences, questions of credibility, conflicts, and sufficiency surface and the ordinary reasons for requiring a hearing come into the picture. Slip op. at 27.

Obviously the adequacy of Applicants' hydrogen control system is not determined by simple tests or inspections, but involves judgement by central decisionmakers. This is precisely the type of issue that must be resolved by the adverserial adjudicatory process.

Applicants also attack OCRE's updated interrogatory responses as "a selective discussion of . . . bits and pieces of information" providing "no explanation of why Applicants will be unable to meet" the new rule. On the contrary, OCRE's updated response outlines grave deficiencies in Applicants' hydrogen control system and supporting program of experiment and analysis. The responses are self-explanatory, and are intended to fulfil OCRE's obligation to update discovery responses. It

must be recalled that the information provided was responsive to Applicants' interrogatory seeking information on the use of igniters as a hydrogen control system (including containment integrity and equipment survivability), matters Applicants now claim to be beyond the scope of Issue #8.

While some selectivity was excercised in preparing the responses, this is necessary, as answers to interrogatories are to be complete in themselves and not merely broad statements that the information sought is to be found in a mass of documents. Commonwealth Edison (Byron Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982). In any event, OCRE's analysis is no more selective than Applicants' analysis will be.

Applicants finally complain that some of the deficiencies raised by OCRE in its updated interrogatory response appear to challenge the new rule, as the rule does not require automatic actuation or a backup power supply for hydrogen control systems. Applicants' response at 8, fn. 10. The Commission simply chose not to require these features on a generic basis for all Mark IIIs and ice condensers. Nothing prevents any licensee from adding these features voluntarily. Nothing prevents a licensing board from ordering these modifications to be made, if the record in any particular case indicates that they are necessary.

Respectfully submitted,

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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 11th day of February, 1985 to those on the service list below.

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