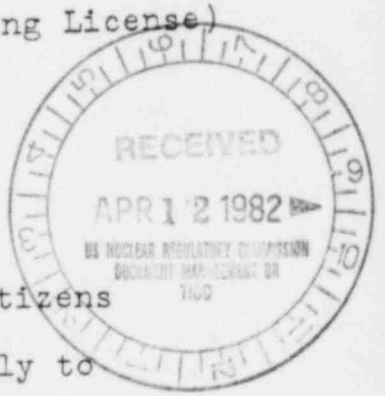
April 5, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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



OCRE RESPONSE TO APPLICANTS' MOTION FOR DIRECTED CERTIFICATION

Pursuant to 10 CFR 2.730(c), Intervenor Ohio Citizens for Responsible Energy ("OCRE") hereby files its reply to the Applicants' Motion for Directed Certification of the Licensing Board's Memorandum and Order of March 3, 1982.

I. INTRODUCTION

In its March 3, 1982 Memorandum and Order, the Atomic Safety and Licensing Board ("Licensing Board") granted in part Intervenor Sunflower Alliance, et al.'s ("Sunflower") motion to resubmit its contention on hydrogen control. Sunflower originally submitted the contention in its March 15, 1981 Petition for Leave to Intervene. The contention was not at first admitted into this proceeding because it did not meet the requirements of Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674 (1980) ("TMI-1"). Sunflower resubmitted the contention, with the credible accident scenario required by TMI-1 on January 8, 1982, offering as good cause for late

DS03
1/1

filing the final rule on interim hydrogen control requirements (46 FR 58484, December 2, 1981) which did not address Mark III containments. The Licensing Board admitted this contention to the extent that it addressed the Applicants' hydrogen control systems, namely, the manual operation of recombiners.

On March 23, 1982 the Applicants moved the Atomic Safety and Licensing Appeal Board ("Appeal Board") to direct the Licensing Board to "certify to it for immediate appellate review that portion of the Memorandum and Order admitting the hydrogen control contention" (Motion at 1). The Applicants also requested that the Appeal Board reverse the Licensing Board's Order and thus deny Sunflower's motion to resubmit the contention.

II. APPLICANTS HAVE NOT MET THE STANDARD FOR DIRECTED CERTIFICATION

OCRE notes that the Applicants' motion constitutes an interlocutory appeal, which is prohibited by 10 CFR 2.730(f) in the absense of compelling reasons. Although the Appeal Board does have the authority to direct the Licensing Board to certify an order to it for interlocutory appellate review, this too is to be done only if strict standards have been met.

Interlocutory review is permitted only when a ruling either (1) threatens the party adversely affected by it with immediate and serious irreparable impact, which cannot be practicably corrected by a later appeal; or, (2) affects the basic structure of the proceeding in a pervasive or unusual

manner (Public Service Co. of Indiana (Marble Hills, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977)). This case meets neither test.

Obviously, the mere admission of a contention into a proceeding can in no way threaten the Applicants with immediate and serious irreparable impact. Nor does the Licensing Board's March 3 ruling affect the basic structure of the proceeding in a pervasive or unusual manner.

Even if the Applicants' allegations were true (which they are not), this one ruling would not constitute a pervasive alteration of the basic structure of the proceeding. The entire record should be examined for evidence of pervasion. No such evidence exists. Rather, the record shows that the Licensing Board has upheld the spirit of Douglas Point (infra) and 10 CFR 2.758.

In fact, two contentions proposed by OCRE were rejected on these principles. OCRE's Contention 14, on electromagnetic pulse, was construed to be an impermissible challenge to 10 CFR 50.13. OCRE's motion for the waiver of 10 CFR 50.13 was likewise denied. The Licensing Board declared this to be a generic issue and suggested rulemaking as a more appropriate forum.

Similarly, OCRE's Contention 15, on nuclear waste disposal/storage, was rejected because of the ongoing rulemaking.

Thus, contrary to the Applicants' allegations, the record reveals that the Licensing Board does not misunderstand its relationship to the rulemaking process (Motion at

10), disregard rules and legal principles, or place into doubt as to every issue the significance of NRC regulations and authority (Motion at 9). No evidence is seen of a pervasive undermining of the proceeding's basic structure.

Nor has there been any unusual effect on the integrity of the proceeding. When examined in the light of the situation, the Licensing Board's Order is not unusual or irregular.

III. DOUGLAS POINT DOES NOT APPLY TO THIS SITUATION

The Applicants claim that any contention that is, or is about to become, a subject of rulemaking, should not be admitted to a licensing proceeding, citing as authority Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974) ("Douglas Point").

However, the Applicants fail to note the differences between Douglas Point and this proceeding. First, Douglas Point dealt with the environmental effects of the uranium fuel cycle, which was the subject of a concurrent rulemaking. This rulemaking included the Commission's specific prohibition of case-by-case litigation of this issue (37 FR 24191, November 15, 1972). No such prohibition was included in the proposed interim rule on hydrogen control (46 FR 62281, December 23, 1981).

The applicability of the Douglas Point decision to other issues was recently addressed by the Licensing Board in the Comanche Peak proceeding, Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2),

LBP-81-51, 14 NRC 896 (1981). Here, the Licensing Board ruled that since Douglas Point involved the special circumstances of a rulemaking in which the Commission explicitly stated that the issue was not to be litigated in individual licensing proceedings, the decision could not be applied to other issues where the Commission's explicit instructions are lacking.

Secondly, the subject matter of Douglas Point (environmental effects of the uranium fuel cycle) is truly a generic issue that is most appropriately addressed by the rulemaking process. However, hydrogen control in Mark III containments is not a generic issue, as is apparent from an examination of the proposed rule (46 FR 62281). The rule would not require all Mark III BWRs to be modified identically; rather, "the particular type of hydrogen control system to be selected is left to the discretion of the applicant or licensee" (p. 62281).

Licensees/applicants have a choice of dissimilar hydrogen control systems for Mark III plants. E.g., Grand Gulf's applicants have proposed a distributed igniter system (Grand Gulf Safety Evaluation Report, NUREG-0831, p. 22-16). The proposed rule mentions post-accident inerting as a possible hydrogen control measure for Mark III plants. Obviously the proposed rule is not a generic resolution of the hydrogen control problem in Mark III BWRs. Plant-specific litigation of this issue is therefore appropriate.

The Douglas Point decision should only be applied to other cases within the context of its own particular issue,

i.e., the uranium fuel cycle. The situation here is so entirely different that Douglas Point cannot be invoked as authoritative precedent.

IV. THE APPLICANTS ARE ATTACKING THE LICENSING BOARD'S AUTHORITY

The Applicants argue that the Licensing Board has ruled incorrectly in admitting the hydrogen control contention, claiming that Sunflower had met neither the "credible accident scenario" requirement of TMI-1 nor the "good cause" requirement of 10 CFR 2.714(a)(1) for late filing. The Applicants have every right to disagree with the Licensing Board's decision; however, mere disagreement does not grant them the right to an interlocutory appeal. The Applicants' motion for directed certification constitutes an attack upon the Licensing Board's authority.

The TMI-1 decision declared that hydrogen control may be litigated under 10 CFR Part 100 "if it is determined that there is a credible loss of coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite doses in excess of Part 100 guideline values" (TMI-1 at 675). However, this decision includes no guidelines or criteria for determining whether an accident scenario is or is not credible. Therefore, this determination must be left to the Licensing Board's discretion.

In this instance the Licensing Board decided that Sunflower had met the test; it is within the Board's authority to determine this. Similarly, the Licensing Board determined that Sunflower had met the "good cause" requirements for late

filing; again, this is the Board's prerogative. The Applicants, of course, are not pleased with this decision. By requesting directed certification of the Licensing Board's March 3 Memorandum and Order, the Applicants are attempting to undermine the Licensing Board's authority. If this motion is granted, the way will have been paved for the continual challenge of the Licensing Board's authority. This authority is necessary for the just and rational conduct of this proceeding. Granting the Applicants' motion would jeopardize the basic structure of the entire proceeding by placing into doubt the validity of each and every Licensing Board order.

V. CONCLUSION

OCRE believes that the Applicants' allegations of the impropriety of the Licensing Board's rulings are totally unfounded. The Applicants' complaints are unsubstantiated, as an examination of the record will clearly show. For precedent and authority the Applicants invoke Douglas Point, which has been cited totally out of context.

Most importantly, the requirements for directed certification have not been met. As the Applicants admit, the Appeal Board is reluctant to direct the certification of a Licensing Board order, and with good reason: this means of obtaining interlocutory appeal could easily be abused, allowing parties to continually appeal each and every Licensing Board order which is not to their liking, thereby undermining the Licensing Board's authority and unnecessarily delaying the proceeding.

For the foregoing reasons, OCRE requests that the Appeal Board deny the Applicants' motion for directed certification of the Licensing Board's Memorandum and Order of March 3, 1982.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt
OCRE Interim Representative
8275 Munson Rd.
Mentor, OH 44060
(216) 255-3158

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing OCRE RESPONSE TO APPLICANTS' MOTION FOR DIRECTED CERTIFICATION were served by deposit in the U.S. Mail, first class, postage prepaid, this 5th day of April, 1982 to those on the Service List below.

Susan L. Hiatt

Susan L. Hiatt

SERVICE LIST

Peter B. Bloch, Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

Frederick J. Shon
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

James Thessin, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Comm'n

Jay Silberg, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

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

Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Daniel D. Wilt, Esq.
7301 Chippewa Rd.
Brecksville, OH 44141