

June 16, 1982

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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, <u>et al.</u>	)	50-441
	)	
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

APPLICANTS' ANSWER TO  
OHIO CITIZENS FOR RESPONSIBLE ENERGY  
MOTION TO RESUBMIT CONTENTION 15

Intervenor Ohio Citizens for Responsible Energy ("OCRE") has moved to resubmit its Contention 15 dealing with the Commission's Waste Confidence Proceeding. As the sole basis for its Motion to Resubmit, OCRE cites the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission, No. 74-1586 (April 27, 1982) (hereinafter "NRDC v. NRC"), in which the court finds a portion of the Commission's Table S-3 Rule invalid. The decision in NRDC v. NRC, however, cannot possibly serve as a basis for the resubmitted contention. The decision is wholly

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irrelevant to Contention 15 -- it deals with a distinct rulemaking proceeding involving entirely different issues. Simply put, OCRE's motion is bottomed on a legal non sequitur.

NRDC v. NRC Is Irrelevant to the Waste  
Confidence Rulemaking Proceeding

OCRE first sought to have this contention admitted by its untimely motion of November 21, 1981, seeking leave to supplement its Petition to Intervene. Citing Minnesota v. United States Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979),<sup>1/</sup> and the Commission's Waste Confidence Proceeding, 44 Fed.Reg. 61372 (Oct. 25, 1979), OCRE challenged the Waste Confidence Proceeding on the ground that the Proceeding is "not effective." OCRE asked the Licensing Board to disregard the ongoing generic Proceeding and to litigate in the Perry operating license proceeding the issues under consideration in the Waste Confidence Proceeding. Specifically, OCRE asked the Licensing Board to adjudicate whether "there is reasonable assurance that the generation of radioactive wastes at PNPP will be followed by their safe storage or disposal." Nov. 21, 1981, Motion, at 4.

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<sup>1/</sup> The Waste Confidence Proceeding was initiated in response to the Minnesota decision, in which the Court of Appeals remanded for further consideration certain questions involving the storage and disposal of nuclear waste materials.

By Memorandum and Order of February 26, 1982, the Licensing Board denied OCRE's untimely motion to file its Contention 15.<sup>2/</sup> It correctly held that the issue OCRE was attempting to litigate through its contention was the subject matter of the Commission's ongoing Waste Confidence Proceeding, and, therefore, was beyond the Licensing Board's jurisdiction. In arriving at its holding, the Licensing Board quoted the Commission's express directive that the issues being considered in the Waste Confidence Proceeding are not to be litigated in individual licensing proceedings.

During this proceeding the safety implications and environmental impacts of radioactive waste storage on-site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided, however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings. These issues are most appropriately addressed in a generic proceeding of the character here

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<sup>2/</sup> The Licensing Board characterized the contention as follows:

The Applicant has not provided reasonable assurance that it will be able to safely store and/or dispose of the radioactive materials that will be generated by Perry Nuclear Power Plant. See 10 CFR section 50.57(a)(3) and 42 U.S.C. section 4332(2)(C)(1976). That this matter poses serious concerns for the health and environment of OCRE members is undisputed. Vermont Yankee Nuclear Power Corp. v. N.R.D.C. 435 U.S. 519 (1978).

Memorandum and Order, at 2.

envisaged. Furthermore, the court in the State of Minnesota case by remanding this matter to the Commission but not vacating or revoking the facility licenses involved, has supported the Commission's conclusion that licensing practices need not be altered during this proceeding. However, all licensing proceedings now underway will be subject to whatever final determinations are reached in this proceeding.

44 Fed.Reg. 61373 (Oct. 25, 1979) (emphasis added); see Memorandum and Order, at 2.<sup>3/</sup>

The Licensing Board also correctly rejected OCRE's argument that the Commission's Waste Confidence Proceeding should be regarded as "not effective." It found in this regard that OCRE not only failed to substantiate its allegation, but also that OCRE "misapprehends the legal setting" in which the Licensing Board may address the substance of the Waste Confidence Proceeding. Memorandum and Order, at 3.

OCRE now contends that the recent Court of Appeals decision in NRDC v. NRC, supra, somehow "supercedes" the Waste Confidence Proceeding, and that the issues being considered in that Proceeding thus can be litigated in individual license proceedings. The simple and obvious answer to OCRE's argument is that the NRDC v. NRC decision deals with an entirely

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<sup>3/</sup> The Licensing Board cited Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974), for the rule that "waste disposal issues are subject to a generic rulemaking proceeding and ought not to be included in individual licensing proceedings." Memorandum and Order, at 2.

different set of issues than the Waste Confidence Proceeding, and, therefore, has no bearing whatsoever on the resubmitted contention.

As stated by the Commission in the Federal Register notice commencing the Waste Confidence Proceeding:

The purpose of [the Waste Confidence] proceeding is solely to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or storage is available.

44 Fed.Reg. 61373 (Oct. 25, 1979).

If the Commission "finds that safe off-site disposal for radioactive wastes from licensed facilities will be available prior to expiration of the facilities' licenses, it will promulgate a final rule providing that the environmental and safety implications of continued on-site storage after the termination of licenses need not be considered in individual licensing proceedings." Id. Should it find otherwise, the Commission will issue a proposed rule dealing with on-site storage after license expiration. Id.

Despite OCRE's confused assertions to the contrary in its Motion to Resubmit, the Waste Confidence Proceeding was not at issue in NRDC v. NRC, supra. At issue in that decision was an entirely different proceeding -- the Table S-3 rulemaking -- a

matter totally irrelevant to the Waste Confidence Proceeding. Indeed, the court in NRDC v. NRC notes the Waste Confidence Proceeding, and describes it as a separate proceeding from the Table S-3 rulemaking proceeding before it. Id., slip op. at 22 n.56; see also id., slip op. at 45 n.123.<sup>4/</sup>

At issue in NRDC v. NRC was whether the Commission, in making its NEPA assessment of the uranium fuel-cycle, was justified in using a zero value for radiological releases from geologic repositories.<sup>5/</sup> The Appeals Court found that because the Commission had failed to consider fully the uncertainties underlying this assumed zero-release value, the use of that value in Table S-3 violated NEPA. OCRE's confusion between the entirely distinct Waste Confidence Proceeding and the Table S-3 rulemaking apparently stems from OCRE's unfounded belief that the zero release value used in Table S-3 somehow is part of the Waste Confidence Proceeding.

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4/ See also Minnesota v. United States Nuclear Regulatory Commission, supra, at 418 n.8 ("[T]he S-3 proceedings may not be concerned with the more limited issue identified in the pending cases of whether offsite storage solutions will be available prior to the expiration of the operating certificates.")

5/ Also at issue was whether the Commission had properly addressed the health, socioeconomic and cumulative effects of fuel-cycle activities in promulgating the Table S-3 Rule. OCRE does not suggest in its Motion to Resubmit that this aspect of the decision has any relationship to Contention 15. In any event, as the court pointed out, since 1978 these effects have not been precluded as issues in individual licensing proceedings. NRDC v. NRC, supra, slip op. at 11 n.13, 60.



OCRE has supplied absolutely no support for its assumption that the zero release value is part of the Waste Confidence Proceeding. As noted, the purpose of the Proceeding is to assess whether there is reasonable assurance at this time that safe, off-site disposal for radioactive wastes will be available prior to the expiration of existing facilities' licenses. See supra. There is nothing in the record of the Waste Confidence Proceeding which even suggests that the Commission will predicate a finding of "reasonable assurance" on the zero release value. To the contrary, the record clearly indicates that the zero release value is not part of the Waste Confidence Proceeding. For instance, the Department of Energy ("DOE"), which will be operating the geologic repositories in which the wastes will be sealed, recognizes that there may be releases from such repositories. See Statement of Position of the United States Department of Energy (hereinafter "DOE Statement of Position"), Proposed Rulemaking on the Disposal and Storage of Nuclear Waste, PR-50, 51 (44 Fed. Reg. 61372), DOE/NE-0007 (April 15, 1980), § II.A.1., at II-3 - II-22, and § II.F., at II-198 - II-297. DOE's position is entirely consistent with the NRC's proposed 10 C.F.R. Part 60 standards for geologic repositories. See 46 Fed. Reg. 35280 (July 8, 1981) ("Disposal of High-Level Radioactive Wastes in Geologic Repositories"). See generally DOE Statement of Position, § III.C.3., at III-31 - III-36 ("Licensing of Repositories").

Those proposed standards permit a specified maximum release rate for radioactive wastes. See proposed 10 C.F.R. § 60.111 ("Performance Objectives"), at 46 Fed.Reg. 35289.

There thus is no reason whatsoever for believing -- as OCRE apparently does -- that the Waste Confidence Proceeding is based upon or otherwise related to the zero release value challenged in NRDC v. NRC. Whatever the validity of the zero release value, the value has no relevancy to the Waste Confidence Proceeding. NRDC v. NRC thus cannot possibly be a basis for questioning the Waste Confidence Proceeding.

The inapplicability of NRDC v. NRC to the Waste Confidence Proceeding is all the more plain in light of the fact that the Proceeding still is ongoing. No findings have as yet been made in the Waste Confidence Proceeding. OCRE cannot seriously maintain that the results of the Proceeding have been "superse-  
ded" when the Commission has yet to issue any findings or conclusions.<sup>6/</sup>

Because the Waste Confidence Proceeding is a continuing Commission action whose validity cannot be attacked in individual licensing proceedings, and because the Commission

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<sup>6/</sup> It also should be noted in this regard that although the court in Minnesota v. United States Nuclear Regulatory Commission, supra, remanded certain waste storage and disposal questions to the Commission for further consideration, see note 1, supra, it did not vacate or stay the involved license amendments.



has expressly prohibited litigation of the issue OCRE here raises, Contention 15 cannot be admitted.

The Waste Confidence Proceeding Is Not Ineffective

OCRE attempts to resurrect in its Motion to Resubmit its earlier argument that the Waste Confidence Proceeding should be disregarded because, as OCRE sees it, the Proceeding is "not effective". Motion to Resubmit, at 3. Despite the Licensing Board's earlier statement that OCRE had failed to substantiate this allegation, see supra, OCRE does not even attempt to support its assertion in its Motion to Resubmit, but merely maintains that NRDC v. NRC has "buttressed OCRE's concerns." Id.

Putting aside the legal merits of its argument, discussed infra, OCRE is wrong on the facts. Since the beginning of the year, the Commission has issued ten separate Federal Register notices indicating its active consideration of the Waste Confidence issues. See 47 Fed.Reg. 19613 (May 6, 1982); 47 Fed.Reg. 13626 (March 31, 1982); 47 Fed.Reg. 12421 (March 23, 1982); 47 Fed.Reg. 11588 (March 17, 1982); 47 Fed.Reg. 10707 (March 11, 1982); 47 Fed.Reg. 9325 (March 4, 1982); 47 Fed.Reg. 3907 (Jan. 27, 1982); 47 Fed.Reg. 3062 (Jan. 21, 1982); 47 Fed.Reg. 2232 (Jan. 14, 1982); 47 Fed.Reg. 888 (Jan. 7, 1982).<sup>7/</sup> In light of

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<sup>7/</sup> See also Memorandum and Order, May 17, 1982 (Commission order regarding status of record in Waste Confidence Proceeding).

this record of active Commission consideration, OCRE's unsubstantiated assertion can only be characterized as frivolous.

OCRE also contends that certain language in NRDC v. NRC, supra, is inconsistent with the Licensing Board's statement in its earlier Order regarding the teaching of the Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).<sup>8/</sup> OCRE argues that footnote 38 of the court's opinion in NRDC v. NRC requires the Licensing Board to determine whether the Waste Confidence Proceeding is "effective." Motion to Resubmit, at 3. The footnote, of course, says no such thing. The pertinent sentence of the footnote reads as follows:

The Supreme Court did not disturb this court's ruling that, in the absence of a valid generic rule, the environmental impact of the fuel cycle must be dealt with in individual licensing proceedings. 435 U.S. 538-39.

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<sup>8/</sup> The Licensing Board made the following observation in its Memorandum and Order, at 3:

We also note that OCRE relies on a portion of an appeals court decision which was overruled. It states that N.R.D.C. v. N.R.C. 547 F.2d 633, 641 (1977) requires that issues be considered in licensing proceedings unless they have been considered in effective generic proceedings. However, that ground for decision was overruled by Vermont Yankee Nuclear Power Corp. v. N.R.D.C. 435 U.S. 519 (1978) and similar language was not employed in the subsequent State of Minnesota Case, which was discussed by the Commission as a reason for the ongoing rulemaking proceeding.

NRDC v. NRC, supra, slip op. at 18 (emphasis added).

All footnote 38 states is that the environmental issues involving the uranium fuel-cycle must be dealt with either through generic rulemaking or in individual licensing proceedings. If dealt with through rulemaking, the final rules that are promulgated must be "valid" -- that is, the rules may not be arbitrary or capricious. Whether a rule is valid is an entirely different matter from whether the rulemaking through which a rule is promulgated meets some vague and undefined standard of "effectiveness." Nothing in footnote 38 in any way requires the Licensing Board or any other tribunal to adjudicate the "effectiveness" of the Waste Confidence Proceeding.<sup>9/</sup>

The Mandate Has Not Yet Issued in NRDC v. NRC

Both the utility intervenors and the NRC have petitioned the D.C. Circuit for a rehearing en banc of the panel's decision in NRDC v. NRC, supra. Pursuant to Fed.R.App.P. 41(a), the mandate is stayed pending final resolution of the petition for rehearing. Because no mandate has issued, the decision has no binding legal force at this time. See Ostrer v. United States, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal

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<sup>9/</sup> The true nature of OCRE's concerns regarding the effectiveness of the Waste Confidence Proceeding can best be judged by OCRE's complete failure even to attempt to participate in the Proceeding.

in our Court to a close and remove it from the jurisdiction of this Court, returning it to the forum whence it came."); see generally 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure §3987 (1977). Thus, even assuming that NRDC v. NRC, supra, has any relevance to this contention, it presently can have no legal impact because the mandate has not issued and the matter has not been returned to the jurisdiction of the NRC.

#### The Contention Is Untimely

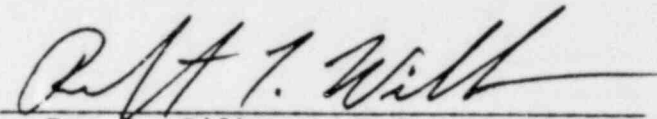
OCRE contends that this late filing is justified by the recent decision in NRDC v. NRC, supra. Because, as the foregoing discussion makes plain, the decision has no relevance to the Waste Confidence Proceeding, it cannot serve as "good cause" for this latest attempt by OCRE to litigate the issues under consideration in that Proceeding. OCRE's original submission of this contention was untimely, see "Applicants' Answer To Ohio Citizens For Responsible Energy Motion For Leave To File Its Contention 15," dated December 7, 1981, at 2-4, and its citation of NRDC v. NRC does not cure that deficiency.

For the stated reasons, OCRE's motion to resubmit  
Contention 15 should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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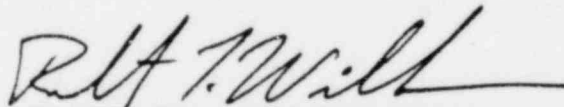
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ILLUMINATING COMPANY, <u>et al.</u>	)	50-441
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(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer To Ohio Citizens For Responsible Energy Motion to Resubmit Contention 15", were served by deposit in the U.S. Mail, First Class, postage prepaid, this 16th day of June, 1982, to all those on the attached Service List.

  
Robert L. Willmore

Dated: June 16, 1982



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THE CLEVELAND ELECTRIC )  
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Units 1 and 2 )

Docket Nos. 50-440  
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The Cleveland Electric  
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