July 14, 1983

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' ANSWER TO OCRE'S AMENDED RESPONSE TO NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF ISSUE #13

On June 29, 1983, Intervenor Ohio Citizens for Responsible Energy ("OCRE") filed an "amended response" to the NRC Staff's ("Staff's") motion for summary disposition of Issue No. 13. OCRE's amended response was filed pursuant to the Licensing Board's June 27, 1983 request that OCRE provide greater specificity with respect to its request for additional time to respond to the Staff's motion. OCRE's request for a continuance[1/] is completely frivolous and should be denied.

1/ Although OCRE requests that the Licensing Board "refuse" the Staff's motion pursuant to 10 C.F.R. § 2.749(c), Amended Response at 1, Ms. Hiatt in her affidavit claims that OCRE will be prepared to respond to the Staff's motion within six months. Applicants thus interpret OCRE's amended response as a motion for a continuance under 10 C.F.R. § 2.749(c). OCRE appears to

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The bulk of OCRE's amended response is devoted, not to specifying the time it believes it needs to respond to the Staff's motion and the reasons for that additional time, but to further legal argument in support of its position. None of OCRE's additional legal arguments has any basis.

OCRE's first argument is that the Staff's motion for summary disposition of Issue No. 13 should be summarily dismissed pursuant to 10 C.F.R. § 2.749(a). 10 C.F.R. § 2.749(a) states that a licensing board "may dismiss summarily motions filed shortly before the hearing commences or during the hearing if the other parties or the board would be required to divert substantial resources from the hearing in order to respond adequately to the motion." In fact, the Staff's motion was not filed prior to or during the hearing on Issue No. 3. As OCRE itself recognizes, the evidentiary hearing concluded on May 27, 1983;[2/] and the Staff filed its motion on May 31, 1983. Thus, the summary dismissal provision of 10 C.F.R. § 2.749(a) does not apply.

Further, OCRE apparently misunderstands the purpose of the summary dismissal provision of the Rules. The provision for summary dismissal is clearly directed to motions filed with respect to the issues about to go to hearing, not to other issues in the proceeding. See 46 Fed. Reg. 30328, 30330 (June 8, 1981).

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ask in the alternative for a summary dismissal of the Staff's motion under 10 C.F.R. § 2.749(a); but this remedy is entirely inappropriate, as explained infra.

2/ See OCRE's Proposed Findings of Fact and Conclusions of Law, dated July 11, 1983, at 1. The Licensing Board received limited appearances on May 31, 1983 and received a site tour on June 1, 1983.

Summary dismissal is an appropriate remedy only if the motion for summary disposition is rendered superfluous by the hearing which is occurring or about to occur. That, of course, was not the case here.

In any event, OCRE's substantive argument in support of summary dismissal of the Staff's motion is without merit. OCRE claims that "to properly respond" to the Staff's motion would require it "to divert substantial resources" from its preparation of proposed findings of fact and conclusions of law on Issue No. 3. Amended Response at 2. Certainly this would not justify the six month delay which OCRE now requests.

OCRE further argues that its situation is aggravated by the fact that OCRE received documents requested through discovery on Issue No. 13 just prior to and during the hearing on Issue No. 3. Id. The turbine missile contention was admitted by the Licensing Board on October 29, 1982. A discovery schedule set by the Board during the January 5, 1983 conference call established January 31, 1983 as the last day for initial discovery requests. The Board also set a deadline for follow-up discovery of seven days from the receipt of first-round answers.[3/] OCRE waited until January 31, 1983 to file its initial discovery request. The Staff and Applicants answered on March 1 and March 8, 1983, respectively. However, as OCRE has acknowledged, OCRE failed to specify to the Staff and Applicants which documents it wished provided to it until April 5, 1983 and April 21, 1983, respectively. Affidavit in support of

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3/ OCRE did not submit any follow-up discovery on Issue No. 13.

OCRE Response to NRC Staff's Motion for Summary Disposition of Issue #13, dated June 23, 1983, at i. Thus, any delay OCRE may have experienced in obtaining discovery materials clearly is the result of OCRE's own laxity in pursuing discovery.

Moreover, OCRE's concern about diversion of its resources to answer the summary disposition motion has a hollow ring. On July 1, 1983, OCRE filed a petition for leave to intervene in another NRC operating license proceeding, Duquesne Light Company (Beaver Valley Power Station, Unit 2), Docket No. 50-412. See Ohio Citizens for Responsible Energy Petition for Leave to Intervene and Request for an Adjudicatory Hearing, dated July 1, 1983. If indeed OCRE is unable properly to respond to the Staff's motion, Applicants can only wonder how OCRE can hope to undertake an entirely new operating license proceeding. The Commission has recently reaffirmed the obligation of intervenors to meet the burdens imposed by participation in the licensing process:

> a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. See e.g., Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC __ (September 9, 1982). And as a corollary, since intervenors have the option to choose the issues on which they will participate, it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding. While we are sympathetic with the fact that a party may have personal or other obligations or possess fewer resources than others to devote to a proceeding, this fact does not relieve that party of its hearing obligations.

Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, Docket Nos. 50-413, 50-414, slip op. at 10-11 (1983). See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 454 (1981); Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1) ALAB-696, Docket No. 50-226, slip op. at 27. n. 29 (1982); Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 338-39 (1980).

OCRE's second argument attempts to muster legal support for its assertion that a decision on the Staff's motion would be premature because there is "a gap in the evidentiary record" on Issue No. 13. Amended Response at 2. For the reasons stated in Applicants' Answer in Support of NRC Staff Motion for Summary Disposition of Issue No. 13, dated June 27, 1983 ("Applicants' Answer"), at 5-7, OCRE has failed to show the existence of such an evidentiary "gap." The Staff in SER Supplement No. 3 (April 1983) ("SSER 3") explains in detail why the submittal of General Electric's ("GE's") probabilistic approach is unnecessary for the purpose of issuing operating licenses for Perry Nuclear Power Plant. The turbine maintenance program requirements imposed in SSER 3 are meant to assure that no turbine missiles are generated for at least three years after startup.

This situation is quite different from the one in Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 N.R.C. 741 (1977), which is cited by OCRE. In

that case, the licensing board reopened the record in order to admit a report by Gilbert Associates, Inc., which was the underlying basis for certain of the Staff's conclusions in an SER supplement. The intervenor objected to the admission of the Gilbert Report, arguing that summary disposition should simply have been denied. The Appeal Board rejected the intervenor's argument, affirming the licensing board's discretion to receive additional evidence when "circumstances warrant" it. Id. at 752 (emphasis added). In ALAB-443, the licensing board had before it only the Staff's conclusions. It required the Gilbert Report to provide the analysis underlying those conclusions. In the present case, the Licensing Board has the Staff's analysis in SSER 3 as well as the analyses contained in the affidavits of GE and Applicants. The Licensing Board has ample evidence on which to base a decision.

It is also important to point out that in ALAB-443, the additional evidence required by the Licensing Board already existed and was readily available to it. No continuance was necessary. The Appeal Board did not even discuss the circumstances in which it would be proper to grant a continuance. In this case, OCRE would have the resolution of Issue No. 13 await the submittal to the Staff of GE's probabilistic analysis and the Staff's evaluation of that analysis. As far as Applicants are aware, GE has not yet submitted its probabilistic approach to the Staff; and there is no assurance that the Staff's evaluation will be complete in time to be litigated prior to Applicants' projected fuel load date of December 1984. Thus,

OCRE is incorrect in asserting that the delay caused by a continuance will not harm Applicants.[4/]

Neither is OCRE's request for a continuance helped by appealing to cases interpreting F.R.C.P. 56(f). In the cases cited by OCRE,[5/] discovery either had not taken place[6/] or had been cut short before information necessary to the case of the party requesting a continuance could be obtained.[7/] In no case had the party requesting a continuance lacked diligence in pursuing discovery.

In contrast, OCRE has been afforded ample opportunity to conduct discovery; and Applicants have provided OCRE with a considerable amount of materials in response to OCRE's discovery request. Thus, OCRE's claim that it "must rely on facts within the knowledge and control of Staff and Applicants," Amended Answer at 4, makes no sense. Although OCRE maintains that discovery "must be reopened to obtain further information," id., OCRE gives no indication of what further

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4/ OCRE's speculation that Applicants' projected fuel load date may be "subject to slippage," Amended Response at 3, is irrelevant

5/ Friednash v. Commissioner of Internal Revenue, 209 F.2d 601 (9th Cir. 1954), has no apparent relevant to F.R.C.P. 56(f) and was evidently cited by mistake.

6/ Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2nd Cir. 1968); Slagle v. United States, 228 F.2d 673, 678-79 (5th Cir. 1956); Loew's Inc. v. Bays, 209 F.2d 610, 612 (5th Cir. 1954); Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016, 1018 (3rd Cir. 1942). In Lockhart v. Hoenstine, 411 F.2d 455 (3rd Cir. 1969), also cited by OCRE, summary judgment was affirmed although no discovery had taken place.

7/ Umdenstock v. American Mortgage & Investment Co. of Oklahoma City, 495 F.2d 589, 592 (10th Cir. 1974); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787-88 (D.C. Cir. 1971);

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information it believes to exist and why that information is relevant.[8/]

Neither does OCRE explain why, if it needed further information, it failed to ask follow-up interrogatories prior to the cut-off date set by the Licensing Board. OCRE has never and does not now question the reasonableness of the Licensing Board's discovery schedule for Issue No. 13. The only answer is that OCRE has not been diligent in fulfilling its discovery obligations on this issue. It is well established that a party's laxity in pursuing discovery is justification for denial of a continuance to conduct further discovery under Rule 56(f). E.g., King v. National Industries, Inc., 512 F.2d 29, 34 (6th Cir. 1975); Abiodun v. Martin Oil Service, Inc., 475 F.2d 142, 144 (7th Cir. 1973) (per curiam), cert. denied, 414 U.S. 866 (1973); Donofrio v. Camp, 470 F.2d 428, 431-32 (D.C. Cir. 1972) (per curiam); Chung Wing Ping v. Kennedy, 294 F.2d 735, 737 (D.C. Cir. 1961), cert. denied, 368 U.S. 938 (1961). The Appeal Board has applied the same principle to denial of a continuance under 10 C.F.R. § 2.749(c). ALAB-696, supra p. 5, at 24-29.

Nevertheless, Ms. Hiatt in her affidavit claims that "the experience of the recent hearing on quality assurance has demonstrated

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Harris v. Pate, 440 F.2d 315, 317-18 (7th Cir. 1971) (reversing denial of continuance to obtain execution of affidavit forms); Raitport v. National Bureau of Standards, 385 F.Supp. 1221, 1226 (E. D. Penn. 1974); Waldron v. British Petroleum Co., 231 F.Supp. 72, 93-94 (S.D.N.Y. 1964).

8/ "The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control . . . ." 6 Pt. 2 Moore's Federal Practice ¶56.24 (and cases cited).

to OCRE the necessity of presenting a direct case." Affidavit at ¶ 1. This, according to Ms. Hiatt, is why OCRE has just begun to search for an expert witness and/or consultant on Issue No. 13, and why OCRE is not now prepared to answer the Staff's motion. Id.

Even if OCRE's dubious rationale for its dilatoriness in putting together a case on Issue No. 13 were to be accepted, it would still not justify a continuance. The case law is clear that

> one must conclusively justify his entitlement to the shelter of rule 56(f) . . . by specifically demonstrating 'how postponement of a ruling on the motion will enable him, by discovery or other means to rebut the movant's showing of the absence of a genuine issue of fact.' Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976). The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.

Securities and Exchange Commission v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980) (emphasis added), cert. denied, 449 U.S. 1082 (1981). Ms. Hiatt utterly fails in her affidavit to provide specific justification for OCRE's request for a continuance. On the contrary, Ms. Hiatt's affidavit contains only vague and speculative assertions that the unidentified person which OCRE has allegedly located may act as an expert witness for OCRE, at ¶ 1, that OCRE may be able to raise the funds necessary to secure the appearance of this or some other witness, at ¶ 4, and that OCRE may obtain additional information in a "related soon-to-be-filed court action," at ¶ 3.

It is quite evident from OCRE's amended response and Ms. Hiatt's affidavit that OCRE is seeking to delay resolution of Issue No. 13 on the mere hope that it will be able to turn up a genuine issue of material fact through further discovery. According to one of the foremost authorities on the Federal Rules of Civil Procedure, however, "the Court may deny a continuance . . . where the result of a continuance to obtain further information and discovery would be wholly speculative or problematical." 6 Pt. 2 Moore's Federal Practice ¶ 56.24. See, e.g., 475 F.2d 142, 144, supra p. 8; Columbia Fire Ins. Co. v. Boykin & Tayloe, Inc., 185 F.2d 771, 776-77 (4th Cir. 1950); Searer v. West Michigan Telecasters, Inc., 381 F. Supp. 634, 643 (W. D. Mich. 1974), aff'd mem., 524 F.2d 1406 (6th Cir. 1975). The fact that OCRE has not been able to discover any genuine issue of fact after extensive discovery "is ample support for the . . . determination that additional discovery would be futile." First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 298 (1968). So is the fact that after almost a year, OCRE has been unable to obtain an expert to assist it in developing its case more than enough reason to doubt whether OCRE will be able to do so in the next six months.

For all of the above reasons, Applicants respectfully request that the Licensing Board deny OCRE's request for a continuance and grant the Staff's motion for summary disposition of Issue No. 13.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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DATED: July 14, 1983

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Motion For Leave To File Answer To OCRE's Amended Response To NRC Staff's Motion For Summary Disposition Of Issue #13" and "Applicants' Answer To OCRE's Amended Response To NRC Staff's Motion For Summary Disposition Of Issue #13" were served by deposit in the United States Mail, First Class, postage prepaid, this 14th day of July, 1983, to all those on the attached Service List.

Michael A. Swiger

DATED: July 14, 1983

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