September 19, 1983





UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' RESPONSE TO THE LICENSING BOARD'S "MEMORANDUM AND ORDER (MOTION TO REOPEN)"

## I. Introduction

By "Memorandum and Order (Motion to Reopen)," dated August 18, 1983 (Memorandum and Order), the Licensing Board, acting sua sponte, reopened the record on Issue #3. The Board's sua sponte action followed its denial of a motion to reopen the record filed by Ohio Citizens for Responsible Energy (OCRE).1/

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1/ See Motion to Reopen the Record on Issue #3, dated July 13, 1983 (OCRE's Motion).

OCRE's Motion was premised on documents obtained through a Freedom of Information Act request filed by OCRE just prior to the evidentiary hearing on Issue #3. The Board properly denied OCRE's Motion as untimely, noting that OCRE "could have obtained these documents well in advance of the hearing."2/ Having denied OCRE's Motion on the basis that the Board could not "condone this untimely approach to discovery,"3/ the Board, in fact, has condoned OCRE's tardy discovery by requiring, sua sponte, additional documentary evidence addressing matters raised by OCRE's FOIA documents. Applicants supply herewith the documentary evidence requested by the Board.4/ We respectfully submit that the documentary evidence submitted to date (including evidence at the hearing), when tested against the well-established legal standards applicable to this situation, requires the Board to close the record on Issue #3.

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2/ Memorandum and Order at 1-3; see Applicants' Answer to Motion to Reopen the Record on Issue #3, dated August 4, 1983 (Applicants' Answer), at 5.

3/ Memorandum and Order at 3.

4/ Attached to this Answer are two affidavits, Affidavit of Murray R. Edelman, dated September 15, 1983 (Edelman Affidavit), and Affidavit of Gary R. Leidich, dated September 19, 1983 (Leidich Affidavit), responding in detail to the Board's concerns as set forth in its Memorandum and Order.

## II. The Licensing Board Adopted an Inappropriate Standard in Deciding to Reopen the Record

With a wave of the hand, and with only momentary explanation,5/ the Board in its Memorandum and Order has swept aside firmly established requirements governing the reopening of the record in NRC proceedings. As shown in Applicants'6/ and Staff's7/ briefs in response to OCRE's Motion, the new information justifies reopening of the record only if the information (1) is submitted in a timely manner; (2) raises a significant safety issue; and (3) has the potential to affect the decision of the case.

The Board has declined to apply the third test, and has apparently relaxed the second, distinguishing the precedents cited by Applicants and Staff on the basis that "[m]any of the cases cited to us by the parties are addressed to motions to reopen the record of a case after an initial decision on all or a portion of the record has been written," and on the basis that the Board "need not find that it would change the result on an issue that we have not yet decided, even though findings of fact have already been filed."8/ The Board cites two prior

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5/ Memorandum and Order at 2.

6/ Applicants' Answer at 2-5.

7/ NRC Staff's Answer Opposing OCRE's Motion to Reopen the Record on Issue #3, dated July 26, 1983 (Staff's Answer).

8/ Memorandum and Order at 2.

NRC decisions 9/ in support of relaxing the second test (safety significance) and dispensing with the third test (capacity to change the decision) in a case such as ours. Neither decision supports the Board's position.

Point Beach, ALAB-86, is distinguishable on its facts. In that case, the Appeal Board directed that the record be reopened based on significant information generated by Staff, applicants, and the Commission subsequent to the partial initial decision by the licensing board. The case did not deal with the issue of what constitutes a proper standard for reopening, 10/ let alone whether the standard should vary depending on when the issue of reopening is raised. ALAB-86 did not adopt, either expressly or by implication, a "somewhat more relaxed standard" (Memorandum and Order at 2) for reopening a record prior to initial decision. Indeed, ALAB-86 predated the numerous Appeal Board and Commission decisions cited by Applicants and Staff in this case.

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9/ Wisconsin Electric Power Company (Point Beach Plant, Unit 2), ALAB-86, 5 A.E.C. 376 (1972); Consumers Power Company (Midland Plant, Units 1 and 2), LBP-83-50, slip op. at 9-10, 17 N.R.C. ___ (August 17, 1983). See Memorandum and Order at 2 n.2.

10/ The Appeal Board simply referred to the "of substance" test which had been applied by the licensing board, stating: "We need not discuss whether or not the standard is too stringent, in the context of this proceeding, inasmuch as we find its requirements either to be satisfied or not applicable." ALAB-86, 5 A.E.C. at 378.

Midland, LBP-83-50, is the only other precedent cited by the Board in support of a more relaxed standard. However, the licensing board in Midland relied heavily on the Point Beach case just discussed.11/ The licensing board in Midland does cite two other decisions.12/ Neither citation supports the more relaxed standard.13/

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11/ See LBP-83-50, slip op. at 9-10

12/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 N.R.C. 9, 21 (1978); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523 n.12 (1973). See LBP-83-50, slip op. at 9-10.

13/ The licensing board in Midland states, at page 9 of the slip opinion, that "Only where an initial decision has been issued must a movant to reopen a record establish that the material sought to be presented is susceptible of altering the result previously reached. Three Mile Island, ALAB-486, supra, 8 NRC at 21." However, Three Mile Island deals with a case where the motion to reopen was filed after the licensing board decision was issued. The Appeal Board in Three Mile Island certainly was not propounding the "only if" proposition suggested by the board in Midland. In any case, Three Mile Island suggests a much more stringent test than the one applied by the Board's Memorandum and Order, namely, for untimely motions without good cause, a board must find "not merely that the issue is significant but, as well, that the matter is of such gravity that the public interest demands its further exploration." 8 N.R.C. at 21 (emphasis added).

The second precedent cited by the board in Midland (see LBP-83-50, slip op. at 10, citing ALAB-138, 6 A.E.C. at 523 n.12) similarly fails to provide a basis for relaxing the standard at this stage in the proceeding. Footnote 12 of ALAB-138 relates to the timeliness test for motions to reopen. Footnote 12 notes that timeliness does not depend on whether all, or only a portion of, the evidentiary record of a proceeding has been closed. The Appeal Board stated that "Regardless of when the motion is presented, the question in each case must

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The tripartite standard has been reiterated by the Appeal Board in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 804 (1979), where, as here, a motion to reopen was filed prior to issuance of a decision by the Licensing Board.14/ In the instant case, where the parties have litigated Issue #3, and filed proposed findings, the Board has sufficient knowledge of the case to determine whether the inspector certification or QAAC issues have the capacity to affect the Board's decision on Issue #3. The Board certainly is in the position to judge whether the issues raise significant safety issues requiring supplemental hearings. The policy reasons favoring consumation of the administrative process, including stringent standards for reopening adjudicative records,15/ are triggered once the record is

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center on whether the matter could have been raised earlier." ALAB-138, 6 A.E.C. at 523 n.12. Of course, in the instant case, the Board has already held that OCRE's motion was untimely. Moreover, the text of ALAB-138, 6 A.E.C. at 523, states that unless motions to reopen are timely and raise matters of "major significance to plant safety," a board need not grant a motion to reopen. ALAB-138 thus does not support the relaxed standard suggested by the board in Midland.

14/ The motion to reopen was denied by the licensing board on May 3, 1978, see 10 N.R.C. at 804 n.121, while the initial decision was issued on July 24, 1978, LBP-78-26, 8 N.R.C. 102 (1978). See also Houston Lighting and Power Company (South Texas Project Units 1 and 2), LBP-83-___, slip op. at 1-3 (January 10, 1983).

15/ See Applicants' Answer at 3.

closed. The better view of the test for reopening is that set forth in the Appeal Board and Commission cases previously cited by Applicants and the Staff in response to OCRE's Motion. Those precedents do not suggest that the standard for reopening depends on whether the issue arises before or after initial decision.

The second test for reopening, requiring the existence of a significant safety issue, is not unlike the requirement governing sua sponte action by a board in an operating licensing proceeding, i.e. that "a serious safety, environmental, or common defense and security matter exists." 10 C.F.R. §2.760a. Before requiring, sua sponte, the further litigation of inspector certification or QAAC issues, the Board in this case must find that a serious new safety issue has been raised. Thus, whether viewed under 10 C.F.R. §2.760a, or under the cases governing reopening, the test is a stringent one. Moreover, even if the tripartite test is initially satisfied, where the record has been supplemented through the introduction of affidavits, the Board may not reopen the evidentiary portion of the record absent a showing of genuine unresolved issues of fact.16/

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16/ See ALAB-138, 6 A.E.C. at 523-527; Applicants' Answer at 4.

## III. There Is No Basis To Require Further Hearings On The Inspector Certification Issue

The Board indicates at page 3 of its Memorandum and Order that the inspector certification issue is "[t]he most serious matter" raised by OCRE's tardy FOIA papers. The Board has accepted OCRE's meritless presumption that the August 6, 1982 Comstock force letter attached to OCRE's Motion indicates that CEI's control of Comstock "may be much worse than the testimony presented at the recent hearing would lead one to believe."17/ The Leidich Affidavit, attached hereto, should dispel any such notion.

The Leidich Affidavit shows that the task force records review was a comprehensive corrective action undertaken by Comstock in response to CEI and Comstock QA findings. The task force review involved a massive QA/QC documentation search, and was not limited to reviewing certifications.18/ At the hearing, both CEI and Staff witnesses discussed Comstock's records review, and the audits and corrective action relating thereto.19/ As a result of the task force's nine month review

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17/ Memorandum and Order at 4 (quoting OCRE's Motion).

18/ See, e.g., Leidich Affidavit, ¶¶7-8. (Subsequent paragraph references in this Section refer to the Leidich Affidavit).

19/ See, e.g., Tr. 1534 (¶7); Tr. 1338 (¶10); Tr. 1336, 1611-19 (¶11); Tr. 1541-42, 1556-57 (¶12); Tr. 1540-41 (¶¶14, 16).

covering some 30,000 records, the task force noted certification discrepancies on only 190 records. The vast majority of inspections by the 15 inspectors involved were properly within their certifications, to say nothing of the thousands of records generated by other inspectors. As noted at the hearing, the records review was conducted in advance of Comstock's and CEI's final turnover document reviews. The latter reviews would have detected the discrepancies identified by the task force.20/

The first type of discrepancy noted by the task force, involving the absence of level II inspector co-signatures, had been identified and documented by CEI prior to the task force finding.21/ Applicants' witnesses discussed the co-signature problem at the hearing.22/ The second category of certification discrepancies involved inspection items for uncomplicated inspections (e.g., cleanliness and torquing), that were common to two or more certification task areas. Inspectors performing these inspections, while not certified in the task area covered by the discrepancy, were found to be proficient in the procedures involved.23/ The inspector

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20/ ¶14.

21/ ¶¶10, 11, 15.

22/ Tr. 1338 (¶10).

23/ ¶16.

certification discrepancies found by the task force were few in number and significance, and there is nothing to suggest that the discrepancies were the result of "wrongdoing." See Memorandum and Order at 7.24/

The Leidich Affidavit shows that "CEI was aware of the task force review, was monitoring the review consistent with its QA/QC program, and was independently performing QA/QC reviews of areas covered by the task force."25/

Although the Board's Memorandum and Order implies at pages 4-6 that the inspector certification issue "led to" the NRC Inspection Report No. 83-06 severity level IV finding, in fact the Inspection Report (Board Exhibit 4) does not single out the certification issue, but rather cites the general failure of the task force to formalize its program and checklists in QA documents. At the hearing, the Staff testified at length on Inspection Report No. 83-06 and did not indicate a special concern with inspector certification discrepancies or other substantive findings of the task force.26/

In response to the task force certification finding, extensive reinspections were performed to assure the adequacy of

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24/ ¶23.

25/ ¶23; see ¶¶7-16.

26/ Tr. 1611-19; ¶11.

the equipment and penetrations involved. The reinspections met or exceeded the original inspection requirements, and were accomplished without difficulty in obtaining access to the items covered by the original inspections. The reinspections, which are virtually complete, have detected no hardware or safety problems with the equipment and penetrations covered by the certification discrepancies.27/ CEI has closely monitored the reinspection program.28/

In short, as detailed in the Leidich Affidavit, "the task force certification review and CEI's and Comstock's responses to the task force review have confirmed the adequacy of Comstock's and CEI's QA/QC programs with respect to certifications."29/ Given the absence of any significant QA/QC or safety issue relating to certifications, there was no reason for Applicants to emphasize certification issues during their testimony.

The miniscule percentage of certification discrepancies and their lack of safety significance demonstrates why the lack of emphasis on this non-problem was totally appropriate. The Leidich Affidavit, as summarized herein, demonstrates the

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27/ ¶20.

28/ ¶¶21, 22.

29/ ¶23.

complete absence of any triable issues of fact raising matters of any safety significance. Based on the applicable legal standards as set forth in Section II above, or even the standards applied by the Board, and considering the documentary evidence compiled to date, including the Leidich Affidavit, Applicants respectfully submit that the Board is obligated to close the record on the certification issue.

## IV. There Is No Basis To Require Further Hearings On the QAAC Issue

The Board has also raised questions concerning "the significance [which] should be attached to the QAAC."30/ In its Memorandum and Order, the Board requested additional details concerning the nature of the QAAC reviews, so that the Board can "assess their seriousness."31/ The Board's decision to reopen the record to receive more information on the QAAC is based on a failure of the QAAC to conduct two formal meetings in 1981, as well as "an unsigned, unattributed typed document provided to OCRE in answer to its FOIA request," which the Board concedes "is not evidence."32/ The Board does not

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30/ Memorandum and Order at 20.

31/ Id. at 9 n.20.

32/ Id. at 9.

suggest that its QAAC questions raise plant safety issues.

The Edelman Affidavit should dispense with any lingering concerns on the Board's part. The Affidavit makes clear that the QAAC was a voluntary creation of CEI's, not required by regulation, and that the QAAC is independent of CEI's monthly and quarterly QA management review process.33/ Nonetheless, the QAAC has conducted wide-ranging and serious reviews. This is true not only for the disputed 1981 period, but for all QAAC reviews conducted since the Committee's inception in June 1978. The Edelman Affidavit details the Committee's reviews and indicates the important consultative role that the Committee has had on the Project since the time of CEI's programmatic responses to the NRC's 1978 Immediate Action Letter.

In light of the details set forth in the Edelman Affidavit showing the voluntary nature of the QAAC, and the comprehensiveness of QAAC reviews, and in the absence of any documentary evidence linking the QAAC to safety problems at Perry, there is no proper basis for further evidentiary consideration of the QAAC issue.

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33/ Edelman Affidavit, ¶5.

## V. Conclusion

Neither the inspector certification issue nor the QAAC issue raises any matter of major safety significance.34/ Neither issue could possibly affect the Board's pending decision on Issue #3. Moreover, in light of the documentary evidence produced on these issues to date, including the Leidich and Edelman Affidavits, there are no genuine outstanding issues of

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34/ We note that in the past week, the Appeal Board in Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 17 N.R.C. _____ (1983) has reaffirmed that "in examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation." Id., slip op. at 2 (emphasis added). Even when there are claims of a breakdown in quality assurance procedures, the question is whether the procedural breakdowns "raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components. A demonstration of a pervasive failure to carry out the quality assurance program might well stand in the way of the requisite safety finding." Id. at 2-3 (emphasis added).

The current record on the inspector certifications and QAAC issues is devoid of facts raising either plant safety issues, or the possibility of "pervasive" procedural failures. Accordingly, under Callaway, further inquiry would not be appropriate.

material fact. For these reasons, and for all the reasons set forth herein, the Board should refrain from taking further evidence on these issues and should now close the record on Issue #3.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: September 19, 1983