

November 30, 1983  
DEC -2 A10:58

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING	)	Docket No. 50-440
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 REOPEN DISCOVERY  
ON ISSUES 6, 8, 14, and 15

By Motion of November 15, 1983,<sup>1/</sup> Ohio Citizens for Responsible Energy ("OCRE") asks the Licensing Board to "reopen discovery" for Issue Nos. 6, 8, 14 and 15, "and for any new issues which may be admitted (or old ones readmitted)."<sup>2/</sup> The Motion seeks discovery that is "practically unlimited (as much as is consistent with the NRC's rules of practice) in scope and amount."<sup>3/</sup> OCRE has identified no reasons which justify lifting the discovery cut-off dates previously imposed by the Licensing Board. The Motion is premature with respect to issues not yet admitted to the proceeding. Accordingly, the Motion should be denied.

<sup>1/</sup> "Motion To Reopen Discovery on Issues 6, 8 14 and 15," dated November 15, 1983 (Motion). The Motion was served by mail on November 16, 1983.

<sup>2/</sup> Id. at 1.

<sup>3/</sup> Id. at 5-6.

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OCRE's Motion recognizes that "[d]iscovery in this proceeding has been closed for some time."<sup>4/</sup> As noted at pages 1-2 of OCRE's Motion, the Licensing Board has previously imposed cut-off dates of September 30, 1982 for Issue 6 and 8,<sup>5/</sup> and January 31, 1983 for Issues 14 and 15.<sup>6/</sup> OCRE believes that "[a]t the times they were imposed, these restrictions were reasonable."<sup>7/</sup>

The Motion states that, because the original hearing schedule for these issues has been delayed, and in consideration of the passage of time since the close of discovery, the discovery restrictions "no longer serve the purposes for which they were adopted."<sup>8/</sup> The Motion further asserts, without factual basis, that "[t]he closure of discovery has shackled OCRE by severely limiting its ability to properly prepare its case."<sup>9/</sup> OCRE's arguments supporting these assertions conflict with the Commission's Rules and Statement of Policy, as well as with the law of this case. They must be rejected.

OCRE first argues that its request is "not untimely under the rules," citing 10 C.F.R. 2.740(b)(1) and Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 A.E.C. 457, 467 (1974). OCRE misreads 10 C.F.R. §2.740(b)(1) as indicating that

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<sup>4/</sup> Id. at 1.

<sup>5/</sup> See Tr. 753.

<sup>6/</sup> See Tr. 800-801. The Licensing Board required follow-up discovery on Issues 14 and 15 to be filed within seven days from the time of receipt of answers to initial discovery. Id.

<sup>7/</sup> Motion at 1.

<sup>8/</sup> Id. at 2.

<sup>9/</sup> Id.

discovery filed prior to a prehearing conference held pursuant to §2.752 "cannot be untimely under the NRC's rules of practice."<sup>10/</sup> Contrary to OCRE's construction of the regulation, 10 C.F.R. §2.740(b)(1) merely establishes the §2.752 prehearing conference as an outside limit on discovery, and does not in any way preclude a licensing board from setting an earlier cut-off date. The introductory language of 10 C.F.R. §2.740(b), which modifies the provisions of §2.740(b)(1), explicitly states that the scope of discovery may be "otherwise limited by the presiding officer in accordance with this section."

The Licensing Board in this case has implemented 10 C.F.R. §2.740(b) in a manner wholly consistent with the Commission's Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452 (1981), which instructs that

the boards should manage and supervise all discovery, including not only the initial discovery directly following admission of contentions, but also any discovery conducted thereafter. The Commission again endorses the policy of voluntary discovery, and encourages the board, in consultation with the parties, to establish time frames for the completion of both voluntary and involuntary discovery. Each individual board shall determine the method by which it supervises the discovery process. Possible methods include, but are not limited to, written reports from the parties, telephone calls, and status report conferences on the record. In virtually all instances, individual boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted.

Id., 13 N.R.C. at 456 (emphasis added).<sup>11/</sup> The Licensing Board has utilized all of the suggested management tools noted above,

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<sup>10/</sup> Id. at 3-4.

<sup>11/</sup> See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 N.R.C. 150, 154-57 (1981).

including the establishment of reasonable discovery time frames, in recognition of the fact that "the Commission expects us to manage the discovery process in the interest of expedition."<sup>12/</sup>

Commonwealth Edison Co., ALAB-196, which OCRE cites, does not support a wholesale lifting of the established discovery cut-offs in this case. The question considered by the Appeal Board in ALAB-196 was whether the licensing board had acted properly in granting a motion to quash a subpoena. The Appeal Board found, among other things, that the subpoena request was filed within the period for initiation of discovery authorized by the licensing board, that the subpoena in question met the Commission's "general relevance" standard applicable to obtaining discovery by subpoena, and that "there was no warrant for any speculation by the Licensing Board that granting the discovery would inevitably have led to delay." ALAB-196, 7 A.E.C. at 464, 466. In light of these and other findings, the Appeal Board ruled that the licensing board abused its discretion in quashing the subpoena in question.<sup>13/</sup> Thus, ALAB-196 involved timely filed discovery in a factual setting

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<sup>12/</sup> Memorandum and Order Concerning the Status of Ashtabula County and Objections to the Special Prehearing Conference Order, LBP-81-35, 14 N.R.C. 682, 689 (1981). See Tr. 751 ("The Board can establish discovery deadlines, that is clear, and we were requested to do so by the Commission, and a public notice to that effect.")

<sup>13/</sup> The Appeal Board emphasized that "[o]ur ruling on the timeliness of the instant discovery request should not be taken as denigrating the significance of requiring that parties' discovery requests be filed in a manner consistent with the goal of carrying on and completing licensing proceedings expeditiously." Id., 7 A.E.C. at 467.

completely dissimilar to our own, and is therefore inapposite.<sup>14/</sup>

In both the August 13, 1982 and November 15, 1982 telephone conferences, the Licensing Board made it abundantly clear that additional discovery, beyond the targeted deadlines, would be available upon a showing of good cause.<sup>15/</sup> This is consistent with the Commission's rules. See 10 C.F.R. §§ 2.711 and 2.732. OCRE's Motion cites only two relatively limited areas, both relating to Issue #8,<sup>16/</sup> in which it seeks additional discovery. If OCRE believes that it has good cause to file discovery with respect to these or other areas, OCRE has only to seek a good cause exception to the discovery cut-off under the Licensing Board's prior rulings in this case. (In this regard, the same standard will be applied whether the information sought is proprietary or non-proprietary. See Motion at 5). The parties have, in fact, successfully utilized

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<sup>14/</sup> Similarly, Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 N.R.C. 1038, 1040 (1978), cited by OCRE at page 2 of its Motion, involves the application of the "general relevance" standard of 10 C.F.R. §2.740(b)(1) and does not involve the question, which OCRE raises, of removing established discovery cut-offs.

<sup>15/</sup> See, e.g., Tr. 753 ("The Board in setting a target understands that there may be good cause for exceeding these deadlines. We would not expect them to be exceeded without good cause."). See also Tr. 800-01 ("After considering the arguments, we have decided to set a January 31 cut-off date on initial discovery requests on issues 13 through 15 subject to a showing of good cause for late filing.")

<sup>16/</sup> OCRE asserts that it is entitled to receive information on hydrogen ignition experiments being conducted by the Hydrogen Control Owners' Group, and proprietary portions of a Westinghouse Electric Corp. publication on the CLASIX-3 computer program. See Motion at 4-5. Applicant is willing to discuss with OCRE the basis for OCRE's assertion that such information is relevant to Issue #8; however, OCRE's two specific requests under Issue #8 hardly justify a blanket reopening of discovery on Issues 6, 8, 14 and 15.

the good cause exception to obtain extensions of the discovery schedule in specific instances.<sup>17/</sup>

Thus, there is already a procedural mechanism in place for intervenors to obtain discovery as to relevant matters that were not known at the time of the discovery cut-off date. See Tr. 737-38. It is therefore not "imperative that discovery be reopened" for "[n]ew information and data [which] are continuously being generated with respect to the issues in question."<sup>18/</sup>

The Licensing Board has previously rejected a similar blanket motion, filed by Sunflower, to extend for an indefinite period of time the discovery schedule for Issue #1.<sup>19/</sup> Sunflower argued, among other things, that relevant information (final emergency plans) had yet to be published on Issue #1, that this information would have to be reviewed, and that "[s]ince there is no hearing date yet in place on this issue, no one (Applicant, Staff or Intervenor) would be prejudiced by permitting the time for discovery

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<sup>17/</sup> See, e.g., Memorandum and Order Concerning Motion For Extension of Time, dated October 28, 1981 (granting Sunflower Alliance, Inc. a 30-day extension of time within which to respond to Applicants' first set of interrogatories); Order Concerning Motion For Extension of Time, dated November 6, 1981 (granting OCRE a 30-day extension of time within which to respond to Applicants' first set of interrogatories); Letter, Applicants' Counsel to Licensing Board, dated April 4, 1983 (confirming the Board's granting of an extension of time within which to file follow-up interrogatories on Issues 13, 14 and 15).

<sup>18/</sup> Motion at 4.

<sup>19/</sup> See Sunflower Alliance Inc. Application To Extend Discovery Time on Contention One, dated September 30, 1982.

to remain open on this contention."<sup>20/</sup> The Licensing Board denied Sunflower's motion, stating,

the purpose of a discovery cut-off date is to require a party to complete as much discovery as is feasible before that date. The fact that Sunflower will obtain additional information in the future will permit it to argue that it has good cause for late-filing of interrogatories with respect to that material, providing that the information was not previously available to it.

We will not deprive Sunflower of its fair opportunity to seek discovery of matters not previously known to it, but that is not a reason to extend the deadline on matters already known to it.

Memorandum and Order (concerning Request to Extend Discovery on Issue #1), dated October 8, 1982, at 1.<sup>21/</sup> Applicants submit that the same principles require the rejection of OCRE's Motion to lift the discovery cut-offs for Issues 8, 6, 14 and 15.

OCRE's final argument in support of its Motion is that "practically unlimited discovery" is necessary "so as not to abridge OCRE's cross examination rights in the future."<sup>22/</sup> OCRE cites two procedural rulings by the Licensing Board during the Issue #3 hearings, which assertedly "limited intervenors' cross examination on the grounds that the questions could have been (but were not) asked during discovery. Tr. 1074, 1530-1."<sup>23/</sup>

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<sup>20/</sup> Id at 1.

<sup>21/</sup> Cf. Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1665 (1982).

<sup>22/</sup> Motion at 5.

<sup>23/</sup> Id.

While Applicants believe that the rulings in question were proper,<sup>24/</sup> the appropriateness of two discretionary rulings in a completed hearing on Issue #3 can have no conceivable relevance to the question of lifting discovery cut-offs on Issues 6, 8, 14 and 15. OCRE fails to explain how "practically unlimited discovery," in unspecified areas, will aid its future cross-examination rights. It is not possible for other parties or the Licensing Board to speculate in this regard.

For all the stated reasons, the Licensing Board should deny OCRE's Motion.

Respectfully submitted,

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DATED: November 30, 1983

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<sup>24/</sup> In one case, contrary to OCRE's assertion, the Licensing Board made clear that cross-examination would not be limited. See Tr. 1532 (permitting questions by OCRE or Sunflower on Applicants' testimony in response to Board questions). In the other case, OCRE's cross-examination was neither relevant nor material, and called for speculation. See Tr. 1074.

November 30, 1983

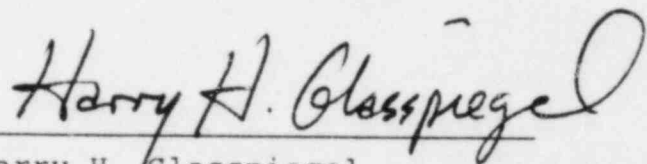
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer to Ohio Citizens For Responsible Energy Motion to Reopen Discovery on Issues 6, 8, 14 and 15" were served by deposit in the United States Mail, first class, postage prepaid, this 30th day of November, 1983 to all those on the attached Service List.

  
Harry H. Glasspiegel

DATED: November 30, 1983

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Docket Nos. 50-440  
50-441

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