December 8, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'83 DEC 13 A11:33

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

OCRE RESPONSE TO STAFF AND APPLICANT ANSWERS TO OCRE'S MOTION TO REOPEN DISCOVERY ON ISSUES 6, 8, 14, AND 15

Intervenor Ohio Citizens for Responsible Energy ("OCRE") hereby responds to Staff and Applicant answers to OCRE's Motion to Reopen Discovery on Issues 6, 8, 14, and 15, wherein Applicants and Staff urge that OCRE's Motion be denied on the ground that OCRE's arguments conflict with the Commission's rules of practice and Statement of Policy and that no compelling showing has been made justifying the reopening of discovery. OCRE suggests that their opposition to reopening discovery results less from zeal for the Commission's regulations and policies than from a desire to limit OCRE's rights in this proceeding.

Applicants' reliance upon CLI-81-8, 13 NRC 452 (1981), the Commission's Statement of Policy on Conduct of Licensing Proceedings is misplaced. The Commission's two-and-a-half-year-old policy statement must be interpreted in its historical context and should not be accepted forevermore without question. CLI-81-8 was a response to a perception which is no longer valid. As amply indicated in the "Background" part of the policy statement, the measures advocated therein were designed to alleviate a perceived situation which former Commissioner Peter Bradford called "the licensing hoax", i.e., that most of the nuclear power plants under construction would be completed and forced to sit idle while licensing hearings are conducted. As Commissioner

Bradford's label suggests, the perception was inaccurate at the time, and certainly is erroneous now. Few of the construction schedules of 1981 are viable now, and the delays in these schedules have been sought by the utilities, largely due to financial and construction problems. The few cases where the regulatory and licensing process has delayed plant operation (e.g., Zimmer and Diablo Canyon) can fairly be attributed to the faults of the licensees, and, to paraphrase the Appeal Board in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 (1973), delay in such situations shows that the system is working properly, as the facilities were not ready for operation.

Furthermore, legislative measures were taken to alleviate the perceived problem; the temporary operating license provision (see Final Rule, 48 FR 46489, October 13, 1983) should solve problems of the type envisioned by the Commission's Statement of Policy. Thus, CLI-81-8 can be said to be superceded by this legislation.

Even if CLI-81-8 were still valid policy, it should obviously only be invoked when the specific case in question may delay plant operation. No such threat exists in this proceeding. Perry Unit 1 fuel load is at least a year away. There is no rational reason to invoke the measures in CLI-81-8 here, as there is no evidence to indicate that reopening discovery will delay fuel load, as Staff admits. Also, it should be noted that the Policy Statement frequently emphasizes the Commission's commitment to fair hearings which produce full and complete records. Certainly the Commission did not intend that the measures of CLI-81-8 be used to the detriment of any party or of the quality of the proceeding.

Denying OCRE's motion would do just that, and also would most likely create rather than eliminate delay. Were the Board to continue with its requirement that additional discovery can be had only with a showing of good

cause for lateness (i.e., new information), there would be, in addition to the usual discovery controversy over relevance, further controversy on whether the discovery request was timely and supported by a statement showing good cause. Aside from the immense burden on intervenors who would have to demonstrate that the discovery could not have been sought at an earlier date, the burden of deciding the resultant disputes would fall upon the Board, whose time could be spent more productively on other matters.

The case law cited by OCRE in its motion demonstrates conclusively that parties seeking discovery should not have to meet a show cause standard. Rather, the burden is on the party opposing discovery. To reiterate the point made in Commonwealth Edison (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 468 (1974), "it is an abuse of discretion to deny discovery on timeliness grounds." 1/ Unless Applicants and Staff can show that irreparable harm will result from reopening discovery, discovery must be reopened.

OCRE must also comment on a telephone conference call concerning the motion. On November 22, 1983, the Board Chairman initiated a conference call with Applicants' counsel and OCRE's Representative for the purpose of determining whether Applicants needed to respond to the motion, or whether the matter could be resolved informally. During the call Applicants' counsel stated that, since Issues 6 and 8 were rendered inactive in this proceeding pending Commission rulemaking, the motion would not apply to those issues.

1/ The Staff claims that, contrary to OCRE's assertion, a prehearing conference was held pursuant to 10 CFR 2.752 and therefore, additional discovery requests are untimely. The transcript of the May 9 conference call contains no references to 10 CFR 2.752, and differed little from the several other conference calls held in this proceeding. Specifically, no order was entered pursuant to 10 CFR 2.752(c) which controlled the subsequent course of the proceeding and to which parties could file objections. To the extent that a conference was held prior to the May 24 hearing, only the QA matters addressed at the hearing were covered. Staff's assertion that this constituted the 10 CFR 2.752 prehearing conference is clearly in error.

Counsel also expressed the opinion that Issues 6 and 8 would be disposed of through rulemaking. While OCRE admits that Issue 6 may well be affected by the ATWS rule, OCRE does not believe that the final hydrogen rule, if it bears any resemblance to the proposal, will preclude the litigation of Issue 8. The rule may change the scope of the litigation, but this is not enough to cause its dismissal.[2/]

This is precisely the reason that discovery must be reopened. If Applicants believe that a final rule on hydrogen control is cause for quickly filing a motion for summary disposition, OCRE will be forced to respond to such a motion with evidence demonstrating the existence of a genuine issue of material fact, which appears, from the Licensing Board's Memorandum and Order (Summary Disposition of Turbine Missile Issue), LBP-83-46, August 9, 1983, to be an exceedingly difficult standard to meet. That same Order exhibits the Board's disinclination to grant continuances (sanctioned by the Commission's rules of practice) so that this standard can be met. Clearly, OCRE cannot be expected to meet these standards without liberal discovery rights.

Issue 8 is not the only issue for which this is a problem. OCRE has discovered in the LPDR a memo (attached) to the NRC Staff calling for Staff input to SSER 4. Input was especially requested on Issue 15, on steam erosion, so that summary disposition can be sought on the issue.

Discovery is the main means whereby OCRE can obtain information of evidentiary weight. The problem of imminent summary disposition is precisely why discovery must be reopened, if OCRE is to have any opportunity to protect its interests in this proceeding.

Respectfully submitted,

Susan L. Hiatt
OCRE Representative

2/ The mutually-agreed-upon moratorium on hearings on these issues did not include a prohibition on discovery.

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Docket Nos.: 50-440
and 50-441

LB#1 Rdg
BJYoungblood

MRushbrook
JStefano

MEMORANDUM TO: Multiple Addresses (see attached list)

FROM: B. J. Youngblood, Chief, Licensing Branch No. 1, DL

SUBJECT: REQUEST FOR STAFF EVALUATION INPUTS FOR PERRY SSER NO. 4

We have scheduled issuance of Supplement No. 4 to the Perry SER in November 1983, to officially document several evaluation findings received from the staff since Supplement No. 3 was issued in April 1983. Our records indicate several correspondence submitted by the applicant for which a staff response has not yet been received, some of which were submitted as early as mid-1982. A listing of this information and the responsible review staff is attached. It is accordingly requested that where appropriate, your staff complete their reviews and furnish input for SSER No. 4 not later than Friday, October 21, 1983.

In addition, in adhering to the suggestion made by the Perry Attorney (Steve Goldberg) at our steam erosion issue meeting with staff of September 19, 1983, it is further requested that the staff provide their integrated position regarding the steam erosion issue for input in SSER No. 4. It is the intent of Counsel to reference SSER No. 4 in submitting a proposed summary disposition of this issue to the board. It is expected that DE will have determined the lead responsibility requested in T.M. Novak's memo of August 25, 1983 to J. P. Knight and W. V. Johnston concerning the formulation of the staff's position on the steam erosion issue. Therefore, we anticipate that the SSER input for that issue will be forthcoming from staff (AEB, MEB, EQB, ASB, RSB, MTEB) individuals designated lead responsibility. It is essential that we use SSER No. 4 as the basis for addressing the steam erosion issue, if we are to take advantage of the opportunity to summary dispose of the issue.

Your cooperation in helping us meet our scheduled issuance date for SSER No. 4 will be most appreciated, and is urged.

Original signed by
B. J. Youngblood

B. J. Youngblood, Chief
Licensing Branch No. 1
Division of Licensing

Attachment:
As stated

CONCURRENCE: DL:LB#1 DL:LB#1

JStefano BJYoungblood

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CERTIFICATE OF SERVICE

'83 DEC 13 A11:33

This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this _____ day of _____, 1983 to those on the service list below.

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Susan L. Hiatt

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