

October 12, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, ET AL.

(Perry Nuclear Power Plant,
Units 1 and 2)

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Docket Nos. 50-440 0 ✓
50-441 0 ✓

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APPLICANTS' REPLY TO OCRE RESPONSE
REGARDING SPECIFICATION OF A
CREDIBLE ACCIDENT SCENARIO UNDER ISSUE #8

In "OCRE Response to Applicants' Motion for Specification of a Credible Accident Scenario Under Issue #8," dated October 3, 1984 ("OCRE Response"),^{1/} OCRE asks the Licensing Board to overrule decisions by the Commission, the Appeal Board and this Licensing Board governing the litigation of Issue #8. The Licensing Board should deny the relief OCRE seeks in its October 3 response.

The litigation of this issue is governed by Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980) ("TMI-1 Restart"). However, OCRE argues that TMI-1 Restart has been overtaken by "time and

^{1/} OCRE's filing is in response to "Applicants' Motion for Specification of a Credible Accident Scenario Under Issue #8," dated September 18, 1984 ("Applicants' Motion").

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events,"^{2/} and that Issue #8 should now be governed by the draft rule attached to OCRE's response.^{3/} OCRE's new arguments are without legal basis.

The ground rules for the litigation of Issue #8 are those set forth in TMI-1 Restart. These ground rules were recently reaffirmed by the Appeal Board in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728 17 N.R.C. 777, 805 (1983). The TMI-1 Restart ground rules are the law of this case. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 N.R.C. 1105, 1114 (1982) ("the Commission's TMI-1 Restart ruling requires a credible LOCA scenario for the generation of hydrogen.") The Board itself has already agreed to "the need to specify a particular type of credible accident scenario in order to litigate meaningfully the adequacy of a hydrogen control mechanism" Memorandum and Order (Concerning Reconsideration and Dismissal of Hydrogen Control Contention), dated December 13, 1982, slip op. at 2.

OCRE has set forth nothing to indicate that the Commission has withdrawn TMI-1 Restart. OCRE cites no authority in its response which would permit the Board to disregard TMI-1 Restart and the rulings of this case. OCRE cannot prevail by

^{2/} OCRE Response at 7.

^{3/} See OCRE Response at 2-4, and Exhibit 1 to OCRE Response (containing selected portions of SECY-83-357).

simply asking the Board to disregard these precedents in favor of a draft position paper.^{4/} The Licensing Board is bound to follow the Commission and its appeal boards on this issue.

In any event, even if OCRE were correct and this Board could ignore TMI-1 Restart and apply the draft rule attached in Exhibit 1 (Enclosure "F") to OCRE's response, OCRE could not justify a new contention.^{5/} Section 50.44(c)(3)(vii) of the draft rule provides that CEI would have 180 days from the effective date of the final rule by which to submit a schedule for meeting the rule's requirements (see last page of Enclosure "F" in OCRE's Exhibit 1). According to the draft "Supplementary Information" section of the draft rule (see page 9 of Enclosure "F") it is expected that CEI will have a minimum of two years to implement the requirements of the rule. Thus, under this draft language, OCRE's proposed contention would have to be dismissed, since CEI would not be required to demonstrate compliance with the rule for two years.

^{4/} SECY-83-357, which OCRE states is "[t]he current thinking on the hydrogen control rule" (OCRE Response at 2) is not a regulation. In this situation, "[t]he existence of a draft internal staff working paper suggesting the adoption of some other standards . . . could not relieve the Board of its obligations to apply the current regulations." Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 A.E.C. 244, 254-55 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 407-09 (1975).

^{5/} OCRE appears at page 4 of its response to be suggesting a new contention based on the draft rule. If so, OCRE would, of course, be obligated to supply the required basis, specificity, and justification for late-filing, under 10 C.F.R. §2.714. OCRE has not attempted such a showing.

For all these reasons, Applicants respectfully submit that OCRE's new arguments set forth in its response cannot be adopted.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Harry H. Glasspiegel
Jay E. Silberg, P.C.
Harry H. Glasspiegel

Counsel for Applicants
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Dated: October 12, 1984

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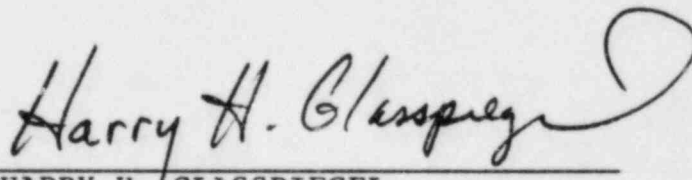
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Motion for Leave to file Reply" and "Applicants' Reply to OCRE Response Regarding Specification Of a Credible Accident Scenario Under Issue #8" were served by deposit in the United States Mail, first class, postage prepaid, this 12th day of October, 1984, to all those persons on the attached Service List.


HARRY H. GLASSPIEGEL

Dated: October 12, 1984

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NUCLEAR REGULATORY COMMISSION

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SERVICE LIST

Peter B. Bloch, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Christine N. Kohl, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles, Esquire
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John G. Cardinal, Esquire
Prosecuting Attorney
Ashtabula County Courthouse
Jefferson, Ohio 44047

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Colleen P. Woodhead, Esquire
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Terry Lodge, Esquire
Suite 105
618 N. Michigan Street
Toledo, Ohio 43624

Donald T. Ezzone, Esquire
Assistant Prosecuting Attorney
Lake County Administration
Center
105 Center Street
Painesville, Ohio 44077

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ms. Sue Hiatt
8275 Munson Avenue
Mentor, Ohio 44060