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July 24, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' ANSWER TO OCRE MOTION FOR LEAVE TO RESPOND TO APPLICANTS' REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED BY THE OTHER PARTIES (HYDROGEN CONTROL)

In an intemperately worded motion dated July 10, 1985,[1/] Ohio Citizens for Responsible Energy ("OCRE") requests the Licensing Board's permission to file a reply to Applicants' Reply to Proposed Findings of Fact and Conclusions of Law Filed By the Other Parties (Hydrogen Control) (July 1, 1985) ("Applicants' Reply Findings"). OCRE attached to its motion its Response to Applicants' Reply to Proposed Findings of Fact and Conclusions of Law Filed by the Other Parties (Hydrogen Control) (July 10, 1985). OCRE claims that due process requires

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1/ Motion for Leave to Respond to Applicants' Reply to Proposed Findings of Fact and Conclusions of Law Filed by the Other Parties (Hydrogen Control), dated July 10, 1985 (served July 11, 1985) ("Motion").

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the Board to permit OCRE to address "new arguments" and "new cases" in Applicants' Reply Findings. Motion at 1. OCRE's motion is contrary to the Commission's regulations and should be denied.[2/]

As OCRE acknowledges (Motion at 2), the applicable regulation governing proposed findings of fact and conclusions of law is 10 C.F.R. § 2.754. That provision only grants "[a] party who has the burden of proof" the opportunity to file reply findings. 10 C.F.R. § 2.754(a)(3). The provision provides no such right to "other parties," i.e., parties other than the "party who has the burden of proof." Id. OCRE's rights are covered under 10 C.F.R. § 2.754(a)(2), which states:

> (2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed. However, the staff may file such proposed findings, conclusions of law and briefs within fifty (50) days after the record is closed.

The Board's Memorandum and Order (Proposed Findings and Conclusions) (May 7, 1985), which governs proposed findings and conclusions for Issue #8, is consistent with 10 C.F.R. § 2.754.[3/]

2/ Applicants do not reply herein to the substance of OCRE's Response. Applicants believe the Board can adequately evaluate Applicants' proposed findings and reply findings, and the proposed findings of OCRE and the Staff, in light of the existing record and without additional rounds of argument. For the reasons noted herein, it would be contrary to the Commission's regulations, and the Board's own orders, for the Board to consider OCRE's proposed reply.

3/ See also Memorandum and Order (Proposed Findings and Conclusions) (April 18, 1985), which sets forth the schedule for proposed findings for Issues #1 and #16, and discusses the general format for proposed findings.

OCRE has no right under the Board's Memorandum and Order to respond to Applicants' Reply Findings.

Since Applicants carry the burden of proof, they are given the last word. OCRE in its proposed findings had the opportunity to respond to Applicants' proposed findings. Granting OCRE's motion would therefore entitle Applicants to respond to OCRE's response. OCRE could then seek to respond to Applicants' response, and so on. The place to call a halt to this endless circle is where 10 C.F.R. §2.754 directs -- with the applicant's reply findings.

OCRE claims to find support for its motion in two previous decisions by the Board. OCRE first cites LBP-82-89, 16 N.R.C. 1355 (1982), for the proposition that "it is the policy of this Licensing Board to permit parties to respond to new information contained in the replies of their adversaries." See Motion at 1-2. That decision dealt with procedures for late-filed contentions. The issue was whether the Board would permit intervenors, as the proponents of late-filed contentions, to reply to Applicants, who opposed admission of the contentions. The Board stated that its decision permitting intervenors to reply to Applicants' opposition was governed by Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521 (1979), from which the Board quoted:

> Before any suggestion that a contention should not be entertained can be acted upon favorably, the proponent of the contention must be given some chance to be heard in response.

LBP-82-89, 16 N.R.C. at 1356, quoting ALAB-565, 10 N.R.C. at 525.

LBP-82-89 provides no basis for granting OCRE'S motion. It did not deal with 10 C.F.R. § 2.754(a) and the filing of proposed findings of fact or replies thereto. OCRE has already had its opportunity to address the evidentiary record and to reply to Applicants' proposed findings of fact. The Board in LBP-82-89 was addressing whether it might be helpful in some circumstances for the Board to have additional information at the very beginning of the hearing process, before deciding the admissibility of a contention. The Board's knowledge about a contention at that stage in the proceeding is obviously different than at the findings stage, after the contention has been admitted and the record is fully-developed and then closed.4/

Nor is this a situation, as in LBP-82-89, in which "the proponent" is seeking "some chance to be heard in response." 16 N.R.C. at 1356. Applicants have the burden of proof to demonstrate that the hydrogen control system meets the Commission's requirements, and neither Applicants nor OCRE has ever

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4/ In LBP-82-89, the Board concluded that intervenors were entitled to comment on Applicants' objection that the information relied on by intervenors as good cause for late filing was available earlier. Id., 16 N.R.C. at 1356. There is no similar need in the instant case for the Board to consider additional information from OCRE. The facts are in and the record is closed. OCRE only seeks an opportunity for another round of arguments -- to which it is not entitled under the Commission's regulations.

argued otherwise.[5/] See 10 C.F.R. § 2.732; Part 2, Appendix A, § V(d)(1). It is because an applicant has the burden of proof in NRC initial licensing proceedings that it is given the last word. See 46 Fed. Reg. 30328, 30330 (1981) (discussing the considerations behind the Commission's decision to retain the applicant's right to file reply findings.)

OCRE also cites another decision by the Board, LBP-83-46, 18 N.R.C. 218 (1983), in support of its motion. Motion at 2. OCRE implies that the Board in LBP-83-46 permitted Applicants to file "further supporting statements" in response to Staff's motion for summary disposition of Issue #13 (turbine missiles), contrary to 10 C.F.R. § 2.749(a).[6/] The apparent logic of OCRE's argument is that (1) the Board in LBP-83-46 permitted Applicants to file "further supporting statements" where the regulation "expressly prohibited" such filing; and therefore (2) the Board should permit OCRE to file reply findings in this case, since the regulation "neither prohibits nor permits parties not having the burden of proof from filing responses." Motion at 2.

5/ OCRE provides no support for the assertion, at page 2 of the Motion, that "Applicants' arguments can be distilled to the theory that OCRE, and not Applicants, bears the burden of proof in this proceeding." Applicants have not argued this, nor does OCRE contend that it has the burden of the proof.

6/ OCRE's implied assertion is essentially a rehash of OCRE's Motion to Strike Portions of Applicants' Answer in Support of NRC Staff Motion For Summary Disposition of Issue #13 (June 30, 1983), which the Board rejected in LBP-83-46.

OCRE's argument is illogical and incorrect. The Board in LBP-83-46, 18 N.R.C. at 224 n.22, discussed information contained in Applicants' answer in support of the Staff's motion for summary disposition. The footnote makes clear that Applicants' answer "was proper and timely" in that case, and was not contrary to the Commission's rules governing summary disposition. Thus, OCRE mischaracterizes LBP-83-46, which in any case is irrelevant to the issue of whether intervenors may file a response to an applicant's reply findings.

Finally, OCRE's motion makes the implicit assumption that Applicants have no right to raise "new arguments" in reply findings that were not raised in Applicants' proposed findings. Motion at 1. OCRE's assumption is without any basis and is clearly in error. There would be no purpose to granting reply rights to Applicants if Applicants were constrained to make the same factual and legal points in their reply as those contained in their proposed findings and conclusions.

Thus, OCRE seeks to challenge the Commission's rules, and the Board's rulings, regarding the filing of proposed findings. OCRE cites no precedent in which intervenors have been permitted to file a response to an applicant's reply findings, and Applicants are aware of no such precedent. Consideration of OCRE's proposed response by the Board would require the Board to permit Applicants, as the party with the burden of proof, to respond to OCRE's response, to which OCRE could then seek to file yet another response, ad infinitum. OCRE's tactic would

delay a decision on the merits and unnecessarily interfere with the Commission's expectation "that decisions will be issued as soon as practicable after the submission of proposed findings of fact and conclusions of law."7/

For these reasons, Applicants respectfully request that the Licensing Board deny OCRE's motion and refuse to consider OCRE's proposed response to Applicants' Reply Findings.

Respectfully Submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: July 24, 1985

7/ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 458 (1981).

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants Answer to OCRE Motion For Leave to Respond To Applicants' Reply To Proposed Findings Of Fact and Conclusions of Law Filed by the Other Parties (Hydrogen Control)" were served by deposit in the United States Mail, first class, postage prepaid, this 24th day of July, 1985, to those on the attached Service List.

Jay E. Silberg

DATED: July 24, 1985

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