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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:  
James P. Gleason, Chairman  
Dr. Jerry R. Kline  
Mr. Glenn O. Bright

DOCKETED  
USNRC

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of

CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, et al.

(Perry Nuclear Power Plant,  
Units 1 & 2)

Docket Nos. 50-440-OL  
50-441-OL

ASLBP No. 81-457-04 OL

August 23, 1985

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MEMORANDUM AND ORDER  
(Motion to Respond to Reply to  
Proposed Findings of Fact and Conclusions of Law)

Intervenor, Ohio Citizens for Responsible Energy (OCRE), filed a motion for leave to respond to Applicants' Reply to the Findings of Fact and Conclusions of Law submitted by the other parties. The Applicants and Staff both oppose the motion which had attached to it a proposed response.

The Intervenor alleges that Applicants' reply to OCRE's proposed findings constitutes "a compendium of distortion, deception, insinuation and invective" and included new arguments and cited new cases, all of which was "extremely prejudicial." Stating that its response was aimed at only the new arguments and cases found in Applicants' reply, OCRE based its present motion on an ostensible Board policy in the proceeding which allowed parties to respond to new information submitted by their adversaries. In OCRE's judgment, that policy was embodied in a prior ruling wherein Intervenor was required to respond to Applicants'

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arguments opposing the admission of late-filed contentions. See LBP-82-89, 16 NRC 1355, 1982. In that ruling, the Board relied, and correctly we believe, on an Appeal Board memorandum stating that proponents of contentions must be provided an opportunity to respond to opposing objections prior to a contention's rejection. (Houston Lighting and Power Company; Allens Creek Nuclear Generating Station, Unit 1; ALAB-565, 10 NRC 521-525 (1979)). That ruling, however, has no relevance here. The Appeal Board pointed out in the Allens Creek case that the absence of any provision in the Commission's rules dealing with objections to contentions or arguments in support of contentions require licensing boards to provide a fair procedure to assure each side of the arguments an opportunity to be heard. In the Appeal Board's review, which was supported and extended to late-filed contentions by this Board, this requires, as in federal practice dealing with motions to dismiss, some opportunity by the contention's advocate to respond.

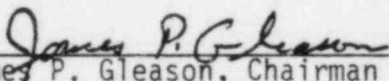
The rules are not silent, however, in dealing with the requirement or opportunity of filing proposed findings and conclusions of law. 10 CFR § 2.754(a)(3) provides only for parties carrying the burden of proof with an opportunity to reply to proposed findings of other litigants. Under 2.732, it is manifest that Applicants carry the burden of proof in the proceeding. To attempt to engraft an opportunity to "reply to a reply" by reason that the rules do not specifically prohibit such a response--as OCRE suggests--would launch a successive series of such requests by other parties and make a nullity of what is basically a sound procedure. OCRE also cites as precedent for its request a Board

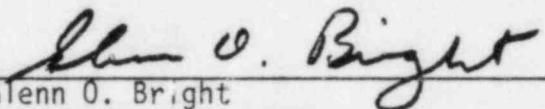
ruling that permitted Applicants to respond to a prior Intervenor filing on a motion for summary disposition. See LBP-83-46, 18 NRC at 224 n. 22. The Board's comment here merely indicated, however, that since Applicants' filing was timely, it was not improper under the rules for a party to comment on a prior filing and have such comments considered.

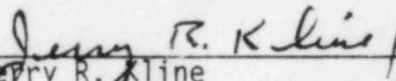
In view of the foregoing considerations, the Board finds no basis for OCRE's motion and, accordingly, it is denied.

ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
James P. Gleason, Chairman / *2074*  
ADMINISTRATIVE JUDGE

  
Glenn O. Bright  
ADMINISTRATIVE JUDGE

  
Jerry R. Kline / *2073*  
ADMINISTRATIVE JUDGE

Bethesda, Maryland