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December 2, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

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APPLICANTS' BRIEF IN OPPOSITION TO INTERVENORS' APPEALS FROM THE CONCLUDING PARTIAL INITIAL DECISION

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APPLICANTS' STATEMENT OF THE CASE

On September 3, 1985, the Atomic Safety and Licensing Board ("ASLB") issued its Concluding Partial Initial Decision on Emergency Planning, Hydrogen Control and Diesel Generators, LBP-85-35, 22 NRC ___ ("PID"). That decision, subject to certain license conditions and the requisite findings by the Director of Nuclear Reactor Regulation, authorizes issuance of full power operating licenses for the Perry Nuclear Power Plant, Units 1 and 2. PID at 122-23.

Intervenors Sunflower Alliance, Inc., et al. ("Sunflower") and Ohio Citizens for Responsible Energy ("OCRE") both have appealed the PID, along with certain earlier interlocutory orders.1/ Pursuant to 10 CFR § 2.762(c), The Cleveland Electric Illuminating Company ("CEI"), Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company

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1/ Appellate Brief of Sunflower Alliance (October 29, 1985) ("Sunflower Brief"); Appellate Brief of Ohio Citizens for Responsible Energy (October 21, 1985) ("OCRE Brief").

(collectively "Applicants") submit this brief in opposition to Intervenors' appeals.2/

ARGUMENT

I. Reply to Sunflower

A. Sunflower Has Waived Its Contentions by Failing To Meet the Briefing Requirements of 10 CFR § 2.762

The Commission's Rules of Practice, at 10 CFR § 2.762(d)(1), require that:

> An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

A brief which does not substantially comply may be stricken. 10 CFR § 2.762(g).

Sunflower has failed to meet its briefing obligations under § 2.762(d)(1). "Proposition No. 1" of Sunflower's brief, which challenges the ASLB's rejection of a number of emergency planning contentions proposed by Sunflower, consists of nothing more than a verbatim restatement of the rejected contentions and their alleged bases.3/ Sunflower fails entirely to address the ASLB's reasons for rejecting the proposed contentions.4/ Sunflower's mere restatement of its rejected contentions is grounds for dismissal of its appeal. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387,

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2/ The relevant history of the proceeding has been set forth in the PID and need not be repeated here.

3/ Compare Sunflower Brief at 2-14 with Sunflower Alliance's Particularized Objections to Proposed Emergency Plans in Support of Issue No. 1 (August 20, 1984) ("Sunflower's Particularized Objections").

4/ See Memorandum and Order (Admissibility of Contentions on Emergency Plans and Motion to Dismiss) (January 10, 1985) ("January 10, 1985 Memorandum and Order"); see also Erratum (Emergency Planning Contention) (January 14, 1985).

395 (1983). Similarly, "Proposition No. 2" of Sunflower's argument, which challenges the ASLB's resolution of those emergency planning contentions which were admitted and went to hearing, restates (essentially verbatim) the proposed findings submitted by Sunflower to the ASLB.5/ This does not constitute an adequate brief under § 2.762(d)(1). Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 805-06 (1979).

Although Applicants must assume from Sunflower's refiling of the text of its earlier pleadings that Sunflower disagrees with the ASLB on every point, Applicants and the Appeal Board are nonetheless in the dark as to Sunflower's bases for its continued disagreements. Sunflower has failed to meet the requirements of the Commission's Rules of Practice and its appeal should be dismissed on this ground alone.6/ Nonetheless, Applicants address below Sunflower's arguments as if they constituted an adequate appeal.

B. The ASLB Correctly Rejected as Inadmissible Sunflower Proposed Contentions D, E, F, K, L, N, R, S, T, V, W, X, Y, AA, EE, FF, HH, II, KK and LL

Sunflower's Proposition No. 1 takes issue with the ASLB's rejection of certain of its proposed emergency planning contentions, and with what it alleges to be a "procedural irregularity" in the ASLB's treatment of the proposed contentions. Sunflower Brief at 1-2. The ASLB properly denied admission of these contentions. Moreover, any "irregularities" involved in the handling of the

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5/ Compare Sunflower's Brief at 15-26 with Intervenor Sunflower Alliance's Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision (Emergency Planning) (May 22, 1985) ("Sunflower's Proposed Findings").

6/ This is not the first time that Sunflower has failed to meet its briefing obligations. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 496 n.30 (1985).

contentions favored Sunflower, not Applicants. Applicants will address the "procedural" issue first.

1. Background

Because Sunflower's statement of the procedural history of the emergency planning contentions is substantially incomplete, it is necessary to provide a detailed account of that history.

Notwithstanding Applicants' argument that offsite emergency plans for the Perry plume exposure pathway emergency planning zone ("plume EPZ") were not yet available, the ASLB admitted a broad emergency planning contention, Issue No. 1, which stated:

> Applicants' emergency evacuation plans do not demonstrate that they provide reasonable assurance that adequate protective measures can and will be taken in the event of an emergency.7/

The ASLB clarified that it was admitting the contention "conditionally," and that it expected the parties "to further refine these issues" as discovery proceeded. LBP-81-35, 14 NRC at 686.

After offsite emergency plans had been available for some time, and following extensive discovery, Applicants moved for a Board order requiring particularization of the contention.8/ The ASLB granted Applicants' motion, directing Sunflower to:

7/ LBP-81-24, 14 NRC 175, 189 (1981), as modified by LBP-81-35, 14 NRC 682, 686 (1981). The ASLB later noted that "State and local" should be substituted for "Applicants'" in the wording of the contention. LBP-84-28, 20 NRC 129, 130 n.1 (1984).

8/ Pursuant to the ASLB's direction in LBP-81-35 that the parties attempt to refine the issue prior to hearing, Applicants had attempted to initiate discussions with Sunflower concerning particularization of Issue No. 1. When Sunflower failed to respond to Applicants' attempts, Applicants filed their Motion for Particularization of Issue No. 1 (June 26, 1984).

> specify in a written filing the specific inadequacies alleged to exist in the draft local and State emergency plans and... provide a reasoned basis for believing that the allegations concerning inadequacies are true.

LBP-84-28, 20 NRC at 132.

Sunflower responded to the ASLB's order by filing a number of "particularized objections" to the State, County and onsite emergency plans. Applicants then moved to dismiss Issue No. 1 based on the inadequacy of Sunflower's "objections." The ASLB denied Applicants' motion to dismiss Issue No. 1, and reworded and admitted as contentions 18 of Sunflower's "objections," while rejecting 20 others for failing to meet the basis and specificity requirements of 10 CFR § 2.714. See January 10, 1985 Memorandum and Order.9/ The ASLB did not apply the tests for late-filed contentions set forth in 10 CFR § 2.714(a)(1).10/

Sunflower's complaint on appeal seems to be that the ASLB should not have subjected its particularized contentions to any kind of review at all, because it already had an admitted emergency planning contention. According to Sunflower, it had "a substantive right to have these matters go to the finders of fact for determination on their merits." Sunflower Brief at 2. This clearly is

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9/ Applicants subsequently filed summary disposition motions which were granted for nine of the 18 admitted contentions and parts of two others. Memorandum and Order (Motions for Summary Disposition of Issues 1, 15 and 16) (April 9, 1985) ("April 9, 1985 Memorandum and Order"); Memorandum and Order (Motions) (March 13, 1985) ("March 13, 1985 Memorandum and Order"). Sunflower does not challenge the summary disposition of these contentions.

10/ See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1188 n.17 (1985) (error in licensing board's initial conditional admission of emergency planning contention academic because board properly applied the five-fact rs test; see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-8 -19, 17 NRC 1041, 1045-47 (1983) (contentions based on materials not available until a later point in the proceeding should be judged by balancing the factors applied to late-filed contentions).

incorrect. First, Sunflower's broad emergency planning contention should not have been admitted in the first place.11/ Second, Sunflower was on notice from the time that Issue No. 1 was admitted that it was admitted "conditionally," i.e., subject to some form of subsequent demonstration. LBP-81-35, 14 NRC at 686. Third, the ASLB found in requiring Sunflower to particularize its concerns that "the underlying factual situation has shifted so dramatically that the original basis for the contention has been undermined." LBP-84-28, 20 NRC at 131 (emphasis added). Thus, contrary to Sunflower's claim, Sunflower had no admitted contention; and even if it did, Sunflower had no "substantive right" to have its particularized contentions automatically admitted. Indeed, Applicants believe that none of Sunflower's contentions would have been admitted had the late-filed criteria been applied.

Aside from Sunflower's misplaced procedural argument, Sunflower offers no reason to question the ASLB's denial of the 20 contentions which were rejected as inadmissible by the ASLB. Those contentions were properly rejected for the reasons given below.

2. Proposed Contention D: "Protective Actions Decision-Making"

In this contention, Sunflower raised a number of subissues on sheltering as a protective action, relating in particular to ventilation control.12/ All of

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11/ See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983) (licensing boards are prohibited from conditionally accepting contentions which (as in the case of Issue No. 1) fail to meet the specificity requirements of 10 CFR § 2.714(b)).

12/ Sunflower also raised an issue concerning a purported failure in the emergency plans to adhere to EPA protective action guidelines. See Sunflower Brief at 3. The 1-5 rem protective action guide for whole body exposures cited by

(Continued Next Page)

these subissues were inadmissible because they were outside the scope of Issue No. 1. That issue was limited to "emergency evacuation plans." LBP-81-24, 14 NRC at 189, as modified by LBP-81-35, 14 NRC at 686.

Even if shelter and ventilation controls were within the scope of emergency evacuation planning, the specific issues raised by Sunflower lacked basis and were properly rejected. As pointed out by the ASLB, "There is no regulatory requirement for evaluating ventilation controls in EPZ shelters." January 10, 1985 Memorandum and Order at 8. See also Applicants' Motion to Dismiss at 13-17. Since Sunflower fails to address the ASLB's reasoning in its appeal brief, Sunflower provides no basis for questioning the ASLB's decision.

3. Proposed Contention E: "Authority Lacking for School Bus Usage"

Sunflower asserted that Ohio law forbids the use of school buses for off-site evacuation of individuals without access to private automobiles. Sunflower Brief at 3-6. The ASLB properly rejected the contention on the grounds that "[a]n NRC hearing is not the proper forum for resolving conflicts - if any exist - in state law." January 10, 1985 Memorandum and Order at 8. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977); see also Applicants' Motion to Dismiss at 17-18. Again, Sunflower offers no basis for questioning the ASLB's ruling.

(Continued)

Sunflower is not a dose limit, but is the projected dose at which protective action is considered to be warranted. The off-site plans for Perry follow this guideline. See Applicants' Motion to Dismiss Sunflower Alliance's Particularized Objections to Proposed Emergency Plans in Support of Issue No. 1 (September 20, 1984) ("Applicants' Motion to Dismiss"), at 15-16.

4. Proposed Contention F: "Insufficient Proofs of Volunteer Aid"

Sunflower claims that the "state and local plans are deficient because they fail to fix in unequivocal terms the availability of volunteers...." Sunflower Brief at 6. Sunflower selectively quotes from NUREG-0654[13]/ to give the misleading impression that volunteer emergency workers must be identified in the plan and letters of agreement obtained from them. However, there is no regulatory requirement (in NUREG-0654 or elsewhere) that emergency workers be named in plans or sign letters of agreement. See January 10, 1985 Memorandum and Order at 8; Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 80, 111-12 (1984); see also Applicants' Motion to Dismiss at 18-19.

The only hint of a basis for Sunflower's claim of the unavailability of volunteers is its citation to a 1983 "Status Report" by the "Perry Legal Defense Fund." Sunflower Brief at 6-7. This report on its face was out-of-date at the time Sunflower submitted the proposed contention.[14]/ Furthermore, the "Status Report" was based on such limited information that it could have been an adequate basis for admitting the contention. See Applicants' Motion to Dismiss at 19. The contention was properly rejected.

13/ NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (Rev. 1, November 1980).

14/ The report was prepared before agency procedures had been finalized and prior to the training of any significant number of offsite emergency workers. See Applicants' Motion to Dismiss at 19.

5. Proposed Contention K: "Implementation of Staff Recommendations on EALs"

Sunflower notes that the NRC Staff in a January 11, 1984 letter to CEI provided comments on the Emergency Action Level ("EAL") statements in Applicants' on-site plan. Sunflower then "incorporates each of the Staff's criticisms of the EALs and realleges them...by reference as particularized objections." Sunflower Brief at 7. In rejecting the proposed contention, the ASLB stated:

> An incorporation by reference is not adequate where the Board does not possess any of the particulars of the referenced document or report. The Board has no way of assuring itself that the proposed issues are proper for adjudication in the proceedings, which is another purpose for requiring contentions to be specified.

January 10, 1985 Memorandum and Order at 8. See id. at 3 & n.9 (citing Alabama Power Co. (Barton Nuclear Plant), LBP-75-32, 1 NRC 612, 615 (1975)); see also Applicants' Motion to Dismiss at 29.

At any rate, Sunflower's Proposed Contention K is moot. Condition 1 of the license conditions imposed by the ASLB15/ requires that "Applicants' EAL's conform to the initiating guidance of NUREG-0654, Appendix I." PID at 123. This condition was imposed to assure that all Staff concerns with the adequacy of the EALs are resolved. See id. at 8. Sunflower neither acknowledges this condition nor explains why it is inadequate. Proposed Contention K thus presents no litigable issue.

15/ This license condition was based on Sunflower's admitted Contention J. See PID at 8.

6. Proposed Contention L: "EPZ Radius"

Proposed Contention L "demand[ed]" that the radius of the plume exposure pathway EPZ be increased to "15 miles or more." Sunflower Brief at 8. The ASLB properly rejected the contention as "a challenge to NRC regulations which call for a 10-mile Emergency Planning Zone...." January 10, 1985 Memorandum and Order at 8. See also id. at 3 & n.8; Applicants' Motion to Dismiss at 29-30. Sunflower fails to make the showing required by 10 CFR § 2.758 to support a challenge to the regulations.

7. Proposed Contention N: "Ingestion Pathway Monitoring"

This contention charged that the State lacks equipment and personnel to handle radiation monitoring and sampling in the ingestion pathway. Sunflower Brief at 8-9. The ASLB correctly denied admission of the contention because "[t]he ingestion pathway is outside the scope of Issue 1." January 10, 1985 Memorandum and Order at 8. See also Applicants' Motion to Dismiss at 33. As discussed supra, Issue No. 1 was limited to emergency evacuation plans.

8. Proposed Contention R: "Insufficient Background Data"

Sunflower claims that "[b]ackground radiation readings must be taken before PNPP becomes operational for the entire 50-mile EPZ." Sunflower Brief at 9. As noted supra, the ingestion pathway (50-mile) EPZ is outside the scope of Issue No. 1.

Moreover, although Sunflower claims that this monitoring is required "to conform with NUREG-0654 at 67," Sunflower Brief at 9, no such recommendation appears there or anywhere else. As stated by the ASLB:

> There is no regulatory or safety guidance that requires for emergency planning purposes the gathering of pre-operational background radiation levels within a 50-mile radius of a nuclear site.

January 10, 1985 Memorandum and Order at 8. The contention was therefore properly excluded.

9. Proposed Contention S: "Unavailable Extension Agent"

Sunflower asserted that the Ashtabula County Cooperative Extension Service has not received the equipment or training to advise on food and livestock protection. Sunflower Brief at 9-10. However, the Cooperative Extension Service is responsible only for ingestion pathway concerns. See Applicants' Motion to Dismiss at 40-41. As discussed supra, ingestion pathway issues are beyond the scope of Issue No. 1; and the ASLB properly rejected the contention for that reason. See January 10, 1985 Memorandum and Order at 8.16/

10. Proposed Contention T: "Shelter and Loading Buses"

This contention appeared to attack the concept of shelter as a protective action. Sunflower Brief at 10 ("Sunflower objects to mere shelter precautions ..."). This argument is outside the scope of Issue No. 1. See supra at § B.2.

Sunflower also questioned the effectiveness of a shelter recommendation followed by a decision to evacuate, arguing that "the plans effectively could cause school children to evacuate outside[,] under or into a plume." Sunflower Brief at 10. However, Sunflower presents no basis for this assertion. See Applicants' Motion to Dismiss at 42. The ASLB correctly rejected the contention for failing to "allege a specific failure in meeting NRC regulations and guidance." January 10, 1985 Memorandum and Order at 8.

16/ Apart from this contention being outside the scope of Issue No. 1, none of the specific points raised in support of the contention has any basis. See Applicants' Motion to Dismiss at 41-42.

11. Proposed Contention V: "Monitoring Contaminated Consumables"

This proposed contention stated that the "role of the State and county public health departments in monitoring the agricultural food chain" is given "little more than lip service." Sunflower Brief at 10-11. For the reasons set forth supra, this ingestion pathway allegation falls outside the scope of Issue No. 1 and was properly rejected. See January 10, 1985 Memorandum and Order at 9; see also Applicants' Motion to Dismiss at 44.

12. Proposed Contention W: "Phantom Reimbursements"

Sunflower complained that the State emergency evacuation plan does not resolve whether there will be reimbursement to the State after an accident, and where any such reimbursement would come from. See Sunflower Brief at 11-12. However, Sunflower cited no requirement that the State plan identify who would reimburse the State. The ASLB properly rejected the contention. See January 10, 1985 Memorandum and Order at 9; see also Applicants' Motion to Dismiss at 44-45.

13. Proposed Contention X: "Source Term"

This proposed contention asserted that the NRC's on-going reevaluation of "source terms" must be completed before the emergency plans can be approved. Sunflower Brief at 12. If the source term reevaluation shows "greater radiation dangers to the populace around Perry," Sunflower Brief at 12, the appropriate step will be to amend NRC emergency planning rules. The ASLB correctly held that the contention was an impermissible challenge to NRC regulations. See January 10, 1985 Memorandum and Order at 9; see also id. at 3 & n.8.

14. Proposed Contention Y: "Incoherent Ambulance Usage"

This proposed contention noted that Lake County may call upon ambulances from Ashtabula and Geauga Counties to evacuate people who cannot be moved by bus. Sunflower alleged that this "underscores the possibility of conflicting responses at the county level." Sunflower Brief at 12. Sunflower provided no basis, however, to indicate that there are insufficient ambulances, or to question the three counties' ability to coordinate their ambulance requirements. See Applicants' Motion to Dismiss at 46. The ASLB correctly rejected the contention as "vague" and failing to "meet the test of stating any basis with specific particularity." January 10, 1985 Memorandum and Order at 9.

15. Proposed Contention AA: "Sunflower's Status Report"

In this contention, Sunflower "incorporate[d] by reference and reallege[d] ...all objections to state and local emergency plans which appear in the 'Status Report: Planning for an Accident at the Perry Nuclear Plant,' Perry Legal Defense Fund (1983)." Sunflower Brief at 12. The ASLB's rejection of the contention as inadmissible was correct for the reasons discussed supra, at § B.5. See January 10, 1985 Memorandum and Order at 9; see also id. at 3 n.9; Applicants' Motion to Dismiss at 47.

16. Proposed Contention EE: "Reception Center Locations"

Sunflower argued that reception centers should be located more than 20 miles from Perry. Sunflower Brief at 12-13. As the ASLB stated in rejecting the contention, "There is no regulatory basis for requiring the location of reception centers beyond 20 miles of a nuclear facility." January 10, 1985 Memorandum and Order at 9. The contention also could have been construed as a disguised attack on the 10 mile plume EPZ limit, and was rejectable for that reason as well. See Applicants' Motion to Dismiss at 50.

17. Proposed Contention FF: "Remote Control Sirens"

This contention appeared to allege that CEI must activate the sirens since it is required by NUREG-0654 to install and maintain them and therefore must hold the FCC license for the radio-activation system. The ASLB correctly stated that "[t]here is no regulatory basis for requiring an applicant to be a Federal Communications Commission licensee...." January 10, 1985 Memorandum and Order at 9; see also Applicants' Motion to Dismiss at 51.

18. Proposed Contention HH: "Evacuees Not Going to Centers"

This contention asserted that the plans do not address the identification and monitoring of evacuees who do not report to reception centers. Sunflower alleged, without more, that "[h]ad CEI bothered to analyze the reactions of evacuees in comparable evacuation scenarios, it might find that a majority, or at least a significant minority, of people go to friends' and relatives' homes during a crisis, not to evacuation centers." Sunflower Brief at 13 (emphasis added). The contention was properly rejected because it was "speculative" and provided "no basis with particularity." January 10, 1985 Memorandum and Order at 9. See also Applicants' Motion to Dismiss at 53 (evacuees not reporting to reception centers would be told to do so, if necessary, via the Emergency Broadcast System and the news media).

19. Proposed Contention II: "Evacuation Center Resources"

Sunflower's Proposed Contention II stated that "[o]ther than identifying the [reception] centers, data on available resources there is nil." Sunflower Brief at 13. Sunflower complained that the evacuation plans do not cover the availability of such items as food, drugs and beds, that no "documentation is provided of the potential length of stays," and that no mention is made of "psychological services" for evacuees. Id.

As a legal argument on the level of detail necessary in the plans, Sunflower's claim is baseless.17/ As the ASLB recognized, "Implementing details are not required to be reviewed in operating license proceedings." January 10, 1985 Memorandum and Order at 9 (footnote omitted) (citing Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107-08 (1983)). See also Applicants' Motion to Dismiss at 54. Sunflower's other claims - that the plans must include documentation of the potential lengths of stays, and that the plans should discuss psychological services - were properly rejected as not alleging "regulatory deficiencies." January 10, 1985 Memorandum and Order at 9. See also Applicants' Motion to Dismiss at 54-55.

20. Proposed Contention KK: "Returning to the EPZ"

This proposed contention alleged that "[o]ther than general references to cordoning off all or parts of the EPZ, the plans do not tell how persons re-entering the EPZ will be handled if an accident is in progress." Sunflower Brief at 14. Sunflower stated without support that "[t]he issues [sic] of securing the cordoned area while allowing access to bona fide residents is difficult to manage." Id. No explanation or basis is provided as to why this is difficult. Such an issue is also beyond the scope of the contention, which, as discussed supra, is limited to emergency evacuation planning. The contention was properly rejected. See January 10, 1985 Memorandum and Order at 9.

17/ Sunflower did not allege that equipment and supplies will be unavailable.

21. Proposed Contention LL: "The Plans Will Not Work"

This generalized contention asserted that the evacuation plans were "unworkable" because there had been "no full-scale drill of any sort" to test the plans. Sunflower Brief at 14. This contention suffered from the fatal defect that it was no more specific than the broad Issue No. 1 which the ASLB ordered particularized. Also, as the ASLB pointed out in its January 10, 1985 Memorandum and Order, at 9, "[e]xercises and drills are not required prior to Board hearings on emergency evacuation plans."

In any case, the contention has long been overtaken by events. A full-scale emergency preparedness exercise was held for Perry on November 28, 1984. See FEMA Ex. 2, ff. Tr. 3111 (FEMA Exercise Report). Sunflower has provided no grounds for questioning the adequacy of the State and local plans based on the exercise.

C. The ASLB Correctly Decided Sunflower Contentions A, J, M, P, Q, U, Z and BB

As discussed supra, Sunflower's brief on these contentions is essentially a word-for-word repetition of its proposed findings. Sunflower fails to address the reasons given by the ASLB in its PID for dismissing the contentions. See PID at 3-22. Although Applicants do not believe Sunflower has met its briefing obligations, see § I.A above, Applicants address Sunflower's arguments below.18/

18/ Applicants note that Sunflower is not appealing the ASLB's resolution of Contention CC. See PID at 21. Sunflower conducted no cross-examination and submitted no proposed findings on this contention. See id.

1. Contention A: State and Local Comments on ETE Study

Contention A concerned the issue of obtaining comments from State and local officials on the evacuation time estimate study ("ETE") prepared for the Perry plume EPZ. See PID at 3-4.19/

Sunflower's substantive arguments on Contention A are wholly deficient as well. First, Sunflower misstates the evidence. Sunflower claims that Applicants failed to follow the regulatory guidance of NUREG-0654 by seeking "concurrences, rather than, and in lieu of, written comments, from local officials." Sunflower Brief at 16 (original emphasis). On the contrary, the evidence clearly established that written comments were obtained from county (and State) officials, and that those comments, reflected in the February 1985 revision to the ETE, were submitted to the NRC along with the revised ETE.20/

Second, Sunflower misunderstands the NUREG-0654 regulatory guidance applicable to ETEs. For instance, Sunflower attempts to make much of the fact that the ETE authors met for the first time with the county engineers approximately three weeks before the evidentiary hearing, and then only as a result of Sunflower's "litigative insistences." Sunflower Brief at 15. However, all witnesses agreed, and the ASLB concurred, that participation by county engineers is not necessary to meet NUREG-0654 guidelines. Perrotti at 3; Tr. 2799-2804,

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19/ The portion of Contention A concerning consideration of adverse weather conditions in the ETE was dismissed by summary disposition. See April 9, 1985 Memorandum and Order at 3; March 13, 1985 Memorandum and Order at 1. Sunflower has not appealed this dismissal.

20/ Applicants' Direct Testimony of Scott T. McCandless on Issue No. 1 - Contention A, ff. Tr. 2791, at 3; Testimony of Donald J. Perrotti Regarding Emergency Plan Issues, ff. Tr. 3111 ("Perrotti"), at 2; Tr. 2823-24 (McCandless), 3112-13 (Shapiro). See PID at 4.

2811-16, 2830 (McCandless), 3122, 3127 (Shapiro), 3141-43 (Perrotti). See PID at 5-6. At any rate, the ETE authors did meet with the county engineers and obtained their concurrence. Tr. 2795-97 (McCandless). See PID at 5-6.

Sunflower also points out that, at the time of the hearing, written concurrences on the revised ETE had not been received from certain state and local officials. Sunflower Brief at 15-16. This argument is irrelevant. The contention deals with obtaining comments on the ETE from State and local officials. In any case, NUREG-0654 says nothing about obtaining concurrences, let alone written concurrences, from State and local officials with respect to changes made to the ETE as a result of their comments. See Tr. 3146 (Shapiro, Perrotti). Applicants in fact obtained verbal concurrence from State and local officials, including the county engineers. Tr. 2795-97, 2809 (McCandless), 2896-97 (Cole). That is more than Applicants were required to do. Sunflower's criticisms concerning the ETE are without basis.

2. Contention J: Incomplete Emergency Action Levels

This contention was based on the incomplete status of 13 out of 200 EALs in Revision 3 of the Perry onsite emergency plan.21/ The testimony established that all of the EALs, including the 13 that were incomplete in Revision 3 of the onsite plan, were now complete and included in Revision 4. Hulbert (Contention J) at 2-3; Perrotti at 3-4. See PID at 7. The ASLB found that the EALs were complete. PID at 8.

21/ Aplicants' Direct Testimony of Daniel D. Hulbert on Issue No. 1 - Contention J, ff. Tr. 2965 ("Hulbert (Contention J)"), at 1-2. See PID at 6. EALs describe specific plant conditions at which one of the four Emergency Classifications is to be declared. Hulbert (Contention J) at 2. See PID at 6.

Sunflower does not question the completeness of Applicants' EALs. See Sunflower Brief at 16. Indeed, Sunflower identifies no errors which could be considered the subject of an appeal. See 10 CFR § 2.762(d)(1). Sunflower offers only the gratuitous comment that the "late provision of this data has helped [Applicants] successfully to slick by the operating license stage, and have orchestrated the startup impectus [sic], such as to forestall any serious regulatory questioning of the new data." Sunflower Brief at 16. However, Sunflower fails to show that it was prejudiced in any way by Applicants' inclusion of the "missing" EAL data in Revision 4 to the onsite plan. See PID at 7.

3. Contention M: Independent Radiation Monitoring Systems

Contention M stated that independent radiation monitoring systems should be installed within the plume EPZ. See PID at 9. Sunflower's argument was that each of the counties within the plume EPZ should have fixed radiation monitors, meteorological and telemetering equipment. See Sunflower Brief at 16.

Sunflower's proposed findings questioned both the effectiveness of, and the cost-benefit for, the mobile monitoring teams on which the State of Ohio, the counties and Applicants rely, versus the fixed monitoring systems which Sunflower would prefer. However, the ASLB found Sunflower's arguments unpersuasive, and concluded that "an effective independent monitoring system, which meets all regulatory guidance and standards, has been programmed for the Perry facility." PID at 12.

Once again, Sunflower ignores the PID in offering up its proposed findings to the Appeal Board. In addition, Sunflower consistently misstates the record, ignores evidence which does not support Sunflower's views, and makes irrelevant arguments. For example, Sunflower argues that CEI monitoring teams would not be

deployed until 1.5 to 2.0 hours after an accident, although a major release of radioactivity could occur within 45 minutes. Sunflower Brief at 17, 19. However, the record cited by Sunflower for this proposition discusses the response time of the Lake County monitoring teams (compare Tr. 2935 with Sunflower Brief at 19), not the CEI monitoring teams, which would be in place within 30 minutes. Applicants' Direct Testimony of Richard Bowers on Issue No. 1 - Contention M, ff. Tr. 2914 ("Bowers"), at 5-6; Tr. 2936-37 (Bowers).

Sunflower also claims that cross-examination of Applicants' witness Cole revealed, contrary to Applicants' direct testimony, that the State monitoring teams would be gathering data for use after an accident at Perry, rather than during the emergency. Sunflower Brief at 20. Sunflower ignores the evidence, which shows that the State teams obtain gross gamma readings which are used to plot the radioactive plume, identify plume parameters, and make protective action recommendations during an emergency. Applicants' Direct Testimony of Kenneth B. Cole on Issue No. 1 - Contention M, ff. Tr. 2835 ("Cole"), at 2, 4; Tr. 2890-91 (Cole). Thus, Sunflower is incorrect in suggesting that the State teams do not provide an independent source of radiation monitoring data during an emergency at Perry.22/ See also PID at 11-12.

Sunflower also argues that the "team approach [does] not provide for monitoring in Lake Erie," and that "monitoring teams would be largely confined to sampling along road rights-of-way." Sunflower Brief at 17. See also id. at 19. However, the record shows that there is an excellent network of roads in the

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22/ Sunflower also completely ignores the independent monitoring during an emergency by the Department of Energy, USEPA, NRC and Lake County mobile teams. Bowers at 5; Cole at 5. See Tr. 2842-44 (Cole).

vicinity of Perry which allows effective tracking of the plume by mobile teams in land-based vehicles. Tr. 2932 (Bowers). Releases over Lake Erie would be tracked by Applicants' computerized dose projection system, and could be detected by mobile teams along the shore if the plume returned to land. Tr. 2958-59 (Bowers). In addition, DOE helicopters are capable of conducting offshore monitoring. Tr. 2901 (Cole). See PID at 11.

Sunflower further argues that "[n]one of the drills to date of the monitoring teams have taken place under any more adverse conditions than darkness and rain." Sunflower Brief at 19-20. However, the record shows that the CEI teams are equipped with four-wheel drive vehicles and that snow conditions would therefore not be likely to be a serious problem. Tr. 2945 (Bowers).23/

With respect to cost-effectiveness, Sunflower criticizes the decision not to use fixed monitors on the grounds that Applicants have not comparatively assessed the costs of the existing systems with the cost of a fixed system. Sunflower Brief at 17, 19. This argument is irrelevant, since a system of fixed monitors would not replace the existing systems which will be used at Perry. See Tr. 2958 (Bowers).24/

23/ Sunflower also alludes to alleged health effects of "unreported releases of radiation" from Three Mile Island and "other plants." Sunflower Brief at 20. Sunflower here relies solely on the direct testimony of its witness, Dr. Ernest J. Sternglass. The ASLB concluded that the credibility of Dr. Sternglass on this and other contentions had been "substantially impeached" on cross-examination. PID at 10. Sunflower on appeal does not dispute this conclusion.

24/ Sunflower mischaracterizes witness Bowers' testimony as stating that a combination of mobile monitoring teams and fixed systems as envisioned by Sunflower "would not be as effective as the exclusive use of monitoring teams." Sunflower Brief at 17. Mr. Bowers actually testified that such a combined system would not be any more effective than mobile monitoring by itself. Tr. 2928 (Bowers).

Sunflower also claims that Applicants' projected costs for a fixed monitoring system "did not even mathematically add up." Sunflower Brief at 17. Applicants' addition was correct. Sunflower omitted the $9000 cost for each of the 100 radiation detectors. See Tr. 2917 (Bowers).

Sunflower fails to support its claim that a system of fixed monitors is either preferable or legally required. Contention M was correctly decided by the ASLB.

4. Contention P: Hospitals

Sunflower's Contention P concerned the capability of hospital medical services to handle contaminated injured or exposed persons if an accident were to occur at Perry. See PID at 12.25/

The Commission's emergency planning regulations, at 10 CFR § 50.47(b)(12), require that "[a]rrangements are made for medical services for contaminated injured individuals."26/ The U.S. Court of Appeals has ruled that "arrangements" for medical services for contaminated injured and exposed members of the general public require more than "a simple list of treatment facilities already in place...."27/

25/ Although the wording of the contention itself did not explicitly limit the contention to hospitals, Sunflower's objection which formed the basis for this contention was so limited. See Sunflower's Particularized Objections at 19. A contention cannot extend beyond the intervenor's self-imposed limitations. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1115 (1982).

26/ The Commission has interpreted § 50.47(b)(12) to include radiation exposed as well as contaminated injured persons. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 530 (1983).

27/ GUARD v. NRC, 753 F.2d 1144, 1146 (D.C. Cir. 1985).

Sunflower contends that Applicants have failed to detail satisfactory "arrangements" consistent with the GUARD decision.28/ According to Sunflower, GUARD mandates that Applicants "detail medical arrangements fully, as to facilities, equipment, personnel, etc., for each facility which would be included in emergency preparations." Sunflower Brief at 21. Sunflower alleges that Applicants "put forth no substantive evidence of arrangements for provision of medical services to public persons who would be radiological victims beyond a superficial discussion of persons trained at area hospitals." Id. at 23.

There is no requirement in GUARD for the type of detail called for by Sunflower. In any case, the record contains considerable detail concerning arrangements for medical services at the four designated local hospitals, and the medical resources (including facilities, equipment and trained personnel) which those hospitals possess. See, e.g., PID at 13-14.29/ In addition, evidence was

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28/ Sunflower also continues to insist, in reiterating its proposed findings, that the number of casualties requiring emergency medical care could be extremely high. See Sunflower Brief at 21-22, 23. The overwhelming record evidence is, and the ASLB agreed, that even a severe accident at Perry would produce few if any contaminated injured or radiation exposed persons requiring emergency medical care. Applicants' Direct Testimony of Roger E. Linnemann on Issue No. 1 - Contention P, ff. Tr. 2980 ("Linnemann"), at 3-4, 6; Rebuttal Testimony on NUREG/CR-2239, ff. Tr. 3158 ("Hankins"), at 7-9; Tr. 2984-87, 2991, 2994, 3033-34 (Linnemann), 3173 (Hankins). See PID at 13. These cases could readily be handled by the four local hospitals designated to handle contaminated injured or exposed members of the general public. See, e.g., PID at 13-14. The worst case estimates cited by Sunflower are inapplicable to Perry. Hankins at 2-8; Tr. 3176 (Hankins). See PID at 13.

29/ Sunflower asserts that Applicants did not adequately deal with the case of persons who are internally contaminated with radiation. Sunflower Brief at 22. However, internal contamination is not the critical factor in radiation exposure; thus, the need for treatment of internal contamination is unlikely. Tr. 2991-93, 2999-3001 (Linnemann). Moreover, radiation exposure as a general matter is unlikely to require hospital emergency room care. Tr. 3031-33 (Linnemann).

submitted describing generally the capabilities and resources of 26 backup hospitals which could be used if needed. Linnemann at 6-7; Testimony of Robert O. Shapiro, Federal Emergency Management Agency Regarding Emergency Planning Contentions A, M, P, Q, U, Z, BB, ff. Tr. 3111 ("Shapiro"), at 6-7; Tr. 3034 (Linnemann). See PID at 14.30/ The ASLB concurred that "the training, personnel and equipment at the designated hospitals within the EPZ as well as the medical resources available outside of the EPZ are adequate to comply with the Commission's regulations and standards...." PID at 15. None of Sunflower's arguments is sufficient to question that conclusion. The ASLB correctly decided Contention P.31/

30/ Sunflower erroneously characterizes arrangements with these backup hospitals as "ad hoc." Sunflower Brief at 22. Sunflower fails to address the existing written hospital disaster plans which provide for emergency patient overflow at one hospital to be handled by referral hospitals. See Tr. 2998-99, 3041 (Linnemann). These plans constitute adequate pre-arrangements for purposes of GUARD. See PID at 82 (Finding 37).

31/ As noted in the PID at 15, the Commission has recently issued interim guidance to licensing boards pending the Commission's response to the Court of Appeals' remand in GUARD. 50 Fed. Reg. 20892 (May 21, 1985). The Commission's Statement of Policy directs licensing boards to consider an exception from Section 50.47(b)(12) under 10 CFR § 50.47(c)(1) for applicants who meet the pre-GUARD standard for medical services and commit to full compliance with the Commission's forthcoming response to the GUARD remand. 50 Fed. Reg. at 20893. Because the ASLB found that Applicants have fully complied with 10 CFR § 50.47(b)(12) as interpreted by GUARD, the ASLB apparently did not believe it was necessary to pursue the course of action made available by the Commission. However, the ASLB required Applicants to commit to comply with any additional requirements that may be forthcoming in the Commission's response to the GUARD remand. PID at 15, 123 (Condition 4). Applicants have fulfilled that condition. See id. at 123.

5. Contention Q: Letters of Agreement for School Buses

The portion of Contention Q which remained following summary disposition32/ concerned formal letters of agreement with school districts supplying buses in the event of an emergency evacuation at Perry. See PID at 15-16. The evidence, unchallenged by Sunflower, was that the necessary letters were under development and would be obtained in a timely fashion. Applicants' Direct Testimony of John Baer on Issue No. 1 - Contention Q, ff. Tr. 3047, at 1-2; Shapiro at 9; Tr. 3049-51 (Baer). See PID at 16. The ASLB concurred that the contention was without basis, but imposed a condition that the letters must be obtained prior to operating license issuance. PID at 16, 123 (Condition 2).

Sunflower declines to brief its purported appeal of this contention, but simply notes that "Revision 5 of the PNPP Emergency Plan does not contain letters of agreement as of September, 1985." Sunflower Brief at 24. Sunflower fails to explain the significance of this observation, given the fact that the letters are not required prior to operation of Perry above 5% of rated power. See 10 CFR § 50.47(d); Memorandum and Order (Motion for Clarification of Initial Decision) (October 4, 1985), at 2.33/ Sunflower's appeal of Contention Q is without merit and should be rejected.

32/ See April 9, 1985 Memorandum and Order at 8; March 13, 1985 Memorandum and Order at 1.

33/ Neither does Sunflower provide any reason to believe that the letters, when obtained, would be published in Applicants' onsite plan.

6. Contention U: Handling Contaminated Property at Reception Centers

Contention U claimed that reception centers do not have the means or facilities to handle contaminated property. The ASLB found, contrary to the contention, "that the reception centers around PNPP will be adequately supplied with equipment and supplies for implementing monitoring and decontamination procedures in handling property and that trained fire personnel will be available to carry out this assignment." PID at 18.

Sunflower on appeal simply restates its proposed findings. First, Sunflower states that emergency kits were not present at reception centers at the time of the hearing. Sunflower Brief at 24.34/ There is no regulatory requirement that such kits be in place at the time of the hearing. Wolf Creek, LBP-84-26, 20 NRC at 61-62 & n.4. In any case, the ASLB imposed a license condition that emergency kits be in place prior to operation above 5% power. PID at 123 (Condition 3). See Memorandum and Order (Motion for Clarification of Initial Decision), supra, at 2.

Sunflower also claims, based on a provision in the Ohio Disaster Services Agency's ("ODSA's") Radiological Training Manual (see Sunflower Ex. 12), that private individuals will be personally responsible for decontaminating their own vehicles and equipment. Sunflower Brief at 24. The provision cited by Sunflower does not apply to nuclear power plant accidents. Tr. 3201-03 (Wills). See PID at 17-18. Decontamination of privately owned vehicles at reception centers

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34/ Sunflower incorrectly assumes that the emergency kits will be stored at the reception centers themselves. The equipment will be kept at the fire departments responsible for monitoring and decontamination activities at reception centers. Tr. 3060 (Baer). See Memorandum and Order (Motion for Clarification of Initial Decision), supra, at 2.

will be handled by fire department personnel. Applicants' Direct Testimony of John Baer on Issue No. 1 - Contention U, ff. Tr. 3055 ("Baer (Contention U)"), at 1-2. See PID at 17.

Sunflower further complains that vehicle decontamination procedures do not provide for trapping of radioactive water runoff. Rather, the areas where decontamination takes place are quarantined. Sunflower Brief at 24. The quarantine procedure is a commonly accepted method that would pose no threat to the public health or safety, and that there is no need to conduct special studies of possible leaching effects. Tr. 3068 (Baer). See PID at 18 (Finding 58).

Finally, Sunflower alleges that although the Ohio EPA is designated to dispose of contaminated personal property collected at reception centers, Ohio law does not give that agency authority to handle nuclear waste. Sunflower Brief at 24. Under Ohio's radiological emergency response plan, the Ohio EPA arranges for disposal of contaminated personal property with a licensed commercial radioactive waste disposal firm. Baer (Contention U) at 2. See Tr. 3056-57 (Baer). There was no need for the ASLB to consider whether the State Plan is in conflict with State law on this point, since an NRC licensing proceeding is not the appropriate forum for resolving such alleged conflicts. See supra at § B.3.35/

35/ In any event, Sunflower fails to establish such a conflict. Sunflower cites Sections 3734.01 et seq. of the Ohio Revised Code. Although § 3734.01(J)(2) provides that Ohio does not have regulatory authority over substances subject to the Atomic Energy Act, nothing in the statute prohibits the Ohio EPA from making the arrangements specified in the State Plan. Arranging for disposal of the contaminated material with a licensed firm is not exercising regulatory authority.

7. Contention Z: Bus Driver Protection

Sunflower's Contention Z asserted that the emergency evacuation plans do not provide decontamination protection for bus drivers. Sunflower contended that bus drivers should also be provided with protective gear such as respirators and goggles. See PID at 18.

The ASLB correctly rejected Sunflower's arguments. See id. at 17-18. Sunflower first argues that the testimony of Applicants' witness Baer was inconsistent because he stated that there is no regulatory requirement or guidance calling for bus drivers to be supplied with respirators, yet he acknowledged that an EPA Manual recommends respiratory protection for emergency workers. Sunflower Brief at 25. However, Sunflower ignores Mr. Baer's testimony that the EPA Manual's recommendation does not apply to bus drivers. Tr. 3071-74, 3076 (Baer). For instance, bus drivers will not be required to remain in evacuation areas to perform life-saving activities or time-consuming loading of elderly or handicapped persons into special vehicles. Tr. 3073-74, 3084-86 (Baer). See Applicants' Direct Testimony of John Baer on Issue No. 1 - Contention Z, ff. Tr. 3069 ("Baer (Contention Z)"), at 3-4; see also PID at 19.

Sunflower also claims that Applicants have failed to consider the possibility of prolonged radiation exposure to bus drivers as a result of repeated trips into the plume EPZ. Sunflower Brief at 25. There is no record support for this claim.36/ There are sufficient buses to evacuate everyone needing transportation in a single trip. Tr. 3082 (Baer). In any event, bus drivers would not be subject to radiation exposures beyond the protective action guides established for the general population. Tr. 3074 (Baer).

36/ Tr. 3074, cited by Sunflower, contains no discussion of repeated trips into the plume EPZ for bus drivers.

Sunflower also states that the dosimetry supplied to bus drivers is not capable of recording cumulative radiation exposures. Sunflower Brief at 25. Sunflower's citation to the record, at Tr. 3078, does not support this claim. On the contrary, the record indicates that the self-reading dosimeters supplied to bus drivers do measure cumulative exposure, or radiation dose, as opposed to dose rate. See Baer (Contention Z) at 3; Tr. 3077-78 (Baer).37/

Finally, Sunflower argues that "[a]s of the time of hearing, training to bus drivers on the use of dosimeters had been given to only one-half of their number." Sunflower Brief at 25. There is no regulatory requirement that training of personnel must be complete at the time of the hearing. Wolf Creek, LBP-84-26, 20 NRC at 61-62 & n.4. Sunflower provides no reason to believe that the training of bus drivers will not proceed in a timely fashion.

8. Contention BB: FEMA Interim Report

Contention BB asserted that the offsite emergency plans for Perry are inadequate due to the planning deficiencies set forth in FEMA's Interim Report on Offsite Radiological Emergency Planning for the Perry Nuclear Power Station (1984) ("FEMA Interim Report").38/ See PID at 19. Sunflower alleges, as it did in its proposed findings, that 58 of the 145 planning deficiencies set forth in the FEMA Interim Report were "still open and not corrected as of the time of hearing." Sunflower Brief at 26.

37/ In addition, each bus driver will be provided with a thermoluminescent dosimeter ("TLD"), which is a permanent record device. Tr. 3076 (Baer). See Baer (Contention Z) at 2. TLDs also measure cumulative exposure.

38/ FEMA Ex. 1, ff. Tr. 3111.

In fact, the 58 deficiencies cited by Sunflower were those originally identified by FEMA in the Interim Report itself as being uncorrected. See Applicants' Direct Testimony of John Baer on Issue No. 1 - Contention BB, ff. Tr. 3088 ("Baer (Contention BB)"), at 2; Tr. 3097 (Baer); see also PID at 20. Most had been corrected by the time of the hearing by subsequent revisions to the county plans. See Baer (Contention BB) at 2-3; Tr. 3097 (Baer); see also PID at 20. The evidence established that the county plans are adequate in spite of the few remaining uncorrected deficiencies. See Shapiro at 13. The ASLB correctly concluded that there was no reason to believe that the few items still being addressed at the time of hearing would not be resolved in a timely manner.39/ Sunflower provides no grounds for questioning the ASLB's conclusion.

II. Reply to OCRE

A. The ASLB Correctly Decided OCRE Issue Nos. 8 and 16

1. Issue No. 8: Hydrogen Control

a. Introduction

Issue No. 8 has a long and somewhat complicated history. Its background is recounted in the ASLB's Memorandum and Order (Motions on Hydrogen Control Contention) (March 14, 1985) at 1-3. See PID at 22-23. As reworded and admitted by the ASLB, the contention challenges the ability of Applicants' distributed igniter system to comply with the hydrogen control requirements of 10 CFR § 50.44(c)(3)(iv)-(vii), 50 Fed. Reg. 3498 (1985) (the "hydrogen rule").

39/ Those items primarily concerned Applicants' emergency information material. Baer (Contention BB) at 3. See PID at 20. The NRC reviewed the emergency information brochure for Perry and determined that it complies with the applicable regulatory guidance. Tr. 3145-46 (Perrotti). See PID at 20.

After a detailed review of the extensive record on this issue, the ASLB concluded that Applicants' hydrogen igniter system complies with the hydrogen rule, and that Applicants have carried their burden of proof on Issue No. 8. See PID at 56-59. OCRE now appeals the PID, arguing that the ASLB misinterpreted and misapplied the hydrogen rule and applied the wrong standards for adjudicating Issue No. 8 (OCRE Brief at 2-12), that the PID is based on unreliable evidence (id. at 13-16), and that it applies the wrong burden of proof and is illogical and contrary to the weight of evidence (id. at 16-25). For the reasons below, OCRE's appeal of the ASLB's dismissal of Issue No. 8 is without merit and should be dismissed.40/

b. The ASLB Correctly Interpreted and Applied the Hydrogen Rule

The first section of RE's brief, while somewhat disjointed, appears to argue two basic points: (1) that the ASLB placed too much weight on the Staff's interpretation of the hydrogen rule; and (2) that the ASLB refused to rule on the proper scope of a preliminary analysis and applied the wrong standards for adjudication. Both arguments are without basis.

The Staff's Role

OCRE begins with a "straw man": that Applicants and Staff believe the hydrogen rule "give[s] the Staff the sole power to determine whether compliance with the rule has been achieved." OCRE Brief at 3. Neither Applicants nor the Staff advanced this position,41/ nor was such a position adopted by the ASLB.42/

40/ OCRE's brief contains numerous citations to its proposed findings, often with little discussion of the PID. Where OCRE incorporates by reference its proposed findings, and offers no new argument based on the PID, Applicants have identified for the Appeal Board those portions of Applicants' Reply To Proposed Findings of Fact and Conclusions of Law Filed By The Other Parties (Hydrogen Control) (July 1, 1985) ("App. Reply") which address OCRE's proposed findings.

41/ See, e.g., Applicants' Proposed Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision (Hydrogen Control) (June 3, 1985) ("App.

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An extensive record was developed demonstrating to the ASLB's satisfaction Applicants' compliance with the hydrogen rule.

OCRE argues that "a basic misunderstanding of the obligations and authority of the Licensing Board as opposed to the Staff pervades not only the PID but several earlier decisions as well." OCRE Brief at 4. OCRE admits that "the Board did not explicitly address the question of what the Staff's role is under this rule in a contested proceeding," but asserts that the "decision represents an implicit acquiescence to Applicants' interpretation." Id. at 4.

The single portion of the PID which OCRE cites to support this broad assertion of error on the ASLB's part is page 24 of the PID.43/ But there, in summarizing the hydrogen rule, the ASLB accurately quoted the rule's requirement

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PFC"), at 13; App. Reply at 6-7. As discussed therein, the plain words of paragraph (c)(3)(vii)(B) and other parts of the rule make it apparent that some weight is to be given to the NRC Staff's judgment of what constitutes a satisfactory preliminary analysis. The cases cited at page 6 of OCRE's brief did not involve similar express delegations by the Commission. Cf. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-141, 6 AEC 576, 580-81 (1973) (citing the "'venerable' doctrine that the construction of a statute by the agency charged with its administration is entitled to great weight," and applying that doctrine to staff interpretations of Commission regulations); see also Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1370 (1982) (the Staff "as an arm of the Commission and as the principal instrumentality through which the Commission carries out its regulatory responsibilities...is charged with the more weighty responsibility of advancing the correct interpretation of the Commission's regulations").

42/ OCRE attempts to have the Appeal Board consider extra-record material on the issue of "the degree to which the Commission intended to place discretion on this issue with the Staff." See OCRE Brief at 11-12, Attachment. OCRE offers the material for the proposition that "the rule was never intended to insulate the Staff's actions from Licensing Board scrutiny" (OCRE Brief at 12). Whether or not OCRE's attachment is competent "legislative history," Applicants have not argued that the rule insulates the Staff from the ASLB's scrutiny.

43/ See OCRE Brief at 4.

that Applicants' analysis must "use accident scenarios that are accepted by the Staff." See PID at 24; 10 CFR § 50.44(c)(3)(vi)(B)(3). Contrary to OCRE's claim, OCRE Brief at 4, the ASLB did not "ignor[e] the substantive requirements" of the section of the rule dealing with accident scenarios. The ASLB dealt extensively with these requirements. See PID at 35-45, 48-53.

OCRE next asserts--without citation or explanation--that Applicants presented their interpretation of 10 CFR § 50.44(c)(3)(vii) "as essentially a challenge to the jurisdiction of the Licensing Board." OCRE Brief at 3.44/ Contrary to OCRE's suggestion, Applicants never challenged the ASLB's jurisdiction to construe and apply subsection (c)(3)(vii) regarding the scope of the Commission's preliminary analysis requirements.

OCRE claims that the ASLB should not have delegated Conditions 6 (implementing procedures) and 7 (confirmatory analysis)45/ to the Staff for

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44/ See also OCRE Brief at 5, which incorrectly asserts:

> Applicants have argued that, in the case of the hydrogen rule, the Commission chose not to delegate...determination of the scope of the preliminary analysis to the Board, but rather gave those functions to the Staff in 10 CFR § 50.44(c)(3)(vii)(B).

OCRE provides no citations to support the assertion, which patently misstates Applicants' position. See, e.g., App. PFC at 10-14; App. Reply at 3-7.

45/ Conditions 6 and 7 are set forth at PID at 123:

> Prior to the issuance of the aforementioned licenses the Applicants shall demonstrate to the Director of Nuclear Reactor Regulation satisfactory completion of the following
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> * * *
>
> 6. Written procedures for operation of the hydrogen igniter system are available before operation in excess of 5% power.

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post-hearing resolution. See OCRE Brief at 6-9, 11-12.46/ Contrary to OCRE's claim, the ASLB did not refuse to consider Applicants' implementing procedures for the hydrogen control system. OCRE Brief at 12. The record described the general approach to be incorporated in the procedures. See PID at 90-91 (Findings 82, 85). OCRE had full opportunity to cross-examine this testimony. The ASLB considered and rejected OCRE's arguments that the procedures are of sufficient complexity to warrant further detailed consideration. See PID at 27-28.47/

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> 7. Applicants have made further confirmatory analysis of equipment in the containment that has not been qualified for pressure survivability, or have narrow margins of pressure survivability: this includes containment vacuum breaker, hydrogen mixing compressor and discharge check valves.

46/ Although as a general proposition, issues should be dealt with in the hearings, relatively minor unresolved issues may be left to the Staff if the ASLB is able to make the reasonable assurance findings requisite to the issuance of the license. Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951 (1974); see also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159-60 (1984) (permitting post-hearing delegation to the Staff to confirm that non-safety electrical equipment was either upgraded to be environmentally qualified under 10 CFR § 50.49, or isolated from safety-related equipment); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 506-09 (1984) (delegating to the Staff remaining § 50.49 environmental qualification issues).

47/ OCRE's reliance (OCRE Brief at 7, 12) on Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) is misplaced. In that case, the court held that the evaluation of emergency preparedness exercise results was a material licensing issue based on an NRC regulation which made the exercise results a precondition to licensing. 735 F.2d at 1438, 1442-43. In this case, there is nothing in the hydrogen rule, or in OCRE's contention, that required the ASLB to examine the detailed implementing procedures for the hydrogen control system. Cf. Waterford, ALAB-732, 17 NRC at 1106-07 (implementing procedures for applicant's emergency plan not required for "reasonable assurance" finding). Unlike the emergency planning rules at issue in Waterford, the hydrogen rule does not require that Applicants submit implementing procedures to the Staff.

Similarly, Applicants' preliminary analysis of equipment survivability was extensively considered below. See, e.g., PID at 45-48, 103-108 (Findings 136-153). Subject only to the condition of "further confirmatory analysis" of the pressure survivability of three pieces of equipment (containment vacuum breaker, hydrogen mixing compressor and discharge check valves), see PID at 45-48, 123, the ASLB confirmed the adequacy of Applicants' preliminary analysis of equipment survivability.48/ Hence, Condition 7 was an appropriate matter for post-hearing confirmation by the Staff. The ASLB's judgment that the matter was minor enough to be resolved by the Staff, and that it did not justify further hearings, is consistent with the evidence concerning these few items and with the extensive record demonstrating the overall adequacy of Applicants' preliminary survivability analyses.49/

Scope and Standards for Adjudication

OCRE first asserts, OCRE Brief at 3, that the ASLB "refused to accept its responsibility" to determine Applicants' compliance with 10 CFR §§ 50.44(c)(3)(vii)(B) and 50.57(a)(2). OCRE's assertion is without basis. The ASLB clearly

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48/ The record indicates that this is a comparatively minor item in the overall issue, and that further analysis will confirm that the limited number of components involved will survive the pressures expected from a hydrogen event. See, e.g., Findings 140, 141, and the evidence cited therein.

49/ Moreover, it is clear from Section 50.44(c)(3)(vii)(B) that the Commission does not require "completed final analyses" to justify equipment survivability prior to full-power operation, as long as Applicants' preliminary analysis is satisfactory. There is no basis for OCRE's suggestion (OCRE Brief at 12) that it was "an idle gesture" for the ASLB to direct the Staff to consider further confirmatory analysis by Applicants. The fact that the Staff was satisfied with Applicants' preliminary analysis of pressure survivability of the three components in question, Staff Ex. 8 at 6-10 - 6-11, certainly does not mean--as OCRE implies--that it will be unable or unwilling to conduct further confirmatory analysis, as required by the ASLB.

held that "Applicants' preliminary analysis as described in the preliminary evaluation report and in Applicants' testimony, and as approved by the Staff and discussed in Staff's testimony, does address in detail the substantive provisions of the hydrogen rule." See PID at 25, 54-59.50/ The ASLB's standard of acceptance, "whether there is reasonable assurance of safety during operation at Perry based on our assessment of the record that was actually developed," PID at 25-26, is in accord with the standards set forth in 10 CFR § 50.44(c)(3)(vii)(E), as well as 10 CFR § 50.57(a)(3).51/ The standard is therefore not "illegal," as OCRE contends.

OCRE devotes a substantial portion of its brief attempting to show that the ASLB possesses "a basic misunderstanding of the obligations and authority" it possesses under Sections 50.44(c)(3) and 50.57 of the Commission's regulations. See OCRE Brief at 4-12. However, OCRE's lengthy argument fails to identify any errors of fact or law in the PID. Most of its argument is simply irrelevant to the matters litigated below.

50/ Indeed, the PID provides in great detail the bases for the ASLB's conclusion that Applicants' hydrogen control system, and supporting preliminary analysis, meet the hydrogen rule. Because the preliminary analysis went well beyond the requirements of the rule, there was no necessity for the ASLB to "define the precise boundaries that separate the preliminary analysis from the final analysis because the Applicants submitted an extensive and detailed analysis of hydrogen combustion during degraded core events at Perry." PID at 54. See App. PFC at 10-15.

51/ The ASLB clearly spelled out at pages 54-59 of the PID how it applied this general standard to the preliminary analysis requirements of the hydrogen rule. OCRE fails to cite, let alone discuss, this portion of the PID, despite its clear relevance to the issues raised by OCRE at pages 2-12 of its brief.

OCRE concludes after some discussion, for example, that:

> If it is inappropriate to consider low-power licensing in a full-power operating license proceeding, absent a specific petition under the appropriate regulatory standards, then it is improper to consider interim acceptance criteria and licensing on a contested issue absent statutory authorization.

OCRE Brief at 9. Low power licensing is irrelevant to the PID. The issue considered and decided by the ASLB concerned Applicants' application for full-power (not low-power) operating licenses. PID at 1, 122-24; Memorandum and Order (Motion for Clarification of Initial Decision), supra, at 2.

OCRE fails to demonstrate that the ASLB improperly considered "interim acceptance criteria" in violation of Commission regulations. Indeed, the ASLB's references to an "interim period" prior to completion and approval of Applicants' final analysis52/ are completely consistent with the plain words in the hydrogen rule:

> Completed final analyses are not necessary for a staff determination that a plant is safe to operate at full power provided that prior to such operation an applicant has provided a preliminary analysis which the staff has determined provides a satisfactory basis to support interim operation at full power until the final analysis has been completed.

10 CFR § 50.44(c)(3)(vii)(B) (emphasis added).

Similarly, OCRE's legal arguments (OCRE Brief at 5-6, 10) suggesting that Applicants' final analysis "is part of the final, full-term licensing," and that it is "within the Licensing Board's jurisdiction," are irrelevant to matters litigated below. Since OCRE admits that it "did not argue this," OCRE Brief at 10, OCRE is not entitled to make that argument now.53/

52/ See, e.g., PID at 33, 46 (cited, but not discussed, at page 3 of OCRE's brief).

53/ In any case, OCRE's assertions regarding the final analysis are in error. Section 50.44(c)(3)(vii)(B) makes it clear that "completed final analyses are

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OCRE further asserts that:

> rather than using a subjective "safety in the interim" standard, the Board should have required full resolution of the matters raised in the preliminary analysis (as defined by OCRE) before licensing.

OCRE Brief at 11. OCRE claims that the ASLB should have adopted "a reasonableness test for defining the scope of the preliminary analysis" suggested in OCRE's proposed findings. See id. at 10-11. OCRE failed to define such a test, other than that it "must encompass all issues raised by intervenors." Id. at 11. OCRE's only reference to the PID to support its related claim that "the Board's standard is completely unreasonable" (OCRE Brief at 11) is the following:

> It is apparent from the PID that the only criteria which need be met to satisfy the Board are that the preliminary analysis mention the substantive requirements of the rule and that it be approved by the Staff. PID at 25. No evaluation of sufficiency was required.

Id. This clearly mischaracterizes the ASLB's statements at page 25 of the PID, which indicated that the ASLB had carefully evaluated the sufficiency of Applicants' preliminary analysis, and the Staff's review and acceptance of the preliminary analysis. See PID at 25.

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not necessary for a staff determination that a plant is safe to operate at full power," so long as Applicants provide a satisfactory preliminary analysis. The ASLB agreed. See, e.g., PID at 25 ("The Applicants have no obligation under the rule to present a final analysis until some time after reactor startup and operation at full power.") Thus, the ASLB would be without authority to conclude that completed final analyses were required as a condition precedent to full-power licensing.

c. The ASLB Gave Appropriate Weight to the Expert Testimony Presented Below

OCRE next argues that the ASLB failed to adopt its arguments that some witnesses were "evasive, untruthful or incompetent," and should therefore be given little if any weight. OCRE Brief at 13-16. An examination of the few examples given by OCRE shows that the ASLB gave proper weight to testimony below.

OCRE argues that the ASLB was in error, but fails to substantiate the assertion. The four isolated instances which OCRE cites (id. at 13), where the ASLB Chairman directed witnesses to provide further answers, hardly call into question the ASLB's reliance on the witnesses' overall testimony. The ASLB's determination of the witnesses' truthfulness and credibility is entitled to substantial deference.54/ Nor does OCRE's incorporation by reference of its proposed findings provide any basis to overturn the PID. OCRE Brief at 13. 55/

OCRE cites a number of examples in which the ASLB allegedly "relied upon ipse dixit averments of the witnesses and other material that was not in the record and was incapable of being examined by OCRE." OCRE Brief at 13. Contrary to OCRE's assertions, the ASLB dealt appropriately with all the examples which OCRE raises.

54/ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 404 (1976) ("where the credibility of evidence turns on the demeanor of a witness, [the appeal board] give[s] the judgment of the trial board which saw and heard his testimony particularly great deference").

55/ The proposed findings reasserted by OCRE, id. at 13, are addressed in detail in Applicants' reply findings: alleged contradictory testimony by Mr. Alley (compare OCRE PFC at 24-26 with App. Reply at 17-20); Mr. Notafrancesco's expertise (compare OCRE PFC at 30 n.1, 32 n.2 with App. Reply at 36); credibility of Dr. Fuls (compare OCRE PFC at 32 n.2 with App. Reply at 35-36); and competence of Dr. Lewis (compare OCRE PFC at 34 and n.3 with App. Reply at 40 n.22).

OCRE's argument regarding testimony on "analyses of stresses at defective welds in the containment vessel at 50 psig" (id. at 14) is without basis. OCRE never asked Applicants to furnish copies of the underlying calculations, and asked no questions about the calculations that the witness was unable to answer. OCRE does not explain why a review of the underlying calculations is required. See PID at 31-32.

The testimony by Dr. Lewis on flame speeds, cited by OCRE (OCRE Brief at 14), was hardly an unreliable "ipse dixit averment" of a witness. The Appeal Board has recognized the special competence of Dr. Lewis to address the hydrogen control issue. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 471 & nn. 37 & 39 (1982). Moreover, OCRE did examine Dr. Lewis on the statement. See Tr. 3520-22 (Lewis). In any case, the ASLB's conclusions as to the adequacy of Applicants' analysis clearly do not depend on the flame speed testimony cited by OCRE. See PID at 40.

OCRE's argument regarding Applicants' testimony on drywell leakage of hydrogen (OCRE Brief at 14) is refuted by the expert testimony of Applicants' and Staff's witnesses, which the ASLB accurately summarized. PID at 45. That testimony amply demonstrates that Applicants adequately considered the effects of drywell leakage on the operation of the igniter system.56/

56/ OCRE suggests, id. at 14, that Applicants "refused to answer" Interrogatory No. 13-10 from OCRE's 13th Set of Interrogatories relating to General Electric ("GE") analyses. OCRE neglects to point out that its discovery concerning GE was untimely, and that Applicants were never required to respond. The sequence of events with respect to OCRE's late-filed 13th Set of Interrogatories is set forth in the following: Applicants' Answer to OCRE Motion to Reopen Discovery on Issue No. 8 (August 14, 1984); Applicants' Further Answer to Ohio Citizens For Responsible Energy Motion to Reopen Discovery on Issue No. 8 (September 24, 1984); Applicants' Voluntary Answers to a Portion of OCRE's Late-Filed

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OCRE's complaints about the ASLB's treatment of testimony relating to Grand Gulf analyses (OCRE Brief at 14-15) are without basis. OCRE initially claims that Applicants "defaulted on their discovery obligations" by failing to make available documents relating to hydrogen control analyses performed for the Grand Gulf plant, in response to Interrogatory No. 13-7 of OCRE's 13th Set of Interrogatories. OCRE's interrogatory was untimely, and Applicants were never required to respond to it; thus, there was no default.57/

OCRE asserts (OCRE Brief at 14-15) that the ASLB relied upon analyses of drywell capacity, equipment survivability, and secondary fires performed for the Grand Gulf plant which were not part of the record, citing Finding 114 (pressure capacity of the containment drywell), Finding 136 (equipment survivability), and Finding 148 (secondary fires). Those findings include ample citation to the record. OCRE fails to show that the evidence is in any way unreliable. OCRE had full opportunity to test this evidence by cross-examination and otherwise to

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Thirteenth Set of Interrogatories to Applicants (Issue #8) (December 28, 1984); Applicants' Second Voluntary Answers to a Portion of OCRE's Late-Filed Thirteenth Set of Interrogatories to Applicants (Issue #8) (December 28, 1984); Memorandum and Order (Motions on Hydrogen Control Contentions) (March 14, 1985), at 7-8. OCRE was permitted extensive discovery on Issue #8, in addition to the extensive material it obtained through Freedom of Information Act requests. See, e.g., Tr. 2009-10, 2025.

57/ See preceding note (and references cited therein). It is also clear that OCRE had available to it extensive material from the Grand Gulf docket relating to the hydrogen issue, which it was free to use for cross-examining Applicants' witnesses. See, e.g., OCRE Updated Response to Applicants' Second Set of Interrogatories to OCRF (January 22, 1985) (updated response to Issue #8, Interrogatory #3, at 4-6, listing "submittals and licensing correspondence on the Grand Gulf docket related to hydrogen control"). OCRE was also well aware prior to the hearing of the areas in Applicants' preliminary analysis involving comparisons to Grand Gulf. See App. Ex. 8-1 at Section 5.0 ("Design Comparison to Grand Gulf").

develop a record. Yet OCRE conducted only minimal cross-examination on Grand Gulf comparisons. Vague, unexplained references to "analyses...not a part of the record" (OCRE Brief at 14-15) at this stage do not suffice to undermine the substantial record evidence and the ASLB's detailed findings.

OCRE challenges the ASLB's general statements (PID at 24, 35, 46) that the hydrogen rule permits referencing of previously approved analyses for plants of similar design. OCRE Brief at 15. OCRE implies that an applicant may only reference hydrogen analyses of other plants when the applicant has a PWR ice condenser plant, or when the applicant is referring to accident scenarios. Id. The rule is not so restrictive. Applicants and Staff have explained in their analyses (App. Ex. 8-1, Section 5.0; Staff Ex. 8 at 6-7 - 6-11), and in their testimony,58/ the extent and justification of any comparisons to previously approved Grand Gulf hydrogen analyses. Nothing in the hydrogen rule suggests that Applicants' comparisons are unacceptable for a preliminary analysis. OCRE had full opportunity to question these comparisons, but conducted only minimal cross-examination. The ASLB, having evaluated all the evidence, appropriately concluded that the comparisons relied on by Applicants were valid.59/

58/ See, e.g., Applicants' Direct Testimony of Eileen M. Buzzelli, John D. Richardson, Kevin W. Holtzclaw, Roger W. Alley, Bernard Lewis, Bela Karlovitz and G. Martin Fuls on The Preliminary Evaluation of The Perry Nuclear Power Plant Hydrogen Control System (Issue No. 8), ff. Tr. 3241 ("Applicants' Hydrogen Testimony") at 49-51; Testimony of Hukam C. Garg Regarding Issue No. 8, ff. Tr. 3676 ("Garg"); see PID at 103-05 (Findings 136-43).

59/ OCRE points to nothing that would indicate the ASLB failed to scrutinize Applicants' comparisons to Grand Gulf, and the Staff's approval thereof. OCRE had ample opportunity to attempt to demonstrate that the Grand Gulf information referenced by Applicants was not "truly applicable, appropriate, and accurate" (OCRE Brief at 15). It has made no such showing.

OCRE questions the ASLB's reliance on Applicants' testimony as to the ability of the reactor core isolation cooling ("RCIC") system to maintain cooling water in the event of a station blackout scenario, thus preventing the buildup of hydrogen. OCRE Brief at 15 (citing Finding 146 and Tr. 3660). OCRE does not show that the single detail which the witness could not recall (the initial line-up of RCIC suction, Tr. 3660) was of any significance to the testimony or to the ASLB's overall conclusions regarding the station blackout scenario. See PID at 36-38, 55 (discussing the tangential relationship between the station blackout issue and the preliminary analysis requirements of the hydrogen rule).

OCRE argues that testimony on the ability of equipment hatch O-rings to withstand elevated temperatures was not based on the witness' own knowledge, citing Tr. 1650 and its proposed findings (OCRE PFC at 25-26). OCRE Brief at 15. As shown at Tr. 3272-78, 3581-83 (see PID at 97 (Findings 108-109)), the witnesses had substantial knowledge about the O-ring issue.60/ The ASLB was fully justified in relying on the evidence, which showed that compression set of the O-ring seals is not a problem for the environmental conditions associated with hydrogen burning. See PID at 33.

Although OCRE questions the reliability of testimony on penetration seals, OCRE Brief at 16, OCRE neglects to explain why the witness' testimony at Tr. 3623-24, cited by the ASLB in Finding 113, did not constitute reliable evidence concerning the ability of the seals to withstand diffusion flame temperatures. See OCRE Brief at 16.61/ Hence, OCRE's unsupported assertion must be rejected.

60/ OCRE's brief essentially incorporates by refernce its proposed findings, which are addressed in App. Reply at 21-22.

61/ The basis for the ASLB's rejection of OCRE's claim is also discussed at page 48 of the PID.

OCRE questions the ASLB's reliance (in Finding 102 and at page 39 of the PID) on testimony by Mr. Notafrancesco, who OCRE asserts "is clearly not an expert." OCRE Brief at 16. Although Mr. Notafrancesco does not have the long experience of witnesses such as Dr. Lewis and Mr. Karlovitz, he has been associated with hydrogen research for over three years, and is the individual at the NRC with responsibility for reviewing the Perry igniter system.62/ OCRE gives no reason for questioning Mr. Notafrancesco's substantive testimony, which provided ample basis for confirming his knowledge and experience regarding the hydrogen control issue.

OCRE challenges the ASLB's rejection of OCRE'S argument in its proposed findings (OCRE PFC at 46-47) that the 1/4-scale test of diffusion flames in Applicants' final analysis should consider diffusion flames resulting from a 75% metal-water reaction. OCRE Brief at 16 (citing PID at 48-49, 107 (Finding 152)). OCRE claims in this regard that it was improperly prevented from challenging the BWR Heatup Code, which will be used in the final analysis. See OCRE Brief at 16. The ASLB properly rejected OCRE's findings, for the reasons set forth in the PID at 48-49 and Findings 149-52.63/ The ASLB did permit OCRE cross-examination concerning the BWR Heatup Code release rates to be used in the 1/4-scale tests, see, e.g., Tr. 3552-57, 3568, 3622-23 (Richardson), 3692, 3695-96 (Notafrancesco), but then properly sustained objections to further inquiry into the 1/4-scale tests and the BWR Heatup Code after it was clearly

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62/ See Testimony of Allen Notafrancesco Regarding Issue #8 (Hydrogen Control), Testimony of Allen Notafrancesco on the Hydrogen Control Issue Contained in the Licensing Board Contention #8, ff. Tr. 3676 ("Notafrancesco I"); Tr. 3666-68, 3672-75 (Notafrancesco), 3674-75.

63/ See App. Reply at 50-52, refuting OCRE's proposed findings on this subject.

established that the examination was outside the scope of the preliminary analysis. See, e.g., Tr. 3692-96 (establishing that the OCRE Ex. 21 raised matters that clearly related to the final analysis, and not to the preliminary analysis).

OCRE argues that the matter of suppression pool drywell loads, discussed by the ASLB in Finding 153 and at pages 50-52 of the PID, "is still unresolved." OCRE Brief at 16. The uncontradicted evidence indicates that for Perry, the differential pressures were less than those analyzed for the design basis case. Thus, the matter is resolved. See PID at 50-51, Finding 153; Tr. 3485-96 (Richardson). OCRE provides no basis for calling into question the credibility of the testimony that was presented.64/

d. The PID is Supported by Substantial Evidence and Applies the Correct Burden of Proof

In the last section of its brief (OCRE Brief at 16-25), OCRE argues that:

> the Licensing Board had to ignore crucial evidence, mischaracterize OCRE's arguments and proposed findings, create bizarre theories for refusing to consider the facts, and continually place the burden of proof on OCRE....

64/ OCRE states parenthetically that:

> The Board's refusal to consider pool loads resulting from conservative assumptions (PID at 51) also contradicts OCRE Ex. 19, in which the Staff required the most severe pool loads to be evaluated.

OCRE Brief at 16. The information requested in the Staff's September 1982 letter to Applicants (OCRE Ex. 19) went beyond what the current hydrogen rule requires. In any case, the Staff's testimony indicated that a majority of the questions in that document have been responded to, and the remaining questions will be addressed as part of Applicants' final analysis. Tr. 3684 (Notafrancesco). OCRE fails to show any contradiction between the ASLB's conclusions at page 51 of the PID, and OCRE Ex. 19.

OCRE Brief at 16-17. The examples OCRE gives to support these broad assertions do not provide a basis to question the PID.

OCRE first questions the ASLB's treatment, PID at 28, of OCRE'S arguments on potential radioactive releases from containment venting. OCRE Brief at 17.65/ OCRE was permitted to explore containment venting in the hearing. The evidence indicated that the venting and offsite dose issues raised by OCRE are being adequately handled by Applicants in a manner consistent with the Commission's regulations.66/ Moreover, OCRE raised the issue of venting in the context of a hypothetical station blackout event, which is not required to be analyzed as part of a preliminary analysis under the hydrogen rule.67/ In any case, OCRE's brief deals selectively with the PID and fails to explain how the issue of "radioactive releases from containment venting" calls into question the ASLB's ultimate determination regarding the adequacy of Applicants' hydrogen

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65/ See OCRE PFC at 15.

66/ See, e.g., Tr. 3599-3600 (Buzzelli) (demonstrating that current design basis offsite dose values are conservative); Tr. 3441-43 (indicating that Applicants are establishing a vent path for the unlikely possibility that venting would be needed following a station blackout); PID at 105-06 (Findings 145-46).

67/ See App. Reply at 26-29 (demonstrating why Applicants are not required to analyze a station blackout scenario as part of the preliminary analysis). As noted in Applicants' Reply, the igniters would be supplied with power from the emergency diesel generators in the event of a LOCA with loss of offsite power. See Tr. 3632-33 (Buzzelli). Applicants' testimony on Issue No. 16, discussed infra § II.A.2, demonstrates that the PNPP diesel generators are reliable. See PID at 59-76, 109-22. In any event, given the low likelihood of a station blackout event leading to release of large amount of hydrogen, the ASLB reasonably concluded that the hydrogen rule does not require detailed consideration of venting as part of the preliminary analysis. See PID at 28, 36-38. The July 15, 1985 letter cited by OCRE at page 17 of its brief was extra-record material, which in any case provided no basis for the ASLB to consider reopening the record to pursue the venting issue. (Indeed, OCRE did not move to reopen the record.)

control system.68/

For the reasons discussed above, there is no basis for OCRE's suggestion, OCRE Brief at 18, that the ASLB was required by the hydrogen rule to take probabilistic evidence concerning the likelihood of a station blackout event, as part of its consideration of Applicants' preliminary analysis.69/ For the same reasons, OCRE's arguments concerning the probability and risk of a station blackout, OCRE Brief at 18-19, do not call into question the ASLB's determination that Applicants and Staff have adequately considered station blackout for purposes of a preliminary analysis under the hydrogen rule.

OCRE is also incorrect in its assertions that the ASLB "failed to confront the facts," and that the ASLB "ignored substantial evidence in the record contrary to its conclusions." OCRE Brief at 19. OCRE first suggests that the ASLB ignored "the severe criticisms of the CLASIX code," citing OCRE Ex. 21. Id. The criticisms were not ignored; the ASLB explained at length why it discounted them. See PID at 38-43, 100-02 (Findings 122-33).70/

OCRE's reference, OCRE Brief at 19, to "OCRE Ex. 20, which contained the NRC Staff's recommendation that the CLASIX-3 Code not be used," is misleading and out of context. The Staff's comments in OCRE Ex. 20 (an August 1984 Staff

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68/ OCRE's reliance on Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980), OCRE Brief at 17, is misplaced, since that decision pre-dated the enactment of the hydrogen control rule which is the basis of OCRE's reworded contention. See PID at 22-23.

69/ In referencing a 10 CFR § 50.55(e) report attached to OCRE's post-hearing letter to the ASLB (OCRE Brief at 18), OCRE again seeks impermissibly to rely on extra-record material, which, in any event, does not address a postulated station blackout accident.

70/ See App. Reply at 30-40, 45-46 (comparing OCRE Ex. 21 to Applicants' CLASIX-3 analysis).

information request to Applicants, which pre-dated the hydrogen rule), related to the use of CLASIX-3 in demonstrating equipment survivability. The Staff testified that, although OCRE Ex. 20 alluded to a possible non-conservative element of CLASIX-3, the overall effect of the CLASIX-3 analysis for Perry was conservative. See Tr. 3684-87, 3721-22, 3733-34 (Notafrancesco). OCRE's example of a statement by Sandia which the ASLB allegedly ignored (the effect of igniter location and spray shield), OCRE Brief at 19, is similarly flawed; the ASLB considered the evidence and reached a different conclusion.71/ Similarly, OCRE's assertion that the ASLB ignored information in OCRE Ex. 18 regarding credit for annulus concrete, OCRE Brief at 19, is no more than a disagreement with the ASLB's weighing of the evidence. See PID at 31-32; App. Reply at 19.72/

OCRE reasserts its proposed findings, OCRE PFC at 22-23, regarding margins in the Aptech analysis (OCRE Ex. 13), claiming that the ASLB at page 31 of the PID "mischaracterizes OCRE's arguments." OCRE Brief at 19-20. The ASLB gave thorough treatment to OCRE's proposed findings regarding the Aptech analysis (PID at 31-32, Findings 100-106) and properly found that Aptech's analysis used adequate margins and was conservative.73/

71/ There was a substantial, reliable record basis for the ASLB to conclude that the hydrogen igniter location, and the igniter spray shield configuration, would not affect combustion characteristics. See Applicants' Testimony at 31; Tr. 3513-14 (Lewis).

72/ In any case, the annulus concrete issue was not central to the ASLB's acceptance of Aptech's analysis, which is discussed at length by the ASLB. See PID at 31-32, 94-96 (Findings 100-104). Moreover, the annulus concrete was considered by Applicants in analyses subsequent to Aptech's analysis. PID at 32.

73/ See App. Reply at 14-17, refuting each of the arguments raised by OCRE at pages 22-23 of its proposed findings.

OCRE argues that the ASLB's treatment of Applicants' spray availability assumption was "contrived." OCRE Brief at 20. OCRE fails to refute the ASLB's reasoning, PID at 43-44, which properly rejects postulating a failure of containment sprays on top of the postulated 75% metal-water reaction. OCRE argues that "the evidence indicates" that the spray availability assumption is not "a conservative or even realistic assumption" (id. at 20), but OCRE fails to cite to any evidence showing this.74/ Thus, the ASLB's conclusion, PID at 43, that "[n]o factual basis exists in the record, however, for challenging the availability of containment sprays," is correct,

OCRE refers to lengthy cross-examination it conducted at Tr. 3448-85 concerning the residual heat removal (RHR) system, containment heat removal, suppression pool cooling, and the emergency core cooling system (ECCS) system, claiming that "the actual as-built configurations of these systems and the procedures for their operation must be examined." OCRE Brief at 20. OCRE had more than adequate opportunity to explore these areas at the hearing. It fails to explain why further inquiry is justified under the hydrogen rule, or to provide any specific basis to challenge the ASLB's consideration of these matters.75/

74/ OCRE's claim, that the Staff believes that spray availability is questionable, OCRE Brief at 20, is a mischaracterization of the record. The Staff has reviewed and approved Applicants' spray availability assumption in the Perry preliminary analysis. See, e.g., Testimony of Allen Notafrancesco on the Hydrogen Control Issues Contained in the Licensing Board Contention #8, ff. Tr. 3276, ("Notafrancesco II") at 5, 7; see also Applicants' Proposed Finding 104; App. Reply at 44.

75/ OCRE claims that the ASLB fails to comprehend "that systems, structures, and components designed and analyzed for design basis conditions are now expected to survive much more severe conditions" (OCRE Brief at 20-21, citing PID at 55). No specifics are provided to support OCRE's broad assertion; it is belied by the ASLB's extensive treatment of Applicants' hydrogen control analysis. Thus, OCRE fails to call into question the ASLB's conclusion, in its discussion of the scope of the preliminary analysis (PID at 54-56), that there are reasonable limits to the ASLB's inquiry under the hydrogen rule.

OCRE contends that "[t]he Board's acceptance of the negative pressure capability of the Perry containment (PID at 34) is entirely illogical, since that acceptance relies on the assumed action of vacuum breakers, which the Board found to be insufficiently qualified for pressure." OCRE Brief at 21. The ASLB has accepted Applicants' preliminary analysis, subject to confirmation by the Staff that the vacuum breakers will withstand pressures due to hydrogen burning. See supra § II.A.1.b. In light of the evidence demonstrating the pressure survivability of the vacuum breakers, see App. Ex. 8-1 at 21D; Tr. 3570-71 (Buzzelli), and the confirmation that will be made by the Staff, the ASLB was correct in assuming that the vacuum breakers will be available.76/

OCRE challenges the ASLB's rejection (PID at 40) of OCRE's comparison of the HECTR Code analysis in OCRE Ex. 21, with Applicants' CLASIX-3 analysis. OCRE Brief at 21. The ASLB correctly noted at page 40 of the PID that there was "uncertainty of the parameters which apply as well to HECTR as they do to CLASIX-3;"77/ therefore, the ASLB did not rely on proposed detailed comparisons

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76/ Moreover, the ASLB was referring, at page 34 of the PID, to negative pressure events. OCRE points to nothing in the record suggesting that the negative pressure capacity of the containment would be challenged following any positive pressure spikes from deflagration burning that might potentially challenge the survivability of the vacuum breakers. Thus, it was not inappropriate for the ASLB to agree that the vacuum breakers would be available during a negative pressure event, while at the same time imposing the condition of further Staff confirmation of the positive pressure survivability of the vacuum breakers.

77/ See also PID at 39, which states:

> We do not put our reliance on the model comparisons of the Sandia report for assessing containment response in Perry since we accept that later experiments tend to confirm the validity of CLASIX-3. (Fuls, Tr. 3621). Additional subjective considerations also support a conclusion that CLASIX results are conservative. (Finding 133).

by OCRE. The ASLB's decision not to consider detailed comparisons between CLASIX-3 and HECTR is consistent with the record, including OCRE Ex. 21.78/

OCRE asserts that the ASLB, at page 43 of the PID, "avoids considering the effect of ionizing radiation of flame speeds." OCRE Brief at 21. OCRE is in error. The ASLB concluded:

> There is no evidence in our record that the specific chemical radicals needed to accelerate flame speed would be present in Perry containment or that ionizing radiation in any event could create enough such radicals to accelerate flame speed. OCRE's assertion was based on old and outdated evidence and there was no recent corroborating evidence to suggest that ionizing radiation in containment could have any effect. (Finding 135).

PID at 43.79/ OCRE provides no basis to challenge the ASLB's conclusion.

OCRE next challenges the ASLB's conclusions concerning the conservatism of Applicant's CLASIX-3 analysis, by essentially reasserting OCRE's earlier proposed findings (OCRE PFC at 38-40, 42-43) regarding various CLASIX-3 input assumptions. See OCRE Brief at 21-22. OCRE argues, without adequate discussion of the PID, that the ASLB neglected, ignored, or failed to consider the record

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78/ The witnesses testified that they know of no information in OCRE Ex. 21 which calls into question Applicants' use of CLASIX-3, and that the HECTR analyses in OCRE Ex. 21 are overly-conservative and out-of-date. See Tr. 3621 (Fuls), 3688-81, 3722-26, 3733-46 (Notafrancesco, Pratt). Sandia itself acknowledged the difficulty of comparisons such as those OCRE recommended in its proposed findings. See OCRE Ex. 21 at 12, which states:

> Comparisons between the various computer codes is difficult because we know little of the calculational models within CLASIX-3 and even MARCH. We have attempted to carry out calculations with MARCH and HECTR that are nearly identical to several CLASIX-3 cases. Unfortunately, we invariably end up comparing "apples" to "oranges."

79/ The ASLB was correct in labelling OCRE's evidence "old and outdated." See OCRE Brief at 21. OCRE relied on its cross-examination of Dr. Lewis at Tr. 3528-29 about a 1928 paper, a paper which Dr. Lewis discounted. Id.

as OCRE had characterized it in its proposed findings. Id. Once again, OCRE has simply disagreed with the ASLB's weighing of evidence, which was amply supported by substantial, reliable evidence in the record.80/ Without an adequate description of how the ASLB neglected material issues raised by OCRE, thereby erring in its decision, OCRE's argument must be rejected.

OCRE asserts that the ASLB should have imposed license conditions or taken other actions with respect to the temperature qualification of "certain components." OCRE Brief at 22. (These components are seals for locks and hatches, and the transformer for the igniter assembly, PID at 47.) OCRE's assertion is without merit; the ASLB noted that Applicants were already obligated to justify interim operation of these components by November 30, 1985, pursuant to 10 CFR § 50.49(i). PID at 47. In light of the Staff's review and approval of Applicants' preliminary analysis of equipment survivability for these and other components,81/ and Applicants' existing obligations with respect to § 50.49(i), the ASLB was justified in approving Applicants' preliminary analysis of the temperature survivability of these two items.

OCRE claims that the ASLB's conclusions (PID at 53) with respect to the potential for secondary fires "ignore OCRE Ex. 24" (a paper by Dr. Pratt and others). OCRE Brief at 22-23. However, Dr. Pratt testified that the statements

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80/ See, e.g., PID at 40, 102 (Finding 132) (flame speed), 43-44, 101 (Finding 129), 108 (Finding 154) (containment spray issues), 40, 101 (Finding 126) (ignition limits), 41, 42 (combustion completeness), 38-39, 42-43, 45-46 (other conservatisms in Applicants use of the CRASIX-3 Code), 35-38 (appropriateness of Applicants' scenarios); see also App. Reply at 32-33, 43-44 (flame speed), 44-45 (containment spray issues), 32-33, 38-39 (ignition limits and combustion completeness), 47 (heat transfer), 45-46 (code validation), and 47-48 (accident scenarios).

81/ See, e.g., Garg at 4-7, Table 1; Applicants' Proposed Findings 110-112.

in OCRE Ex. 24 cited by OCRE were based on analyses of PWR large dry containments and dealt with "very severe hydrogen burns, starting at very high concentrations." Tr. 3730-31. In light of this testimony, and Dr. Pratt's uncertainty about the relevance of the paper to Perry (id.), the ASLB was correct in not relying on the exhibit. Similarly, there is substantial, credible evidence in the record supporting the ASLB's conclusion that Applicants have adequately considered the potential for secondary fires for purposes of the preliminary analysis, and that the risk is low. See PID at 53, 106-07 (Findings 147-48).

OCRE disagrees with the ASLB's acceptance (PID at 39, 57) of evidence indicating that later versions of the HECTR code have predicted decreased pressures and temperatures. OCRE Brief at 23. OCRE's interpretation of "the only reliable evidence on this point" (id.) is in error.82/

OCRE argues that the ASLB "placed the wrong burden of proof on this issue," and "continually viewed the evidence on Issue No. 8 in the light most favorable to Applicants and least favorable to OCRE." OCRE Brief at 23. OCRE's examples fail to show that the ASLB placed the burden of proof on OCRE; they merely illustrate differences in how the ASLB and OCRE viewed the evidence.83/

82/ OCRE cites to Tr. 3738, 3741-42 (OCRE Brief at 23). The analysis discussed at Tr. 3738 involved a model with no drywell. See Tr. 3738 (Notafrancesco). The witness did not testify that this model involved higher pressures (it was OCRE who referred to the higher pressures at Tr. 3738, not the witness), and the witness did not agree that the model being discussed was appropriate to use, given its lack of a drywell. OCRE's questions at Tr. 3741-42 appeared to be based on HECTR pressure calculations from Sandia's 1983 report, OCRE Ex. 21, which is based on the results of the analysis of the Grand Gulf plant through 1981 only. Tr. 3723 (Notafrancesco); OCRE Ex. 21 at 9-10. The testimony shows that HECTR pressures and temperatures have decreased since the time of the analysis in OCRE Ex. 21. See PID at 38-39, 57.

83/ The fact that the ASLB rejected OCRE's interpretation and weighing of the evidence does not mean that the burden of proof was placed on OCRE, or that the

(Continued Next Page)

Thus, the ASLB's statement (PID at 46) that "OCRE has not developed any basis for challenging the HEATING 6 computer code that is used for computing equipment temperatures at Perry," reflects the ASLB's acceptance of uncontradicted evidence endorsing Applicants' use of the code,84/ rather than the ASLB placing the burden of proof on OCRE, as OCRE suggests. See OCRE Brief at 23. Similarly, the ASLB (PID at 29-31) rejected OCRE's proposed findings on containment integrity (OCRE PFC 20-22), see OCRE Brief at 23-24, not by shifting the burden of proof, but based upon the substantial, credible evidence supporting the adequacy of Applicants' preliminary analysis in the areas discussed by OCRE in its proposed findings.85/

(Continued)

ASLB was trying to view the evidence on Issue No. 8 "in the light...least favorable to OCRE." OCRE Brief at 23. Cf. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 923 (1981), where the appeal board stated the following:

> The resolution of issues of fact in favor of one side suggests neither bias nor error on the tribunal's part; without more, the appropriate inference is that the evidence of the prevailing party was the more persuasive. Be that as it may, we reiterate that in administrative hearings as in court cases, rulings and findings made in the course of a proceeding are not in themselves reasons to believe that the tribunal is biased for or against a party.

84/ See, e.g., PID at 104 (Findings 137-38), citing Garg at 5-6.

85/ See PID at 29-31, 92-94 (Findings 90, 91, 94-98), 97-98 (Finding 110) (refuting OCRE's proposed findings regarding "the true limiting penetration, margins available in the use of actual material properties, and the effects of dead load, elevated temperature, and containment vessel out-of-tolerance on containment capacity (OCRE's Proposed Findings 20-22)" referenced at page 24 of OCRE's brief). These portions of the PID refute OCRE's claim that the ASLB "summarily rejected" OCRE's arguments, or that the ASLB "placed [the burden] on OCRE to show that these factors are additive and significant" (OCRE Brief at 24).

Similarly, OCRE reasserts its proposed findings (OCRE PFC at 25-28) regarding the applicability of the ASME Service Level C limits and analytical methods, stating only that "[a] view of the evidence (e.g., Tr. 3382-87, 3401, 3403-06) in accordance with the correct burden of proof would reach the contrary conclusion." OCRE Brief at 24. OCRE fails to show that its proposed findings, or the cited testimony, call into question the PID or the burden of proof imposed by the ASLB.86/ Nor did the ASLB "illegally take credit for Applicants' ASME code service level D analysis," as OCRE (id.) contends.87/

OCRE also disagrees with the ASLB's weighing of the evidence on voids in the drywell wall, and the potential effect of voids on Applicants' preliminary analysis. OCRE Brief at 24 (questioning PID at 35). However, the substantial, credible evidence in the record supports the ASLB's finding that voids in the drywell have been detected and repaired. PID at 35, 99 (Finding 115).88/ Similarly, the PID indicates that the ASLB carefully considered OCRE's proposed

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86/ The ASLB discusses, and rejects, OCRE's challenges to Applicants' use of the ASME Service Level C limits and analytical methods. See PID at 29-35; App. Reply at 12-24. Tr. 3382-87, 3401, 3403-06, cited by OCRE at page 24 of its brief, deal with various test-to-fail experiments. The experiments are not relevant to Applicants' ultimate capacity analyses, which are based on ASME Service Level C limits well within the elastic range. See PID at 34, 93 (Finding 93); Tr. 3356-58, 3382-87, 3392-3402, 3629-30 (Alley).

87/ Applicants' Service Level D analysis demonstrated that the use of Service Level C limits to define the PNPP pressure-retaining capability, rather than the higher, more realistic Service Level D limits, represents a conservative approach to assuring that containment integrity will be maintained. See PID at 34, 92-93 (Finding 92); Applicants Proposed Findings 66-67; App. Reply at 23-24. OCRE provides no basis to support its suggestion that Applicants' Service Level D analysis was "illegal" or that Applicants failed to meet 10 CFR § 50.44(c)(3)(iv)(B)(1) (see OCRE Brief at 24).

88/ Applicants' witness testified "with reasonable certainty" that no undetected voids exist within the wall. Tr. 3417 (Alley). OCRE provides no basis for questioning this testimony.

findings (OCRE PFC at 48-49) concerning decay heat removal assumptions in Applicants' preliminary analysis. See OCRE Brief at 24-25. There was substantial evidence in the record to support the ASLB's conclusions at pages 51-53 of the PID. See PID at 108 (Findings 155-156). Contrary to OCRE's claim (OCRE Brief at 24-25), the ASLB neither "summarily affirms" Applicants' testimony, nor places the burden of proof on OCRE.89/

OCRE offers no other specifics to support the general claim that "[t]he only view of the evidence on Issue 8 consistent with 10 CFR 2.732 is that presented in OCRE's June 13 Proposed Findings." OCRE Brief at 25. For the reasons noted herein, OCRE's proposed findings were adequately addressed by the ASLB. The ASLB's findings and conclusions on Issue No. 8 are amply supported.

e. Conclusion

For the reasons set forth above, OCRE's appeal of the ASLB's decision to dismiss Issue No. 8 should therefore be denied.

2. Issue No. 16: TDI Diesel Generators

a. ASLB's Concluding Partial Initial Decision

OCRE maintains that the ASLB ignored or mischaracterized evidence favorable to OCRE's case in dismissing Issue No. 16, concerning the reliability of the Perry Transamerica Delaval, Inc. ("TDI") diesel generators. Each of OCRE's allegations is without foundation and reflects nothing more than OCRE's disappointment that the ASLB reached conclusions contrary to those urged by OCRE.

89/ See PID at 51-53, 108 (Findings 155-156); Applicants' Proposed Findings 107-108; App. Reply at 52-53 (refuting OCRE's view of the evidence discussed at pages 48-49 of OCRE's proposed findings).

Initially, OCRE states that the ASLB ignored a Staff witness' disapproval of Applicants' evaluation of the engines' foundation. OCRE Brief at 26-27. The witness did not disapprove Applicants' evaluation; rather, he stated that he wanted additional information. Tr. 2417 (Kirkwood). Applicants explained the engineering evaluation which had been performed. See Tr. 2496-97 (Christiansen). OCRE conducted no cross-examination on this point. The ASLB found Applicants' explanation persuasive, and, based on the record before it, concluded that the foundation was acceptable. PID at 74-75, 120 (Finding 200).

Similarly, OCRE argues that the ASLB ignored evidence that Perry's maintenance and surveillance program for the diesels may never be implemented or may not exist for the life of the plant. OCRE Brief at 27. The ASLB correctly found that the record indicated otherwise. PID at 64. Engine maintenance and surveillance is already being conducted at Perry, which has committed to implement all applicable Owners Group recommendations as well as the maintenance and surveillance recommendations made by its independent engineering consultant and Pacific Northwest Laboratory. PID at 111-12 (Finding 169).90/ While maintenance and surveillance requirements may be modified in the future, any modifications will be supported by site experience and successful engine operation, as noted in the very exhibit to which OCRE cites.91/ The Staff will be reviewing Perry's implementation of required maintenance and surveillance. Id.

90/ See also Applicants' Reply to Proposed Findings of Fact and Conclusions of Law Filed by the Other Parties (Emergency Planning and TDI Diesel Generators) (June 10, 1985) ("App. TDI Reply"), at 35-38.

91/ See OCRE Ex. 2, ff. Tr. 2191 (January 10, 1985 Memo to File at 1); OCRE Ex. 2, ff. Tr. 2200 (Executive Summary).

OCRE cites recent correspondence between Applicants and the Staff (not part of the decisional record) to support its position.92/ OCRE Brief at 27. This letter does not reflect a change in Applicants' commitment, which has always been to implement all applicable Owners Group recommendations.93/ Likewise, it has always been Applicants' commitment (and the Staff's requirement), to implement all applicable recommendations prior to startup from the first refueling outage. See Tr. 2499-500 (Christiansen); Staff Ex. 1, ff. Tr. 2284, at 8. There is, therefore, no basis on which to question the ASLB's conclusions regarding the adequacy of Perry's maintenance and surveillance program.

OCRE further argues that the ASLB should have concluded that a problem with crankshaft oil hole plugs was a failure of the Owners Group program.94/ OCRE Brief at 27. It would be unreasonable to expect that any program could guarantee the absence of future problems. See PID at 65. Nor is such a guarantee required; all that is necessary is that the program provide reasonable assurance that the diesels will perform reliably.95/ The record establishes that the

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92/ OCRE impermissibly seeks to add to the record without moving to reopen it. Appeals must be considered and decided on the basis of the ASLB reco .. See, e.g., Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 n.29 (1983).

93/ See Applicants' Direct Testimony of Edward C. Christiansen on Issue No. 16, ff. Tr. 2179, at 12; Applicants' Answers to Ohio Citizens for Responsible Energy Eleventh Set of Interrogatories to Applicants Relating to Issue No. 16 (March 8, 1984), Interrogatory No. 11-9(a).

94/ Contrary to OCRE's assertion, the component did not fail, see Tr. 2230 (Kammeyer), 2263 (Christiansen), and the ASLB did not characterize the defect as a failure. See PID at 65. In any event, the problem occurred at River Bend and was not applicable to Perry. See Tr. 2262 (Christiansen).

95/ Although OCRE would argue otherwise, Applicants are not obliged to meet an absolute standard, but rather a "reasonable assurance" test. See Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 421 (1980); see also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC __ (October 22, 1985), slip op. at 100.

program provides this assurance. See PID at 75.

OCRE next claims that the ASLB mischaracterizes the evidence of cylinder block cracking. OCRE Brief at 27-28. The ASLB's characterization is correct. PID at 72-73.96/ OCRE's abbreviated statement omits, among other things, that the cracks were considered benign. Similarly, it is obvious that there is no support for OCRE's conclusory statement that "Dr. Bush noted that the reason for the absence of [cylinder block] cracking is the low number of operating hours on the engines." OCRE Brief at 28. In the actual testimony of the witness (Tr. 2413):

> Q: Are there any ligament-to-ligament cracks at Perry blocks?
> A: To my knowledge none, but of course it is probably a very few hours of operation, too.

OCRE attacks the ASLB's reliance on the statement of a witness concerning the length of time emergency power would be needed. OCRE Brief at 28; PID at 72. Although the witness cited by the ASLB later corrected the statement, Tr. 2274 (Kammeyer), the ASLB still correctly accepted the 572 hour inspection interval in view of the substantial conservatisms associated with that value. See Tr. 2269-73 (Kammeyer); PID at 72-73.

OCRE argues that the ASLB erred in refusing to consider the character of the Owners Group when it evaluated and approved its program for the revalidation of the Perry engines. OCRE Brief at 28; PID at 62-63. 10 CFR Part 50, App. B, Criterion 1 requires that the entities responsible for performing quality assurance functions be independent from the influence of cost and schedule concerns. Applicants, not the Owners Group, have this responsibility at Perry. Thus, it

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96/ See also App. TDI Reply at 54-55.

was appropriate for the ASLB to completely disregard OCRE's allegations that the Owners Group was a "lobbying force," and to focus, instead, on the technical aspects of the Owners Group program.97/

In response to OCRE's claims that the ASLB improperly delegated contested issues to the Staff for post-hearing resolution, OCRE had every opportunity to question any aspect of the entire Owners Group program. To attack the adequacy of this program (and Perry's implementation thereof), it was not necessary that all of the detailed results be available.98/ Furthermore, with regard to OCRE's claim that the Staff should not evaluate the effect of added loads, there is neither evidence, nor expectation, at this time that additional loads will ever be added to the diesels, and OCRE cited to none.

OCRE attacks the ASLB's reliance on the Staff's conclusions by characterizing the Staff's approval of the diesels as "preliminary." OCRE Brief at 29. OCRE erroneously finds support for its position in the ASLB's reasons for denial of summary disposition of Issue No. 16 and the Staff's program of "interim licensing." Id. at 29-30. In commenting upon the Staff's extensive review of the diesels, the ASLB noted that the review included work the Staff had completed at the time summary disposition was denied. See PID at 66.99/ Although

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97/ In any event, OCRE failed to produce any evidence that the Owners Group was, in reality, a "lobbying force." See App. TDI Reply at 27-32.

98/ OCRE argues that open items 1, 2, 3 and 6, of SER Supp. 6 at 9-7, should not be resolved outside of the evidentiary hearing. OCRE Brief at 29. The record contains substantial evidence on each one of these items which OCRE was free to attack. See PID at 111-12 (Finding 169) (maintenance and surveillance); PID at 118-19 (Finding 192) (torsiograph testing); PID at 119-20 (Finding 195) (engine imbalance); PID at 120-21 (Finding 200) (chock plates).

99/ Compare NRC Staff Response to Applicants' Motion for Summary Disposition of Issue 16 (February 25, 1985), Affidavit of Drew Persinko Regarding Issue 16, at 12.

the ASLB may have concluded in denying summary disposition that the NRC Staff review was "brief" and "preliminary," it was entitled to reach a different conclusion after evidentary hearings.

OCRE continues to confuse the Staff's future evaluation of the Perry diesels' performance with its program of "interim licensing" at other plants. OCRE Brief at 29-30. The Staff did not consider "interim licensing" at Perry because Perry completed its Owners Group Phase II effort.100/ As evidenced by the Staff's testimony at the hearing, as well as its pre-filed testimony and exhibits, the Staff's evaluation of the diesels is complete. The ASLB, therefore, correctly concluded that OCRE's allegations concerning illicit "interim licensing" were without basis.

OCRE fails to support its assertion that the ASLB erroneously transferred the burden of proof. Instead, OCRE makes a series of conclusory statements indicative of nothing more than disappointment in its failure to persuade the ASLB that it should adopt OCRE's interpretation of the factual record. OCRE Brief at 30-31. The record establishes that Applicants met their burden of proof by providing substantial and convincing evidence on each of the matters cited by OCRE.101/

100/ See App. TDI Reply at 38-42.

101/ See PID at 117 (Finding 187) (turbocharger); PID at 120-121 (Finding 200) (foundation); Joint Testimony of Carl H. Berlinger, Drew Persinko, Spencer H. Bush, David A. Dingee, Howard M. Hardy, Adam J. Henriksen, and B.J. Kirkwood on Issue 16 Concerning TDI Emergency Diesel Generators at the Perry Nuclear Power Plant, ff. Tr. 2281, at 7, 52, Tr. 2495 (Christiansen) (Dresser couplings); Tr. 2187 (Christiansen) (engine specification); Tr. 2326-31 (Berlinger, Hardy) (San Onofre crankshaft); PID at 116-17 (Findings 184-185) (engine base and bearing caps).

b. Issue No. 16 Should Not Have Been Admitted as a Late-Filed Contention

OCRE's appeal of Issue No. 16 also should be rejected because the late-filed contention should not have been admitted.102/

OCRE failed to satisfy any of the requirements for an untimely filing of a contention. Relying in large part upon IE Information Notices (and accompanying newspaper articles) concerning events at other plants to establish "good cause," OCRE provided no explanation of the relevance of these occurrences to the reliability of the engines at Perry.103/ OCRE also relied on Perry Deviation Analysis Reports earlier made available to OCRE through discovery, as well as through the public record, without any explanation as to why OCRE previously disregarded this information.104/ OCRE also failed to meet the remaining criteria when it failed to demonstrate why diesel generator reliability was not assured by Applicants' commitment to regulatory requirements, failed to establish its competence to litigate the issue, and summarily stated that its participation would "aid in the development of the record" and that "[d]elay of the proceeding is of no concern."105/

OCRE's contention also lacked adequate basis and specificity, as required by 10 CFR § 2.714(b). As previously noted, OCRE failed to establish a nexus

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102/ Applicants are free to urge affirmance of the ASLB's result on grounds other than those assigned by the tribunal. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 n.3 (1984).

103/ See Ohio Citizens for Responsible Energy Motion to Resubmit its Contention #2 (September 16, 1983) ("Motion"), at 1,3.

104/ Motion at 1-2.

105/ Motion at 3-4.

between the information it relied upon and the engines at Perry, relying instead on a conclusory statement that the items were indicative of a "pattern of deficiencies and substandard quality," a statement not borne out by the documents in question.106/ The Deviation Analysis Reports relied upon by OCRE applied to problems which had either been corrected, were being corrected, or, in some cases, were not even applicable to Perry.107/ Furthermore, OCRE failed to explain why the discovery of such problems was indicative of anything more than a good quality assurance program. Having failed to satisfy the requisite criteria, OCRE's diesel generator contention should not have been admitted.

For the reasons set forth above, OCRE's appeal of the ASLB's decision to dismiss Issue No. 16 should be denied.

c. May 28, 1985 Memorandum and Order (Motion to Reopen the Record on Issue 16)

OCRE argues that the ASLB erred in denying its motion to reopen the record on Issue No. 16. OCRE Brief at 31-33.108/ OCRE initially attacks the decision by noting that "the same valves also failed at Shoreham." OCRE Brief at 31. See also id. at 32. This statement is without basis in the record. In fact, Shoreham "discovered crack indications on the valve body" when it inspected the check valves on its engines, which likely would have been detected when Shoreham

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106/ Motion at 3. The one design problem reported which affected Perry had been addressed and OCRE did not allege that the remedy was inadequate. See Applicants' Answer to Ohio Citizens for Responsible Energy Motion to Resubmit its Contention #2 (October 3, 1983)("Answer"), at 10-12.

107/ See Answer at 12-14.

108/ OCRE's motion was based upon the failure of an air-start system header check valve at Grand Gulf which OCRE maintained demonstrated the inadequacy of the Owners Group program. See Motion to Reopen the Record on Issue #16 (April 30, 1985), at 2. The Perry engines do not have such a valve.

performed the Owners Group maintenance requirements.109/

OCRE attacks on two fronts the ASLB's application of the third prong of the tripartite standard on whether or not to reopen the record.110/ OCRE Brief at 32-33. The ASLB's decision to deny OCRE's motion was premised on the fact that the Perry engines did not have the check valves in question in their air start system and the fact that the component was evaluated by the Owners Group.111/ Because the new information was, therefore, not relevant to Perry or the Owners Group program, the ASLB correctly found that the information could not influence its ultimate decision on Issue No. 16.

The ASLB was therefore correct in denying OCRE's motion to reopen the record.

B. The ASLB Did Not Err in Dismissing OCRE Issue No. 6 and Summarily Disposing of OCRE Issue Nos. 9 and 13

1. Issue No. 6: Standby Liquid Control System

a. Background

OCRE argues that the ASLB wrongly dismissed Issue No. 6. That issue states:

109/ NRC Staff Response to OCRE Motion to Reopen the Record (May 15, 1985), Affidavit of Drew Persinko at 3-4.

110/ The third test is "that a different result might have been reached had the newly proferred material been considered initially." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985). OCRE argues that the ASLB erred by even considering the third test. OCRE Brief at 32. Notwithstanding the ASLB decison cited by OCRE, LBP-83-52, 18 NRC 256 (1983), Appeal Board precedent requires applying the third test in this situation. See Black Fox, ALAB-573, 10 NRC at 804 (1979).

111/ Memorandum and Order (Motion to Reopen Record) (May 28, 1985), at 1-2.

> Applicant should install an automated standby liquid control system to mitigate the consequences of an anticipated transient without scram.

Since Perry has a standby liquid control system ("SLCS"),112/ LBP-81-24, 14 NRC at 220, the issue is whether the SLCS initiation should be automatic or manual.

Following the close of discovery on Issue No. 6, the Commission issued its final rule on anticipated transients without scram ("ATWS"). 49 Fed. Reg. 26036 (June 26, 1984). The new rule explicitly dealt with SLCS initiation.

> The SLCS initiation must be automatic and must be designed to perform its function in a reliable manner for plants granted a construction permit after July 26, 1984, and for plants granted a construction permit prior to July 26, 1984, that have already been designed and built to include this feature.

10 CFR § 50.62(c)(4), 49 Fed. Reg. at 26045 (emphasis added). Since the Perry construction permits were issued prior to July 26, 1984, the Perry SLCS system need only include automatic initiation if it has "already been designed and built to include this feature." The Supplementary Information accompanying the new rule included a similar explanation. 49 Fed. Reg. at 26038.

On July 6, 1984, OCRE moved for summary disposition of Issue No. 6. OCRE argued the Perry SLCS must be automated because it "is being designed and built such that the SLCS will be capable of automatic initiation" and because "[a]utomation of the SLCS can be achieved at low cost."113/ Both Applicants and Staff opposed OCRE's motion, pointing out that the motion on its face failed to establish that the Perry SLCS had already been designed or built for automatic

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112/ The SLCS is a system for injecting borated water into the reactor primary coolant system. 49 Fed. Reg. 26036, 26038 (1984).

113/ Statement of Material Facts As To Which There Exists No Genuine Issue To Be Heard, attached to OCRE Motion for Summary Disposition of Issue No. 6.

initiation.114/

Recognizing that the final ATWS rule as applied to Perry would be dispositive, the ASLB orally requested the parties to provide their views on the meaning of "designed and built" and how that language applied to Perry. Based upon the parties' replies,115/ and the earlier pleadings, the ASLB found that there were no remaining material issues of fact and, with former Chairman Bloch dissenting, denied OCRE's summary disposition motion and dismissed Issue No. 6.116/

b. Status of Perry SLCS

There is no factual dispute on the "designed and built" status of the Perry SLCS initiation. As far as its design, the Preliminary and Final Safety Analysis Reports have always shown manual initiation. The NRC's Safety Evaluation Reports also reflect manual initiation. During 1980-1982, GE performed design and analysis work on automatic initiation for CEI as a prudent response to the possibility that the final ATWS rule might require automatic initiation. In June and July, 1982, meetings with the Advisory Committee on Reactor Safeguards and the NRC Staff, CEI described the SLCS as being manually initiated. Notwithstanding CEI's position to retain manual initiation, the GE electrical

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114/ NRC Staff Response to OCRE's Motion for Summary Disposition of Issue 6 (July 30, 1984); Applicants' Answer in Opposition to OCRE Motion for Summary Disposition of Issue No. 6 (July 30, 1984). For example, OCRE's motion (at 2) acknowledged that the SLCS "was to be manual even though automatic is possible."

115/ OCRE Brief on the History and Intent of the ATWS Rule (September 7, 1984); NRC Staff Response to Board Request for Information Regarding the New ATWS Rule (September 7, 1984); Applicants' Response to ASLB Request for Information on ATWS Rule and the Perry SLCS (September 7, 1984).

116/ LBP-84-40, 20 NRC 1181 (1984). Although no cross-motions for summary disposition were filed, the ASLB majority properly decided the issue in favor of Applicants and the Staff. See 6 Moore's Federal Practice, ¶56.12; Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d ¶2720.

elementary drawings in June 1982 included automatic initiation. The architect-engineer on August 2, 1982 modified its electrical elementary drawings to reflect the GE drawings. However, on August 9, 1982, CEI directed GE to return the design to manual initiation. The GE drawings were effectively changed in December 1983, and the architect-engineer's drawings in February 1984.117/

The "as built" status of the Perry SLCS initiation is similarly uncontroverted. The Perry SLCS was never built to include automatic initiation. Automatic initiation would require bringing plant status indicators from the plant to the control system logic and sending appropriate signals to SLCS pumps and valves. Thirty-two additional circuits and eight additional relays would have to be installed and two switches would have to be replaced in order to convert the Perry SLCS to automatic initiation. While control room panels have automatic initiation logic included in a few of the plug-in circuit cards and memory chips, a substantial amount of additional equipment would be required to make the Perry SLCS initiation automatic. As of June 26, 1984 (the date of the final ATWS rule), installation of manual SLCS initiation in Unit 1 was at least 90% complete.118/

117/ LBP-84-40, 20 NRC at 1185-86; Affidavit of Frank R. Stead, attached to Applicants' Response to ASLB Request for Information on ATWS Rule and the Perry SLCS (September 7, 1984); Affidavit of John A. Grobe, attached to NRC Staff Response to Board Request for Information Regarding the New ATWS Rule, (September 7, 1984) ("Grobe Affidavit").

118/ LBP-84-40, 20 NRC at 1186-87; Affidavit of Gary R. Leidich, attached to Applicants' Response to ASLB Request for information on ATWS Rule and the Perry SLCS (September 7, 1984); Grobe Affidavit. Since Unit 2 construction is substantially behind that of Unit 1, Unit 2's SLCS is similarly not built for automatic initiation. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2) DD-84-23, 20 NRC 1549 (1984) (discussing construction status of Unit 2).

c. Interpretation of the Final ATWS Rule

The key to this issue is the meaning of the term "already designed and built" in the final ATWS rule. If the Perry SLCS was never designed and built to include automatic initiation, then the ASLB's decision was correct. The ASLB majority concluded that the Unit 1 SLCS was "now designed and built for manual initiation and that it is not designed and built for automatic initiation." LBP-84-40, 20 NRC at 1187. Given the undisputed facts surrounding the design history and construction status of the initiation feature, that is clearly the proper conclusion.

The dissent filed by former Chairman Bloch would bypass the literal language of the rule and interpret it "to effectuate the purpose of the framer rather than by mechanical rules of word interpretation." LBP-84-40, 20 NRC at 1192. The dissent states that its "reasonable interpretation of 'designed and built' would require that the total project, including its design and construction and possible costs for downtime during construction, be reasonably completed." Id. at 1193.

OCRE's arguments are similar to those advanced by the dissent.119/ OCRE rejects applying the language of the rule. Indeed, OCRE concedes that the Perry SLCS was not designed and built to include automatic initiation.120/ OCRE tries

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119/ OCRE would have "the dissenting opinion of Chairman Bloch affirmed in every respect." OCRE Brief at 39.

120/ See OCRE Reply to Applicant and NRC Staff Responses to OCRE's Motion for Summary Disposition of Issue No. 6 (August 3, 1984) ("Applicants claim that Perry has not already been designed and built to include an automated SLCS. Of course it has not.") OCRE's acknowledgement that the Perry SLCS could be converted to automation means that it is not already automated. See, e.g., OCRE Motion for Summary Disposition of Issue No. 6, at 2.

to glean some other meaning from the "legislative history." However, legislative history should be used to resolve ambiguities, not to create them. Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp., 545 F.2d 754, 757 (1st Cir. 1976).

OCRE's major argument is that the "designed and built" language stems from a "generic value/impact analysis." According to OCRE, this analysis showed that the cost to automate SLCS on an existing plant would be $23 million. OCRE Brief at 34. OCRE then argues that since the cost of converting Perry to automatic initiation is only $100,000, Perry is not like the existing plants which the Commission excluded from the automatic initiation requirement. Id. at 34-35.

Regardless of the accuracy or comparability of the dollar amounts quoted by OCRE,121/ its argument is irrelevant. The ATWS rule reflects the Commission's policy determination that certain categories of plants need not automate their SLCS systems. OCRE cannot challenge the appropriateness of these categories by analyzing the cost of converting Perry to automatic initiation. As even OCRE must acknowledge, the purpose of generic rulemaking is to avoid such case-by-case analyses. Cf. OCRE Brief at 37. The test is whether the SLCS was "already designed and built to include this feature [automatic initiation]," not whether "the total project...be reasonably completed," LBP-84-40, 20 NRC at 1193, or the dollar comparisons on which OCRE relies. OCRE Brief at 34-35.

121/ The $100,000 figure for converting the Perry SLCS to automatic excludes delay costs as well as the costs of an inadvertent trip. See Affidavit of Gary R. Leidich, attached to Applicants' Answer to OCRE's Motion for a Stay Pendente Lite (October 10, 1985). The $23 million figure includes both of these cost elements, as well as the cost of increasing the SLCS capacity from 86 gpm to 150-200 gpm, and the cost of automatic initiation. See 49 Fed. Reg. at 26038; SECY-83-293 (July 19, 1983), Encl. C at 15, Encl. D at 19.

Similarly unavailing is OCRE's argument that the rule "would create the opportunity for [construction permit] holders to evade the rule" by allowing construction permittees "having an automatic SLCS design to avoid implementing its function by not building it as automatic." OCRE Brief at 36. OCRE's rationale would apply equally to pre-July 1984 construction permittees who could "avoid" the rule by not designing automatic SLCS's. The Commission has made the policy choice reflected in the rule. While OCRE may disagree with the line which the Commission has drawn, that was a matter for the rulemaking.122/ OCRE's position would, in fact, penalize utilities such as CEI which took prudent steps in advance of the rule so that they might be able to comply with whatever rule was finally promulgated.

OCRE also argues that it is unappropriate to apply the words of the rule because of the "extreme safety significance of ATWS in BWRs and the important contribution to safety made by automating the SLCS." OCRE Brief at 38. The Commission has determined that manual SLCS initiation is acceptable from the standpoint of the public health and safety for all plants currently operating or under construction unless a plant is already designed and built to include automatic initiation. That safety determination cannot be re-examined by OCRE's appeal. Nor can that issue be considered in the guise of "[capturing] a significant safety improvement at low cost." OCRE Brief at 39. Had the Commission intended a cost-benefit analysis, it would have provided for one in the rule.

What the ATWS rule does mandate for plants such as Perry is an analysis of whether the plant has already been designed and built to include automatic SLCS

122/ OCRE's representative participated in the ATWS rulemaking, see 49 Fed. Reg. at 26037, but did not challenge the final rule.

initiation. The ASLB majority correctly determined that Perry was neither designed nor built to include automatic SLCS initiation and that it was in fact designed and built with manual initiation. The ASLB's dismissal of Issue No. 6 was, therefore, correct.

2. Issue No. 9: Polymer Degradation

a. Background

OCRE in Section II.E of its appeal brief takes issue with the ASLB's summary disposition of Issue No. 9.123/

Following discovery and OCRE's particularization of the issue, the Staff filed for summary disposition.124/ The ASLB granted the Staff's motion with the exception of the following genuine issue of fact, which the ASLB admitted for hearing:

> whether the inspection and maintenance program will be adequate to assure that safety functions will not be inhibited by radiation-induced embrittlement of polymers.

123/ The contention as admitted stated:

> Applicant has not demonstrated that the exposure of polymers to radiation during the prolonged operating history of Perry would not cause unsafe conditions to occur.

Memorandum and Order (Concerning Motions to Admit Late Contentions) (July 12, 1982), at 6. Issue No. 9 was based on studies by Sandia National Laboratories ("Sandia") which indicated that certain polymeric materials used as electrical cable insulation experienced greater degradation when subjected to relatively low dose rates over a longer period of time (as during normal plant operation) than when subjected to the same total integrated dose at higher dose rates over a shorter period of time (as during environmental qualification testing). See id. at 4. The ASLB admitted the broad polymer degradation contention conditionally, subject to further specification by OCRE. Id. at 6. Cf. ASLB's conditional admission of Issue No. 1, discussed supra at § I.B.1.

124/ NRC Staff Motion for Summary Disposition of Issue #9 (January 14, 1983) ("Staff's Issue 9 Motion").

LBP-83-18, 17 NRC 501, 511 (1983) (footnote omitted).

Applicants moved for reconsideration of the ASLB's order on the surveillance and maintenance issue.125/ In their motion for reconsideration Applicants pointed out that NRC regulations and practice do not require that a surveillance and maintenance program be issued prior to the need for such a program. See Motion for Reconsideration at 7-9.126/ The ASLB granted Applicants' motion, concurring that NRC regulations permit development of a surveillance and maintenance program at the time when it is needed, which in this case (due to the long-term nature of dose-rate effects on polymers) would not be until several years after plant startup. See Tr. 828.

b. Timing of OCRE's Appeal

The ASLB granted Applicants' motion for reconsideration, summarily disposing of Issue No. 9 in full, on May 9, 1983. OCRE now comes, almost two years later, to challenge the ASLB's decision granting summary disposition of Issue No. 9.

Appeals must be brought within 10 days of an initial decision. 10 CFR § 2.762. It is well established that a partial initial decision is an appealable decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 (1983). A partial initial decision makes earlier summary disposition rulings ripe for review. Carolina

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125/ Applicants' Motion for Reconsideration and Clarification of the Licensing Board's March 30, 1983 Memorandum and Order on Summary Disposition of Issue No. 9 (April 14, 1983) ("Motion for Reconsideration").

126/ As part of the overall quality assurance program for plant operation, the program should be "establish[ed] at the earliest practicable time, consistent with the schedule for accomplishing the activities...." 10 CFR Part 50, App. B, Criterion 2 (emphasis added).

Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232, 235 (1985). OCRE failed to take advantage of the timely opportunity offered by the December 2, 1983 partial initial decision, LBP-83-77, 18 NRC 1365, to appeal the polymer degradation issue. Instead, OCRE chose, unreasonably, to wait until the ASLB issued its September 1985 concluding partial initial decision. This delay could unfairly prejudice Applicants in the event that an appeal were to result in the need to take additional actions, since it might not be possible to take such actions prior to plant operation. Applicants, as a matter of policy and fairness, should not be made to suffer for OCRE's inexcusable dilatoriness in filing its appeal. Neither would a delay be in the public interest since, for the reasons discussed in § II.B.2.c., infra, OCRE fails to establish the existence of a safety concern relating to polymer degradation at Perry. OCRE's appeal is therefore untimely and should be denied.

c. OCRE's Arguments on Appeal

OCRE in its appeal argues that the ASLB should not have limited its analysis to the interim period prior to full-scale environmental qualification, was incorrect in excluding mechanical (non-electrical) equipment from its analysis, improperly allowed "gaps" in the envidentiary record to be filled by post-summary disposition affidavits, and erred in ruling on reconsideration that Applicants' surveillance and maintenance program was not an appropriate subject for litigation under the Commission's regulations. None of OCRE's arguments has any merit.

(1) Mechanical Equipment

OCRE objects that the ASLB's "assumption that seals and gaskets can become degraded without causing a safety problem...is not supported by evidence," and that the ASLB improperly placed the burden of proof on OCRE to show the existence of a safety problem. OCRE Brief at 50. See LBP-83-18, 17 NRC at 507.

With respect to burden of proof, OCRE misunderstands the Commission's Rules on summary disposition. Those Rules, at 10 CFR § 2.749(b), require that:

> When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact.

(Emphasis added). Applicants and the Staff supported the Staff's motion for summary disposition by affidavits of experts.127/ Those affidavits were not limited in scope to electrical equipment, but addressed polymer degradation in safety-related equipment generally. It was incumbent upon OCRE to set forth specific facts controverting Applicants' and Staff's case where OCRE believed a genuine issue of material fact existed. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 NRC 75, 81-83 (1981).

OCRE is unpersuasive in its attempts to suggest the existence of a material issue of fact overlooked by the ASLB. OCRE states generally that "electrical systems control mechanical components such as valves, which utilize the suspect

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127/ Affidavit of James E. Kennedy in Support of Summary Disposition of Issue #9, attached to Staff's Issue 9 Motion; Affidavits of Srinivasan Kasturi and David R. Green attached to Applicants' Answer in Support of NRC Staff Motion for Summary Disposition of Issue No. 9 (February 8, 1983).

polymers," and that, as a logical matter, "[i]t is inconsistent to assume that the failure of a control system is unsafe while failure of the controlled component is not unsafe." OCRE Brief at 50. However, OCRE fails to identify specifically any mechanical components at Perry (electrically controlled or otherwise) which could be rendered unsafe by radiation dose-rate effects.128/

OCRE further states that the ASLB's dismissal of the mechanical components aspect of the contention is inconsistent with the ASLB's stated reasons for interpreting the contention to include such components. OCRE Brief at 50. See LBP-83-18, 17 NRC at 505. This ignores the substantial difference between the requirements for admitting a contention, see 10 CFR § 2.714, and the stricter standard imposed where, as here, a motion for summary disposition is properly supported by affidavit or other evidence. See 10 CFR § 2.749; Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425 n.4 (1973) (fact that contention is found admissible under 10 CFR § 2.714 does not give rise to a genuine issue of fact within the meaning of § 2.749).

(2) Scope of the ASLB's Analysis

OCRE argues that the ASLB erred in limiting its analysis of electrical components to consideration of the interim period between startup of Perry and the deadline for demonstration of full-scale equipment qualification under the new rule. OCRE Brief at 48-49. Applicants note that OCRE raises this argument for

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128/ In this connection, OCRE claims that the ASLB incorrectly asserted that OCRE had failed to identify polymeric mechanical components with sufficient specificity. See OCRE Brief at 50-51. The ASLB did not dismiss OCRE's argument for failure to identify specific mechanical components. The ASLB dismissed OCRE's concern with mechanical components because OCRE failed to show that degradation of such components would cause a safety problem. LBP-83-18, 17 NRC at 507 & n.16.

the first time on appeal.129/ Indeed, OCRE argued below precisely the interpretation of 10 CFR § 50.49 which it would now have the Appeal Board reject.130/ OCRE cannot now argue that the interim analysis which it called for, and which the ASLB endorsed, is not sufficient.

At any rate, OCRE's current argument regarding the proper scope of the ASLB's analysis is without basis. OCRE reiterates its argument that a licensing board has no authority to consider anything less than a full-term operating license, and claims that the ASLB's interim analysis was an improper delegation of authority to the Staff. OCRE simply ignores the fact that the Commission's equipment qualification rule, at 10 CFR § 50.49(i), specifically authorizes the interim analysis which OCRE claims is prohibited. OCRE's assertion that nothing in the rule prohibited the ASLB from imposing an earlier compliance schedule can only be viewed as a challenge to the regulation.131/

129/ Absent a serious substantive issue, which OCRE does not show to exist here, the Appeal Board does not ordinarily entertain arguments that are raised for the first time on appeal and that the licensing board thus had no opportunity to address. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978).

130/ See OCRE Response to NRC Staff Motion for Summary Disposition of Issue #9 (February 7, 1983), at 4.

131/ The provision of the regulations cited by OCRE purportedly allowing the ASLB to impose an earlier deadline, 10 CFR § 2.711, is inapposite. As stated in 10 CFR § 2.700, which addresses the scope of Subpart G: "The general rules in this subpart govern procedure" (emphasis added) in NRC adjudications. Thus, § 2.711 does not apply to substantive regulations such as 10 CFR § 50.49.

OCRE also cites Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 208 (1978), which states that a board may, under certain circumstances, order the Staff to publish licensing documents by a certain date to avoid delay. This case is totally irrelevant to a licensing board's power to alter a compliance schedule set by Commission regulation.

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OCRE also argues that "to claim that the Board is bound by a projected licensing date, beyond which it has no authority, is circular reasoning, as the Board itself controls the date of licensing...." OCRE Brief at 49. The ASLB's approach was consistent with the direction given by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, (1981), that licensing boards should conduct licensing proceedings so as not to interfere unnecessarily with plant operation. Once Applicants' official projected schedule for plant startup changed, it was incumbent on OCRE to bring any concern it might have had with the adequacy of Applicants' full-scale equipment qualification to the attention of the ASLB. OCRE did not do so, but simply sat back and waited for the appeal process.

(3) Post-Summary Disposition Affidavits

OCRE's objections to post-summary disposition affidavits required by the ASLB are unfounded.132/ OCRE argues that "[a]llowing gaps in the evidentiary

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OCRE also refers to the wording of the contention itself ("exposure of polymers to radiation during the prolonged operating history of Perry"). OCRE Brief at 49. This, likewise, is irrelevant, since the issue was admitted prior to passage of the Commission's environmental qualification rule.

132/ The ASLB conditioned its partial summary disposition of the contention on submission of an affidavit by Applicants confirming a statement concerning safety margins in electrical equipment, as applied to particular equipment at Perry potentially subjected to significant dose-rate effects. LBP-83-18, 17 NRC at 508. Applicants subsequently submitted the required affidavit. See Affidavit of Srinivasan Kasturi, attached to Applicants' Response to Licensing Board's March 30, 1983 Order Concerning Summary Disposition of Issue No. 9 (March 9, 1984).

In granting Applicants' motion for reconsideration, the ASLB required Applicants to submit

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record to be filled by post-summary disposition affidavits is clearly unfair and improper" because OCRE has "no means...by which to challenge the affidavits." OCRE Brief at 51.133/ OCRE did not object at the time that the ASLB imposed the requirements for additional affidavits, either in a motion to reconsider or on the record (See Tr. 828-29). Cf. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985) (party may not challenge on appeal licensing board practices not objected to at hearing stage). Neither did OCRE raise any questions concerning the adequacy of the affidavits (by motion for reconsideration or other appropriate motion) after they were

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> brief affidavits stating the tests that they now intend to include in the quality assurance program [on polymer degradation], and an expert opinion that those tests are adequate to detect electrical embrittlement.
>
> In addition, the affidavit should contain a statement concerning the ability to gain access to key locations in which degraded polymers might be present....

Tr. 828. These requirements addressed concerns raised by OCRE relating to detection of degradation of electrical cable insulation inside conduit. See Tr. 818-19. Applicants submitted the required affidavits on August 4, 1983. See Applicants' Response to Licensing Board's May 9, 1983 Order Concerning Issue No. 9 (August 4, 1983), and attached affidavits of David R. Green and Srinivasan Kasturi.

133/ Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-284, 2 NRC 197, 205-06 (1975), cited by OCRE, is not supportive of OCRE's appeal. That case did not address the standards for summary disposition, but involved reopening of the record to address certain sua sponte issues raised by the Appeal Board following the evidentiary hearing. Further, ALAB-284 held that even in the context of an evidentiary hearing, a gap in the record could be filled by affidavits on narrow and relatively simple questions. More on point is Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977), in which the Appeal Board ruled that it was proper for the licensing board to request submission of an additional document in support of a motion for summary disposition where the board knew of the document and was faced with insufficient record for summary disposition without it.

submitted. Nor, indeed, does OCRE do so now. Thus, OCRE fails to show that the ASLB's alleged procedural error changed the ultimate outcome on this contention. Shoreham, ALAB-788, 20 NRC at 1151, 1155-56 (complaining party must demonstrate actual prejudice, i.e., that procedural ruling had substantial effect on outcome of proceeding).

OCRE further asserts that "[i]f the Board had any doubts about the validity of Applicants' position, it should simply have denied summary disposition and explored the matter at a hearing...." OCRE Brief at 51. OCRE offers no reason to suggest that the ASLB doubted the validity of Applicants' position. The required affidavits clearly were meant to confirm statements Applicants had already made on the record. See LBP-83-18, 17 NRC at 508; Tr. 824-25, 828.

(4) Schedule for Submitting Surveillance and Maintenance Program

Finally, OCRE disputes the ASLB's determination that Applicants need not submit their completed surveillance and maintenance program on polymer degradation for litigation in this proceeding. However, OCRE merely characterizes as "absurd," without addressing the merits of the issue, Applicants' and the ASLB's interpretation of 10 CFR Part 50, Appendix B on this point. OCRE Brief at 52. Again, OCRE points to no genuine issue of material fact concerning the considerable evidence on Applicants' program which was submitted.134/

134/ OCRE also claims that "[i]t appears that the Board was influenced by Applicants' claim that a hearing on the maintenance and surveillance program would cost them money that would not otherwise be expended before fuel load." OCRE Brief at 53. On the contrary, the record appears to reflect that the ASLB was not influenced by Applicants' cost arguments. See Tr. 817 ("The real question is what the section in Appendix B means.")

In conclusion, OCRE fails to point to any genuine issue of material fact on the basis of which summary disposition of Issue No. 9 should have been denied. OCRE's appeal should be rejected.

3. Issue No. 13: Turbine Missiles

OCRE objects to the ASLB's granting summary disposition of Issue No. 13.135/ See LBP-83-46, 18 NRC 218 (1983). OCRE claims that the ASLB improperly deferred final resolution of the issue to the NRC Staff, that the ASLB improperly denied OCRE's request for a continuance to respond to the NRC Staff's summary disposition motion, and that the ASLB improperly rejected OCRE's substantive opposition to the summary disposition motion. None of OCRE's arguments is valid. In addition, OCRE's appeal should be rejected since, as an initial matter, the contention should not have been admitted.136/

a. Issue No. 13 Should Not Have Been Admitted as a Late-Filed Contention

OCRE's motion for leave to file its turbine missile contention was filed August 18, 1982, more than one year after the deadline for filing contentions. As good cause for its untimely filing, OCRE pointed to the Staff's Safety

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135/ Issue No. 13 reads as follows:

> Applicant has not demonstrated that the placement and orientation of the Perry Nuclear Power Plant turbine-generators is in compliance with regulatory requirements that limit the risk that low trajectory turbine missiles will strike safety related targets, thereby endangering the safe operation of the facility.

LBP-82-98, 16 NRC 1459, 1471 (1982).

136/ The result reached by the ASLB (i.e., dismissal of the contention) may be sustained on grounds other than those relied on by the ASLB. Byron, ALAB-793, 20 NRC at 1597 n.3.

Evaluation Report ("SER") (May 1982), the letter from the Advisory Committee on Reactor Safeguards (July 13, 1982), and a 1976 report referenced in the FSAR.

The ASLB in LBP-82-98, 16 NRC 1459, held that OCRE had shown good cause for its late-filed contention because the May 1982 SER "first put [OCRE] on notice of the seriousness of this issue and...the July 13, 1982 report of the ACRS also highlighted this problem." Id. at 1462. The ASLB held that "we do not consider it realistic to expect an intervenor to be conversant with the entire SER and the entire record of the construction permit stage when it first files contentions." Id. at 1462-63. Instead the ASLB stated that it was acceptable for an intervenor "to await scientific publications and key staff documents." Id. at 1463.137/

In fact, OCRE's good cause was premised on a report furnished by Applicants to the NRC Staff in 1976 and a 1977 Regulatory Guide.138/ The May 1982 SER did no more than list turbine missiles as an "open item" with no suggestion that the Staff considered it a significant unresolved safety issue. The ACRS letter only expressed concern with the NRC Staff's "progress" in resolving the generic turbine missile issue and did not even mention Perry.

The Commission has made it clear that an intervenor cannot sit back and await scientific publications and key Staff documents. Rather, the intervenor is obligated to examine publicly available documents to uncover any information which could serve as a basis for a contention. Catawba, CLI-83-19, 17 NRC at

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137/ Applicants' Motion for Directed Certification of the Order Admitting Issue No. 13 was denied as interlocutory in ALAB-706, 16 NRC 1754 (1982).

138/ See OCRE Motion for Leave to File Its Contentions 21 through 26 (August 18, 1982), at 1-2; OCRE Reply to Staff and Applicants' Responses to OCRE's Motion for Leave to File Its Contentions 21 through 26 (October 12, 1982), at 4-6.

1048. The ASLB, therefore, erred in initially admitting Issue No. 13.139/ Since it was erroneously admitted, OCRE's appeal of the decision on the merits must also be dismissed.

b. OCRE's Arguments On Appeal Are Without Merit

OCRE begins its attack on LBP-83-46 by arguing that the ASLB improperly deferred the "final resolution" of the turbine missile issue and delegated that responsibility to the NRC Staff. OCRE Brief at 40-41. OCRE misunderstands the record. The NRC Staff has established an inspection, maintenance and test program for the Perry turbines, including a three year inspection interval. GE, the turbine manufacturer, is preparing a report which will be used to generate Perry-unique testing and inspection schedules. In the meantime, however, Perry must adhere to the NRC Staff program.140/ Although OCRE argues that resolution of this issue must await the GE report, the real issue is not whether there may be later studies, but whether the current requirements are adequate. The Staff's affidavit, together with Applicants' affidavit,141/ fully support the adequacy of the NRC Staff's program.142/

139/ Applicants submit that the ASLB also erred in its analysis of the other factors for late-admission. See Applicants' Answer to OCRE Motion for Leave to File Its Contentions 21-26 (September 16, 1982), at 4-6.

140/ See NRC Staff's Motion for Summary Disposition of Issue No. 13 (May 31, 1983), Affidavit of John O. Schiffgens.

141/ Affidavit of D. P. Timo and L. H. Johnson, attached to Applicants' Answer In Support of NRC Staff Motion for Summary Disposition of Issue No. 13 (June 27, 1983). Messrs. Timo and Johnson are highly qualified engineers with the GE Large Steam Turbine Generator Department. They calculate a longer inspection interval than the Staff. Id. at 18.

142/ Although the ASLB assumed that the NRC Staff has verified or would verify GE's conclusion on the adequacy of testing, LBP-83-46, 18 NRC at 221 n.11, this assumption is unnecessary in light of the evidence presented. See Timo/Johnson Affidavit at 11, 16-17.

Next, OCRE challenges the ASLB's rejection of its request under 10 CFR § 2.749(c) to delay action on the Staff's summary disposition motion. OCRE said that it was actively pursuing potential witnesses and consultants, it lacked time to review documents, it desired further discovery, and it wished to await the GE report.143/ OCRE also argued that further action should await a "soon-to-be-filed court action, seeking additional information necessary for its case on the turbine missile issue," and OCRE's fund-raising activities.144/ None of these excuses warranted the delay. As the ASLB noted, OCRE had since October 1982 for discovery. LBP-83-46, 18 NRC at 226. OCRE's failure to pursue discovery more diligently and failure to investigate earlier the availability of experts or witnesses cannot constitute good cause for a delay.145/ Whether the GE report (which has not yet been issued), or any other document OCRE may obtain would give rise to a genuine issue of material fact is "sheer speculation." LBP-83-46, 18 NRC at 226. The issue is not whether OCRE requested a 6-month delay or a 2-3 month delay, cf. OCRE Brief at 42; OCRE failed to justify any delay.146/

143/ OCRE Response to NRC Motion for Summary Disposition of Issue #13 (June 23, 1983), Affidavit of Susan Hiatt.

144/ OCRE Amended Response to NRC Staff's Motion for Summary Disposition of Issue #13 (June 29, 1983), Affidavit of Susan Hiatt. Applicants know of no such court action.

145/ Indeed, OCRE had sufficient time and resources during this period to file a petition to intervene in another operating licensing proceeding. See OCRE Petition for Leave to Intervene, (July 1, 1983) in Duquesne Light Co. (Beaver Valley Power Station, Unit 2), Docket No. 50-412.

146/ Although OCRE alludes to the alleged liberality in granting comparable requests under the Federal Rules of Civil Procedure, OCRE Brief at 42, a continuance under those Rules must be based on more than "vague assertions that additional discovery will produce needed, but unspecified facts." SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981). See also 6 Pt. 2 Moore's Federal Practice ¶56.24.

OCRE also complains that information from GE was not made available on discovery. OCRE Brief at 43. Yet OCRE never filed a motion to compel nor sought discovery against GE as a non-party.147/ Nor does it appear that OCRE ever raised this issue before the ASLB.

Much of OCRE's appeal is devoted to the ASLB's treatment of the Heasler and Bush articles. OCRE Brief at 44-46. OCRE's June 23, 1983 Answer to the Staff's motion cited a statement in a 1982 paper by Heasler that there was a one in a thousand chance of a new turbine failing soon after it goes into operation. Id. at 3. OCRE did not reveal whether these were GE turbines, or turbines in nuclear service, or whether the failures occurred in the factory, or any other relevant information. Applicants' affidavit, however, demonstrated without contradiction on the record that there had never been an overspeed failure with the type of protection system at Perry and that no GE nuclear turbine had ever failed from stress corrosion cracking. Timo/Johnson Affidavit at 2-3. Since these were the only two kinds of events which could hypothetically lead to turbine missiles, this evidentiary showing was more than adequate to indicate that the Heasler article failed to create a genuine issue of material fact. The 1978 article by Dr. Bush, reviewed by the ASLB, further corroborated this conclusion.

OCRE also asserts that the ASLB erred when it denied OCRE's motion for reconsideration of LBP-83-46.148/ The ASLB's decision denying OCRE's motion for

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147/ OCRE asked for certain documents from Applicants' "agents," including GE. Applicants answered that GE had no contractual obligations to make such documents available to Applicants. OCRE failed to file a motion to compel or pursue discovery directly against GE as a non-party. See, e.g., 10 CFR § 2.740(f)(3); Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973).

148/ Motion for Reconsideration of the Licensing Board's August 9, 1983 Memorandum and Order Granting Summary Disposition of Issue No. 13 (October 14, 1983).

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reconsideration was correct.149/ OCRE's motion was supported by a letter written by Dr. Bush, not by an affidavit as required by 10 CFR § 2.749(b). Thus, OCRE failed to present admissible evidence showing that a genuine issue of material fact existed for the ASLB to address. Moreover, the Timo/Johnson affidavit addressed each of Dr. Bush's concerns. Dr. Bush could not have been aware of the Timo/Johnson affidavit when he wrote his letter since Applicants' Answer, to which the affidavit was attached, was submitted that very same day. Nor, apparently, had Dr. Bush seen the affidavit when OCRE contacted him by phone on October 11, 1983. Thus, the Bush letter was written without the benefit of the detailed information in the Timo/Johnson affidavit. His letter, therefore, could not and did not contravert the information on which the ASLB relied in LBP-83-46. Thus, OCRE's motion failed to provide a basis for reconsideration.

Finally, OCRE alleges that the Licensing Board wrongfully endorsed an unapproved Staff position that denigrated the Staff's former position. OCRE Brief at 46-47. OCRE's complaint seems to be that SSER-3 adopts a mechanism different from that used in a Regulatory Guide and the Standard Review Plan. Since the Staff is bound by regulation and statute, not by other regulatory positions, OCRE is raising a non-issue, and clearly one which has no bearing on a genuine issue of material fact. See Shoreham, ALAB-788, 20 NRC at 1161.150/

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OCRE's motion was based on a letter from Dr. Spencer Bush to A. Cappucci of the ACRS dated June 27, 1983. Dr. Bush therein commented on the Staff's generic position on turbine missile as reflected in SSER 3. See id., Attachment. Dr. Bush's letter reflects his desire to see more information, specifically the GE report, before offering his opinion of the efficacy of the Staff's position. Id.

149/ Memorandum and Order (Turbine Missile Reconsideration) (March 29, 1984).

150/ Moreover, OCRE has made no showing that the Staff's new position is any less stringent than the Staff's former position. The Staff still requires a

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Thus, OCRE's objections to LBP-83-46 and the ASLB's decision denying OCRE's motion for reconsideration thereof are without merit. OCRE's appeal of LBP-83-46 should, therefore, be rejected.

C. The ASLB Properly Denied OCRE's Late-Filed Air Lock Testing Contention

Section II.F of OCRE's Brief challenges the ASLB's denial of OCRE's motion to reopen and late-filed contention on air lock testing.151/ The contention claimed that Applicants' request, pursuant to 10 CFR § 50.12(a), for a partial exemption from air lock testing requirements in 10 CFR Part 50, App. J failed to meet the requirements of 10 CFR § 2.758.

The contention was properly denied because of its faulty premise that Applicants' exemption request must meet the requirements of 10 CFR § 2.758.152/ The contention was also rejectable for other reasons which the ASLB did not need to reach, but which would also warrant denial of OCRE's appeal.

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plant's overall probability of generating turbine missiles causing unacceptable damage to safety related equipment to be less than 10^{-7} per year. SSER-3 at 3-2. Only the method of calculating that probability has changed, as explained by the Staff in SSER-3.

151/ LBP-85-33, 22 NRC 442 (1985), denying OCRE Motion to Reopen the Record and to Submit a New Contention (July 5, 1985) ("OCRE Motion").

152/ Although its Motion and Brief are somewhat confused as to the nature of OCRE's arguments, the contention itself is explicitly limited to the claim that the exemption does not meet the tests of 10 CFR § 2.758. OCRE Motion at 2.

1. Section 2.758 Does Not Apply to Applicants' Exemption Request

Section 2.758 provides a mechanism for dealing with challenges to NRC regulations in adjudicatory proceedings.153/ It provides that a party to a proceeding "may petition that application of a specified Commission rule or regulation...be waived or an exception made for a particular proceeding" (emphasis added). OCRE's argument that an exemption must be judged by the standards of 10 CFR § 2.758 has no basis. Nothing in § 2.758 bars the use of 10 CFR § 50.12(a). Applicants at no time sought to use the adjudicatory process to challenge the applicability of Appendix J. Nor is there any requirement to do so. Therefore, § 2.758 does not apply.

The Commission's exemption regulation, 10 CFR § 50.12(a), has been a part of the NRC's rules since at least 1969. 34 Fed. Reg. 19546 (1969). Section 2.758 was added in 1972. 37 Fed. Reg. 15127 (1972). Section 2.758 was not intended to replace § 50.12(a), but rather to establish a specific procedure to govern challenges to Commission regulations raised in adjudicatory hearings. 37 Fed. Reg. at 15127, 15129. When the Commission adopted § 2.758, it neither repealed nor modified § 50.12(a).

OCRE seems to argue that the Commission's decision in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984), requires that § 2.758 be applied or at least that all exemptions requested in contested proceedings be submitted to the licensing board. OCRE Motion at 8; OCRE Brief at 56. The ASLB correctly pointed out that Shoreham involved an exemption request directly related to an already admitted contention. 22 NRC at 446.

153/ Section 2.758, together with all other provisions of Subpart G to 10 CFR Part 2, applies only to adjudications. 10 CFR § 2.700.

There is no such contention here. OCRE cannot use an exemption request unrelated to any pending issue to bootstrap its way into an admitted contention.

2. Applicants' Exemption Request Was Properly Submitted Under 10 CFR § 50.12

Although OCRE's contention was limited to the applicability of § 2.758, much of OCRE's Motion and Brief is devoted to an attack on § 50.12(a). OCRE argues that specific Congressional authority is needed to grant exemptions, OCRE Brief at 54, and that the Atomic Energy Act "does not authorize the Commission to grant exemptions." OCRE Motion at 3. OCRE proclaims that granting the exemption would be an ultra vires act. OCRE Motion at 1, 10.

OCRE is incorrect on all counts. Administrative agencies have inherent authority to provide for exemptions from their regulations. U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972).154/ The Atomic Energy Act gives NRC the authority to issue regulations to carry out its statutory functions. 42 U.S.C. § 2201(b),(p). Section 50.12(a) is such a regulation. The courts have specifically recognized NRC's exemption regulations. Duke Power Co. v. NRC, 770 F.2d 386 (4th Cir. 1985). Cf. Connecticut Light and Power Co. v. NRC, 673 F.2d 525 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982)(fire protection exemption provisions). Of course, any attempt to challenge the applicability of a Commission regulation can only proceed pursuant to 10 CFR § 2.758. Although OCRE claims that it "was not challenging the regulation, but instead offered an

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154/ OCRE's argument that the Allegheny-Ludlum principle applies only to complex economic regulations (OCRE Response to Staff and Applicant Answers (August 5, 1985)), is incorrect. See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-74-22, 7 AEC 939, 944 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station), LBP-84-45, 20 NRC 1343, 1381 n.143 (1984).

interpretation of it," OCRE Brief at 54, it is hard to read OCRE's argument that the NRC is without statutory authorization to issue exemptions as anything but a challenge to § 50.12(a).

OCRE also argues that the Commission may not consider financial burdens in passing on the exemption request. OCRE Brief at 55. OCRE's reliance on the PRDC and PG&E cases, OCRE Motion at 3-4, is simply inapposite.155/ The NRC has weighed financial burdens in other contexts.156/ So long as the reasonable assurance standard is met, financial burdens may be considered.

3. OCRE's Contention Was Rejectable on Other Grounds

In addition to the grounds relied upon by the ASLB, OCRE's late-filed contention was also rejectable on other grounds.157/

a. OCRE Failed to Support Reopening the Record

A motion to reopen the record must be timely, must address a significant safety or environmental issue, and must show that reopening would produce a different result. Louisiana Power & Light Co. (Waterford Steam Electric Station,

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155/ Neither Power Reactor Develop. Corp. v. International Union, 367 U.S. 396 (1961), nor Pacific Gas and Electric Co. v. State Energy Res. Cons. & Dev. Comm., 461 U.S. 190 (1983), prohibited cost-benefit considerations in reactor licensing. PRDC required that licensing decisions be made on reasonable assurance findings, not on the economic consequences of license denial. PG&E addressed the respective responsibilities of states and the Federal Government with respect to authorization to construct nuclear power plants.

156/ See, e.g., 10 CFR § 20.1(c) ("as low as reasonable achievable"); 10 CFR § 50.109(a)(3) (backfitting rule). OCRE itself relies on the NRC's cost evaluation for the Commission's SLCS regulation. OCRE Brief at 34-35.

157/ Having decided the § 2.758 issue against OCRE, the ASLB did not need to reach other grounds for rejecting the contention. 22 NRC at 445. However, the result reached by the ASLB (i.e. denial of the contention) may be sustained on grounds other than those relied on by the ASLB. Bryon, ALAB-793, 20 NRC at 1597 n.3.

Unit 3), ALAB-812, 22 NRC 5, 13 (1985). The burden of satisfying these requirements is a heavy one. Id. at 14. OCRE's motion met none of these standards. See generally Applicants' July 22, 1985 Answer to OCRE's motion.

OCRE's motion was extraordinarily untimely. Since 1978, the NRC's Standard Technical Specifications158/ have explicitly included the exemption. Applicants' July 31, 1984 initial draft technical specifications, available to OCRE, included the exemption, as did NRC Staff drafts of the technical specifications, served on OCRE on January 30 and March 6, 1985. Applicants formally transmitted the exemption to the NRC on April 8, 1985. OCRE wrote a letter to the NRC Staff concerning the exemption on May 8, 1985. Yet the motion to reopen was not filed until July 5, 1985. OCRE cannot sit back and await a staff document (in this case the June 21, 1985 environmental assessment) when information on which to base the contention was available months (if not years) earlier. Catawba, CLI-83-19, 17 NRC at 1048.159/

The contention does not raise a significant safety or environmental issue. Whether the exemption request is evaluated pursuant to § 2.758 instead of § 50.12 -- the specific issue raised by the contention -- has neither safety nor environmental significance. The underlying exemption request itself does not raise a significant safety issue, as evidenced by its inclusion in the NRC's Standard Technical Specifications since 1978 and the many identical exemptions

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158/ NUREG-0123, "Standard Technical Specifications for General Electric Boiling Water Reactors" (Rev. 1, April 1, 1978) § 4.6.1.3.a. (see Attachment 1 to Applicants' July 22, 1985 Answer to OCRE Motion).

159/ Even a two month delay in the later stages of a proceeding is enough to warrant denial of a motion to reopen. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 526 (1973).

for other plants.160/ Other arguments on significance raised by OCRE in its motion (but not in its brief) are shown to be baseless in Applicants' July 22, 1985 Answer at 14-17.

OCRE did not show that reopening would produce a different result. OCRE's only argument was that new information concerning regulatory non-compliance always warrants reopening. OCRE Motion at 9. This argument is irrelevant to the third reopening test. It is also irrelevant to the contention -- if the Commission grants an exemption, there is no regulatory non-compliance.

b. OCRE Failed to Support a Late-Filed Contention

OCRE's showing on the five factors to be balanced in deciding whether to admit a late-filed contention, OCRE Motion at 9-11, was totally inadequate. The most important of the factors are good cause for lateness, ability to make a significant contribution to the record, and delay/expansion of the proceeding. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). OCRE's unjustified untimeliness is demonstrated above. OCRE should have known of the exemption since July 1984 at the latest, and perhaps since NUREG-0123, Rev. 1 was published in 1978. OCRE's support for its ability to assist in developing the record was limited to an assertion that it conducted research on containment integrity in connection with another contention. OCRE Motion at 10. OCRE admitted that admitting the contention might result in some delay. It would obviously broaden the proceeding. OCRE's late-filed contention, therefore, did not meet the § 2.714(a) criteria.

160/ See Applicants' Answer to OCRE Motion at 3 n.1; NRC Staff Response in Opposition to OCRE Motion (July 24, 1985), Attachment.

CONCLUSION

For all the above reasons, Applicants respectfully request that Sunflower's and OCRE's appeals be dismissed.

Respectfully submitted,

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Dated: December 2, 1985

December 2, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing APPLICANTS' BRIEF IN OPPOSITION TO INVERVENORS' APPEALS FROM THE CONCLUDING PARTIAL INITIAL DECISION were served by deposit in the United States Mail, first class, postage prepaid, this 2nd day of December 1985, to all those on the attached Service List.

Jay E. Silberg

DATED: December 2, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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