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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket No. 50-440
	)	
(Perry Nuclear Power Plant, Unit No. 1)	)	
	)	

LICENSEES' ANSWER TO OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

On December 19, 1989, The Cleveland Electric Illuminating Company, on behalf of itself, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company (collectively "Licensees") filed with the Nuclear Regulatory Commission ("NRC") a request to amend the Technical Specifications for the Perry Nuclear Power Plant, Unit No. 1 ("PNPP"). The NRC published in the Federal Register on February 7, 1990, a notice that it was considering the issuance of the requested amendment, its proposed determination that the amendment involved no significant hazards considerations, and a notice of opportunity to request a hearing. 55 Fed. Reg. 4282 (1990).

On March 8, 1990, Ohio Citizens for Responsible Energy, Inc. ("OCRE") filed with NRC a petition for leave to intervene and request for hearing. OCRE's filing stated that it wished to

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raise a single issue of law with respect to the proposed Technical Specification amendment and agreed with Licensees and the NRC Staff that "the proposed amendment is a purely administrative matter which involves no significant hazards consideration." Petition at 4.

The NRC's notice of opportunity for hearing invited "any person whose interest may be affected by this proceeding" to file a petition for leave to intervene. 55 Fed. Reg. 4260. That petition "shall set forth with particularity the interest of the petitioner in the proceeding." Id. Licensees respectfully submit that OCRE has not shown the requisite interest in this proceeding.

The proceeding in which OCRE seeks to participate concerns an administrative change to the PNPP Technical Specifications. As OCRE acknowledges, the modification "is purely an administrative matter which involves no significant hazards consideration." Petition at 4. The proposed change would "replace the values of cycle-specific parameter limits with a reference to the Core Operating Limits Report, which contains the value of those limits and which is contained in a section of the Plant Data Book." 55 Fed. Reg. 4282. The proposed change would not alter any of these operating limits. The result would therefore be to delete information from Technical Specifications and place that same information in another reference.

This modification has no safety significance, as acknowledged by OCRE in referring to the change as purely administrative. Because of this fact, OCRE has not shown -- and cannot show -- that it meets the NRC's requirements with respect to its showing of interest.

NRC applies judicial concepts of standing in determining whether a petitioner has made the requisite showing of interest required by Section 189.a of the Atomic Energy Act and 10 C.F.R. § 2.714. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-88-2, 21 NRC 282, 316 (1985). These judicial standards require that the challenged action could cause (1) "injury-in-fact" to the potential intervenor, and (2) that such injury is arguably within the zone of interests protected by the Atomic Energy Act and the National Environmental Policy Act. See Warth v. Seldin, 422 U.S. 490 (1975) and Sierra Club v. Morton, 405 U.S. 727 (1972). OCRE has not met either of these requirements.

OCRE has not shown any "injury-in-fact" with respect to this proceeding. OCRE states that its members

> have a definite interest in the preservation of their lives, their physical health, their livelihood, the value of their property, a safe and healthy natural environment, and the cultural, historical, and economic resources of Northeast Ohio.

Petition at 3. Licensees do not dispute this claim. However, the subject matter of this proceeding -- the movement of core operating limits from Technical Specifications to a Core Operating Limits Report -- in no way affects these interests. There must be a connection between the threatened injury and the particular proceeding in which a petitioner wishes to intervene. Allied-General Nuclear Services, (Barnwell Fuel Receiving and Storage Station), LBP-76-12, 3 NRC 27, aff'd ALAB-328, 3 NRC 420 (1976). The purely procedural issue which is the subject of the proposed amendment is wholly unrelated to those interests, i.e., there is no nexus. Nor could the relief presumably requested by OCRE -- retaining core operating limit values in Technical Specifications -- prevent the injury to those interest. As the Supreme Court has held, there must be "a substantial likelihood that . . . relief requested will prevent or redress the claimed injury." Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978).

OCRE also asserts that its members have "an interest in preserving their legal right to meaningful participation in matters affecting the operation of" PNPP. Petition at 3. Licensees believe that this interest in legal rights does not fit the judicial requirements that "injury-in-fact" be "distinct and palpable," not "abstract," "conjectural" or "hypothetical." Warth v. Seldin, 422 U.S. at 501; Allen v. Wright, 468 U.S. 737, 751 (1983); Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983); O'Shea

v. Littleton, 414 U.S. 488, 494 (1974). The petitioner "must allege specific, concrete facts demonstrating that the challenged practices harm him." Warth v. Seldin, 422 U.S. at 507.

OCRE has alleged "injury-in-law," and not "injury-in-fact." Since OCRE has acknowledged that it does not have any substantive problems with the information being moved from Technical Specifications to the Core Operating Limits Report, and does not ask for a hearing on any substantive safety issue, OCRE's concern must be with the possibility that it might, at some future time, want to challenge substantive modifications to the core operating limits. That kind of concern is clearly conjectural and hypothetical, not real and immediate. See, Los Angeles v. Lyons, 461 U.S. at 102-103. Furthermore, the legal interest in having in a hearing is the type of "generalized grievance shared by a large number of citizens in a substantially equal measure" which will not support standing. Duke Power Company v. Carolina Environmental Study Group, id. It is not enough for there to be "a chilling effect on plaintiff's rights . . . absent a specific present objective injury or specific threat of future injury to plaintiff's rights." Allied-General Nuclear Services, Inc., 3 NRC at 285 n. 11 (citing Laird v. Tatum, 408 U.S. 1 (1972)). The Supreme Court "has consistently rejected claims of standing predicated solely on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" Dellums v. NRC, 863 F.2d 968, 973 (D.C. Cir. 1988), quoting Valley Forge

Citizens College v. Americans United for Separation of Church & State, Inc. 454 U.S. 464, 483 (1982).

In addition to OCRE's failure to adequately demonstrate "injury-in-fact," it has also failed to show that its injury is arguably within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act. As indicated above, the only injury with a nexus to this proceeding is OCRE's "legal" injury. That injury does not fall within the "zone of interests" of NRC's substantive statutes.

OCRE's legal injury relates neither to nuclear safety issues nor environmental ones. OCRE's "detriment, if any, is unrelated to the interest of health and safety with which Congress was concerned in the atomic energy area." Drake v. Detroit Edison Co., 453 F.Supp. 1123, 1130 (W.D. Mich. 1978). As pointed out in another District Court case,

> To determine what "zone of interests" are involved in the Atomic Energy Act, this Court must look to the policy set forth in that statute. That policy, stripped of its verbiage, is simply to make sure that this country would continue to lead all other countries in the research, development and application of atomic energy.

Nuclear Data, Inc. v. Atomic Energy Commission, 344 F. Supp. 719, 725 (N.D. Ill. 1972).

Although OCRE lacks standing in this proceeding, it is not without legal remedies in the event that at some future time it should have a substantive concern with changes to the core operating limits. These changes must be provided to NRC. See 55 Fed. Reg. 4282. At that time, OCRE could seek to institute a proceeding under 10 CFR § 2.206, including a request for a hearing. The NRC would be obligated to either institute the requested proceeding, or advise OCRE of the reasons why no proceeding would be instituted. While OCRE may argue that the 10 CFR § 2.206 mechanism does not guarantee it a right to an adjudicatory hearing, the short answer to OCRE's argument is that the Atomic Energy Act "does not confer the automatic right to intervention upon everyone." BPI v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974).

For all these reasons, Licensees respectfully submit that OCRE has not shown that it has the requisite interest in this license amendment proceeding.

Licensees respectfully request that an Atomic Safety and Licensing Board be promptly designated to rule on OCRE's petition. Licensees would also suggest that, in appointing a Licensing Board, consideration be given to designating a Board with two

lawyer-members, since the only issues involved in this proceeding (including OCRE's contention, if it is admitted) are issues of law.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037

Jay E. Silberg

Counsel for The Cleveland Electric Illuminating Company, et al.

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NOTICE OF APPEARANCE

The undersigned, being an attorney in good standing admitted to practice before the courts set forth below, hereby enters his appearance as attorney-at-law on behalf of The Cleveland Electric Illuminating Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company, and sets forth the following information required by 10 C.F.R. § 2.713(b):

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Ohio Edison Company
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Pennsylvania Power
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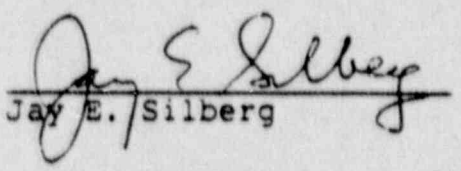
New Castle, Pennsylvania 16103

The Toledo Edison Company
300 Madison Avenue
Toledo, Ohio 43652

Admissions: District of Columbia, New Jersey
U.S. Courts of Appeals for the
District of Columbia, Sixth, Seventh,
and Ninth Circuits
U.S. Supreme Court

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. Petition for Leave to Intervene and Request for Hearing, and Notice of Appearance were mailed, postage prepaid, this 23rd day of March 1990 to those listed on the attached Service List.

Jay E. Silberg

Counsel for The Cleveland Electric Illuminating Company, et al.

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