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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'90 JUN -6 P2:48

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket No. 50-440 OLA-2
	)	
(Perry Nuclear Power Plant, Unit 1)	)	
	)	

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OCRE RESPONSE TO LICENSEE AND NRC
STAFF ANSWERS TO OCRE'S CONTENTION

The Atomic Safety and Licensing Board in its Memorandum and Order (Scheduling Responses to OCRE's Contention) of May 1, 1990 ordered the Licensee and the NRC Staff to respond to the contention which OCRE filed on April 23, 1990. The Board also permitted petitioner Ohio Citizens for Responsible Energy, Inc. ("OCRE") to reply to these responses no later than June 1.

The Licensees decided not to obey the Board's Order, preferring instead to reference their argument, that OCRE lacks standing, raised in their March 23 Answer. "Licensees are not at this time setting forth their substantive response to OCRE's proposed contention. Such response would be premature." Licensees' Answer to OCRE's Contention at 2.

However, Licensees do concede that OCRE's contention "meets the requirements of 10 CFR 2.714(b)(2), and, as indicated by OCRE, raises a purely legal issue." Id. Thus, Licensees agree that OCRE has submitted an admissible contention, should the Board find that OCRE has the requisite

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standing to participate in this proceeding.

The NRC Staff, on the other hand, makes the bizarre assertions that "OCRE has not raised an issue of fact or law concerning the instant amendment request" (NRC Staff Response at 4), "no effort is made by OCRE to comply with 10 CFR 2.714(b)(2)" (Id. at footnote 3), and "simply put, OCRE has not set forth, as required by 10 CFR 2.714, a contention related to the current, proposed license amendment" (Staff Response at 8).

The NRC Staff also exceeds the bounds of the Board's May 1 Order by not just responding to OCRE's contention, but also by responding to the arguments made by OCRE in its April 23 filing regarding the standing question. The Board's May 1 Order very clearly states that Licensees and the Staff were to respond to OCRE's contention, not to the standing arguments. The Staff has taken two cracks at bat when one would suffice. OCRE regards the portion of the Staff's Reponse addressing the standing issue to be an unauthorized filing, and does not respond to it herein. In any event, it is OCRE's opinion that nothing in the Staff's Response undermines OCRE's standing arguments raised in its April 23 pleading.

In support of its absurd conclusions regarding the admissibility of OCRE's contention (made all the more unreasonable by the finding of Licensees, the requester of the license amendment at issue here, that the contention is admissible), the Staff attempts to distinguish the cases cited by OCRE in support of its legal argument. NRC Staff Response

at 4-5. Regardless of the specific factual backgrounds of these cases, the fact remains that the D.C. Circuit Court of Appeals in Sholly v. NRC, 651 F.2d 780 (1980), vacated on other grounds, 435 U.S. 1194 (1983), clearly found that an order which "granted the licensee authority to do something that it otherwise could not have done under the existing license authority" was a license amendment under Section 189a of the Atomic Energy Act. 651 F.2d at 791. I.e., it matters not what the NRC calls a particular action; it is its effect that determines whether it is an amendment triggering the notice and hearing provisions of the Act. This reasoning was followed by the First Circuit in Commonwealth of Massachusetts v. NRC, 878 F.2d 1516, 1521 (1st Cir. 1989). The Staff states that Sholly does not apply to this proceeding, since OCRE was afforded an opportunity for hearing. However, this ignores the fact that the outcome of this proceeding will determine whetner OCRE will retain the right to a hearing under the Atomic Energy Act for future changes to core operating limits. Sholly provides the legal precedent upon which OCRE's contention is based. If the instant amendment is granted, changes to core operating limits will constitute de facto license amendments under Sholly, but there will be no notice and opportunity for hearing, in violation of the Atomic Energy Act. But this is the proceeding which will either permit or enjoin this situation. Sholly is absolutely relevant to this proceeding.

Similarly, OCRE's citation of Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), served to

establish that public hearing rights are unequivocally within the zone of interests of the Atomic Energy Act. The Staff apparently believes that only contentions raising safety issues can be litigated in license amendment proceedings. NRC Staff Response at 3, 10. UCS clearly shows that public hearing rights, in addition to health and safety matters, are within the zone of interests established by Congress in the Act. In addition, any doubt as to whether issues of law are admissible in NRC proceedings should have been dispelled by the NRC's new rules of practice. In promulgating 10 CFR 2.714(e), the NRC stated:

> The intent of the proposed rule in 2.714(d)(2)(iv) was that purely legal contentions, which occur rarely, may be admitted as issues in the proceeding. However, they will not be part of an evidentiary hearing, but rather, will be handled on the basis of briefs and oral argument. A new paragraph (e) has been added to 2.714 to clarify this intention. 54 Fed. Reg. 33168, 33172 (August 11, 1989), "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process."

The Staff cites Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979) for the proposition that the Commission's regulations (10 CFR 50.36) do not require that every operational detail be included in the technical specifications. Staff Response at 5. However, in Trojan the intervenor urged the inclusion of additional operational details for the spent fuel pool in the plant technical specifications. Trojan did not address the removal of items from the technical specifications. Nor did Trojan address public hearing rights under Section 189a of the Atomic Energy Act. Since public hearing rights under the Act are the crux of

OCRE's contention, nothing in Trojan can render OCRE's contention invalid.

The Staff also cites the Commission's policy statement on "Technical Specification Improvement Program," 52 Fed. Reg. 3788 (February 6, 1987) (Staff Response at 7), and attaches a copy of Generic Letter 88-16, "Removal of Cycle-Specific Parameter Limits from Technical Specifications" as support for the requested amendment. However, neither a policy statement nor a Generic Letter can supercede a statute.

Finally, the Staff argues that 10 CFR 50.59 will somehow safeguard OCRE's rights in that the Licensees' self-evaluation under that section would result in a license amendment proceeding if it determines that a change in the core operating limits entails an unreviewed safety question. NRC Staff Response at 6-7. This is not equivalent to hearing rights under Section 189a. Presently, an operating license amendment proceeding is required for any changes to the core operating limits, not just those changes which the Licensees think are significant.

In conclusion, the NRC Staff has failed to raise any valid arguments which would preclude the admission of OCRE's contention. And, since the Licensees concede that OCRE's contention has met the requirements of 10 CFR 2.714(b)(2), OCRE's contention should be admitted.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt
OCRE Representative
8275 Munson Road
Mentor, OH 44060
(216) 255-3158

DATED: June 1, 1990

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 1st day of JUNE, 1990 to the following:

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Secretary of the Commission
ATTN: Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
John H. Frye, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Frederick J. Shon
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Colleen Woodhead, Esquire
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jay E. Silberg
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037

Susan L. Hiatt
OCRE Representative