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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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1/18/94

Before the Atomic Safety and Licensing Board

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In the Matter of)
)
THE CLEVELAND ELECTRIC)
ILLUMINATING CO. et al.)
)
(Perry Nuclear Power Plant,)
Unit 1))
)
)
)

Docket No. 50-440 OLA-3

MOTION FOR SUMMARY DISPOSITION

Pursuant to 10 CFR 2.749 and the Licensing Board's Order of December 27, 1993, intervenors Ohio Citizens for Responsible Energy, Inc. ("OCRE") and Susan L. Hiatt are herewith filing this motion for summary disposition on their contention. Intervenors have attached a "Statement of Material Facts as to Which No Genuine Issue Exists to be Heard."

I. The Contention

Intervenors' contention admitted by the Licensing Board is as follows:

The portion of Amendment 45 to License No. NPF-58 which removed the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 USC 2239a) in that it deprives members of the public of the right to notice and opportunity for a hearing on any changes to the withdrawal schedule.

Intervenors believe that this issue involves a pure issue of law and that there are no factual disputes to be heard.

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II. Legal Analysis

The reactor vessel material specimen withdrawal schedule subject to Amendment 45 has traditionally been part of the Technical Specifications and could not be changed without notice in the Federal Register and opportunity for a hearing, as required by Section 189a of the Atomic Energy Act. Since the issuance of Amendment 45, the Licensees are now able to change the withdrawal schedule without any public notice or opportunity for participation. The NRC will still have to review and approve any revisions to the withdrawal schedule, as required by 10 CFR 50 Appendix H, Part II.B.3; the NRC's jurisdiction and enforcement powers are not diminished by this amendment. The only real effect of this amendment is that the public is excluded from the process. Intervenors believe that this is contrary to the AEA, which applies to de facto license amendments as well as those explicitly labeled as such.

Section 189a of the Atomic Energy Act states that "(i)n any proceeding under this Act for the granting, suspending, revoking, or amending any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." Operating license amendment proceedings under the Act are formal, on-the-record adjudicatory proceedings, conducted pursuant to the NRC's rules of practice in 10 CFR Part 2, where the parties have the opportunity to present evidence and cross-examine witnesses. Review of initial decisions is available within the NRC by the Commission.

Judicial review of final orders in operating license amendment proceedings is clearly established by statute. Atomic Energy Act, Section 189b; Administrative Orders Review Act, 28 USC 2342(4).

The Atomic Energy Act reflects a strong Congressional intent to provide for meaningful public participation. "Congress vested in the public, as well as the NRC Staff, a role in assuring safe operation of nuclear power plants." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984).

Now that Amendment 45 has been issued, the only mechanism available for public participation on this matter is through 10 CFR 2.206. However, this option does not provide meaningful participation, nor does it measure up to the type of proceeding afforded by Section 189a. This regulation permits any person to file a request with the Executive Director for Operations seeking to institute a proceeding to suspend, revoke, or modify a license, or for any other action which may be appropriate. 10 CFR 2.206 does not give the requester the right to a hearing, and simply filing a request under section 2.206 does not give the requester the right to present evidence and cross-examine witnesses. There is no right under section 2.206 to appellate review within the agency; while the Commission, at its own discretion, may review a director's decision, petitions for review of same are not to be entertained. 10 CFR 2.206(c). As the D.C. Circuit has ruled, a 2.206 request is not a Section 189a proceeding. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443-4 (D.C. Cir. 1984).

Most significantly, judicial review is not available for

denials of 2.206 petitions. QCRE v. NRC, 893 F.2d 1404 (D.C. Cir. 1990); Safe Energy Coalition of Michigan v. NRC, 866 F.2d 1473 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223 (7th Cir. 1989); Massachusetts Public Interest Research Group v. NRC, 852 F.2d 9 (1st Cir. 1988). These decisions have held that 2.206 denials are not reviewable because they are "committed to agency discretion by law." 5 USC 701(a)(2). This provision of the Administrative Procedure Act was interpreted by the Supreme Court in Heckler v. Chaney, 470 U.S. 821 (1985), to include those agency actions in which the governing statute provided no meaningful standards for judicial review, i.e., "no law to apply."

Amendment 45 violates the Atomic Energy Act in that changes to the reactor vessel material specimen withdrawal schedule, which the NRC's regulations make material by requiring prior approval by the NRC, will be de facto license amendments, but will not be formally labeled as license amendments and noticed as such in the Federal Register with opportunity for a hearing. Clearly, the purpose of Amendment 45 is to evade the mandate of the Atomic Energy Act by calling these amendments by another name to avoid invoking the notice and hearing provisions of the Act.

However, the law cannot be so easily evaded. Section 189a requires notice and opportunity for hearing on de facto license amendments as well as for those actions explicitly labeled as amendments. As the D.C. Circuit has held, an action which grants a licensee the authority to do something it otherwise could not have done under the existing license authority is a license amendment within the meaning of the Atomic Energy Act. Sholly v.

NRC, 851 F.2d 780, 791 (D.C. Cir. 1980), vacated on other grounds, 459 U.S. 1194 (1983). See also Commonwealth of Massachusetts v. NRC, 878 F.2d 1516, 1521 (1st Cir. 1989): "the particular label placed upon (its action) by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive," citing Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942).

Changes to the reactor vessel material specimen withdrawal schedule, with approval by the NRC, will give Licensees the authority to operate in ways in which they otherwise could not. Thus, they are de facto license amendments, and the public must have notice and opportunity to request a hearing. Anything less is in violation of the Atomic Energy Act.

In Generic Letter 91-01, the NRC justifies the removal of the withdrawal schedule from the Technical Specifications as eliminating an unnecessary duplication of controls which are established through 10 CFR 50 Appendix H. However, the D.C. Circuit has addressed the question of whether the NRC may eliminate public participation on a material issue in the interest of making the process more efficient. The Court held that it may not. Union of Concerned Scientists v. NRC, 735 F.2d at 1444-1447.

III. Questions Posed by the Licensing Board

In its December 27, 1993 Order the Licensing Board posed three questions for the parties to analyze and discuss. Interveners address these questions below.

A. What is the relationship, if any, of 10 CFR 50.36 to the petitioners' contention?

Intervenors believe that there is no relationship between 10 CFR 50.36 and the contention. The focus of the contention is not that the schedule must remain in the Technical Specifications, but rather that its removal from the license erodes public hearing rights established by statute.

Intervenors are not insisting that the schedule be included in the Technical Specifications. Instead, intervenors are insisting that the NRC comply with the Atomic Energy Act by providing notice and opportunity for a hearing on de facto license amendments.

B. Under Part 50, Appendix H, II., B., 1., are there any changes in the reactor vessel material surveillance program withdrawal schedule that would not be reflected in the limiting conditions of operation of the Perry facility?

Changes to the schedule might be indirectly reflected in the title of TS Figure 3.4.6.1-1, "Reactor Vessel Pressure Versus Metal Temperature, Valid up to 8 EFPY" (Amendment 45). Presumably the time period for which this graph is valid is related to the next scheduled specimen withdrawal time in the withdrawal schedule.

However, intervenors believe this question is not relevant to the contention. The issue raised by intervenors is whether the NRC can deprive members of the public of hearing rights to any

changes to the entire withdrawal schedule, a matter made material by the NRC's own regulations.

C. If, as posited in Generic Letter 91-01 (Jan. 4, 1991), the removal of the reactor vessel material surveillance program withdrawal schedule from a facility's technical specifications will not result in any loss of clarity related to the requirements of Part 50, Appendix H, how is the removal of this duplicative matter from a facility's technical specifications violative of 10 CFR 50.36?

Intervenors do not allege that removal of the schedule from the Technical Specifications violates 10 CFR 50.36. Nor does intervenors' contention concern any potential losses of clarity or duplication of regulatory requirements. Intervenors' contention only raises the issue of loss of public hearing rights.

The only real accomplishment of Generic Letter 91-01 and the challenged portion of Amendment 45 is that they cut the public out of the process. Intervenors allege that this violates Section 189a of the Atomic Energy Act.

IV. Relief Requested

Intervenors ask the Licensing Board to grant summary disposition in their favor and to issue declaratory relief by finding the challenged portion of Amendment 45 to be in violation of the Atomic Energy Act.

Respectfully submitted,



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DATED: February 7, 1994

STATEMENT OF MATERIAL FACTS AS TO WHICH
NO GENUINE ISSUE EXISTS TO BE HEARD

1. Prior to issuance of Amendment 45 to the Perry Nuclear Power Plant Unit 1 Operating License, NPF-58, the "Reactor Vessel Material Surveillance Program - Withdrawal Schedule" was included in the plant Technical Specifications as TS Table 4.4.6.1.3-1.
2. Prior to the issuance of Amendment 45 to NPF-58, the Perry licensee could not make changes to the withdrawal schedule without seeking an operating license amendment, of which there would be notice in the Federal Register with the opportunity for interested persons to request a hearing.
3. Amendment 45 to NPF-58, issued December 18, 1992, deleted the withdrawal schedule from the Technical Specification and relocated the schedule to the Updated Safety Analysis Report.
4. After the issuance of Amendment 45 to NPF-58, the Perry licensee could make changes to the withdrawal schedule without seeking an operating license amendment, without any notice in the Federal Register, and without the opportunity for interested persons to request a hearing. However, pursuant to 10 CFR 50 Appendix H, Part II. B. 3, the NRC must approve any revisions to the withdrawal schedule.
5. After the issuance of Amendment 45 to NPF-58, the only mechanism available for members of the public to seek the institution of a proceeding regarding any changes to the withdrawal schedule is to file a petition pursuant to 10 CFR 2.206.

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 7th day of February, 1994, to the following:

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

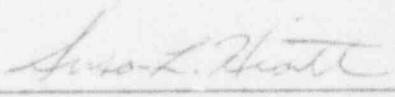
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