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LBP-90-39

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
John H Frye, III, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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In the Matter of

The Cleveland Electric
Illuminating Company, et al

(Perry Nuclear Power Plant,
Unit No. 1)

Docket No. 50-440-OLA-2

ASLBP No. 90-605-02-OLA

November 1, 1990

INITIAL DECISION
(Approving License Amendment)

This proceeding results from a petition to intervene and request for a hearing filed on March 8, 1990, by Ohio Citizens for Responsible Energy, Inc., (OCRE).¹ OCRE petitioned in response to a notice² that NRC was considering the issuance of a license amendment to The Cleveland

¹OCRE is a private, nonprofit corporation which specializes in research and advocacy on issues of nuclear reactor safety and promotes the application of the highest safety standards to such facilities. It was an intervenor in the Perry operating license proceeding. In this proceeding, it seeks to intervene on behalf of its member and representative, Susan L. Hiatt, who resides within 15 miles of the Perry plant. CEI and Staff do not question OCRE's representations in this regard.

²See 55 Fed. Reg. 4282, Feb. 7, 1990.

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Electric Illuminating Company (CEI).³ The license amendment in question removes cycle-specific core operating limits and other cycle-specific fuel information from the plant's Technical Specifications (TS) and replaces them with NRC-approved methodology for determining these limits. These limits provide the technical rules under which the reactor may be operated. OCRE wishes to litigate a single contention which states:

The Licensee's proposed amendment to remove cycle-specific parameter limits and other cycle-specific fuel information from the plant Technical Specifications to the Core Operating Limits 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 hearing on any changes to the cycle-specific parameters and fuel information.

In its petition OCRE agreed with CEI and Staff that the amendment involves purely an administrative matter that raises no significant hazards considerations as the latter term is defined in 10 CFR § 50.92(c). It stated that its intent is to raise a legal issue, viz.: that the grant of the amendment will deprive OCRE members of the legal means to participate in the consideration of significant changes to the plant's cycle-specific operations.

In LBP-90-15, 31 NRC 501 (1990), and LBP-90-25, 32 NRC 21 (1990), we determined that OCRE had standing to intervene

³CEI is lead applicant for itself and Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and the Toledo Edison Company, co-owners of the Perry Nuclear Power Plant.

and had stated a valid contention under 10 CFR § 2.714. We based our conclusion with regard to the contention on the following reasoning.

The contention asserts that § 189a prohibits the elimination of an opportunity for hearing on these changes. Section 189a requires a hearing on license amendments, and changes in Technical Specifications require such amendments. Thus OCRE's contention is correct if cycle-specific parameter limits and fuel information are of such a nature as to be required to be in the Technical Specifications. Clearly, the Trojan decision [Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 271-74 (1979)] requires that some such limitations must be included in the Technical Specifications.

The amendment would both remove these limitations from the Technical Specifications and permit CEI to calculate them according to approved methodology. From this we assume that CEI would be permitted to implement the new cycle-specific parameter limits so calculated without prior Staff approval. Given the safety significance of the cycle-specific parameter limits, this would only be proper if the methodology required to be applied does not permit substantial discretion on the part of CEI. In that circumstance, the Commission will exercise its statutory responsibilities through approval of the methodology, thereby removing the need to include cycle-specific parameter limits in the Technical Specifications.⁴

In LBP-90-25, we set a schedule for limited discovery and a three-day hearing strictly confined to the factual issue posed by the contention, viz., whether the amendment would vest excessive discretion to set cycle-specific parameter limits in CEI. Following the completion of discovery, the parties entered into a stipulation of fact

⁴LBP-90-25, 32 NRC at 26.

which obviated the need for a hearing. That stipulation is attached to and made a part of this Initial Decision.

In their stipulation of fact, the parties agree that

[t]he GE Nuclear Energy methodology for setting cycle-specific core operating limits, which is approved by the NRC and specified in the PNPP Technical Specifications, does not permit substantial discretion on the part of Licensees (or GE Nuclear Energy acting as their design agent) and does not require substantial engineering judgment to derive the cycle-specific parameter limits included in the Core Operating Limits Report.

The stipulation also states that

OCRE, the NRC Staff and licensee agree that the facts stipulated and agreed to above demonstrate that substantial engineering judgment is not needed to derive the cycle-specific information included in the Core Operating Limits Report from the methodology specified in the PNPP Technical Specifications.⁵

Based upon the above stipulation and on the reasoning stated in LBP-90-15 and LBP-90-25, we conclude as a matter of law that the license amendment in question will not improperly deprive OCRE of hearing rights guaranteed to it by § 189a of the Atomic Energy Act.

In consideration of the foregoing, it is hereby ORDERED


1. That Staff's issuance of license amendment 33 to facility operating license NPF-58 is approved; and
2. Pursuant to 10 CFR § 2.762, any party aggrieved by this Initial Decision may take an appeal by filing a notice


⁵Stipulation, p.5.

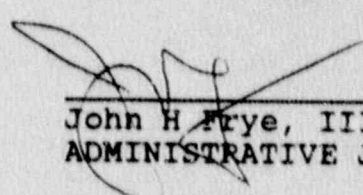
of appeal with the Commission within ten days after service of this Initial Decision; and

3. That pursuant to 10 CFR § 2.760(a), this Initial Decision shall constitute the final action of the Nuclear Regulatory Commission 45 days after its date unless appealed.

Atomic Safety and Licensing Board


Frederick J. Shon
ADMINISTRATIVE JUDGE


Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE


John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 1, 1990