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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING CO. et al.	)	Docket No. 50-440 OLA-3
	)	
(Perry Nuclear Power Plant, Unit 1)	)	
	)	
	)	

INTERVENORS' ANSWER TO NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR SUMMARY DISPOSITION AND LICENSEES' CROSS MOTION FOR SUMMARY DISPOSITION

Pursuant to the Licensing Board's Order of February 16, 1994, intervenors Ohio Citizens for Responsible Energy, Inc. ("OCRE") and Susan L. Hiatt are herewith filing this answer to the NRC Staff's response to intervenors' motion for summary disposition and Licensees' cross motion for summary disposition. Intervenors have attached a "Statement of Material Facts as to Which No Genuine Issue Exists to be Heard" in response to Licensees' cross motion.

I. Answer to NRC Staff's Response

The NRC Staff has failed to comply with the procedural requirements of 10 CFR 2.749 because the Staff did not include in its response the required separate, short statement of material facts.

10 CFR 2.749(a) states that a party opposing a motion for summary disposition "shall annex to any answer opposing the motion a separate, short, and concise statement of the material

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facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." (Emphasis added.)

This language is clearly mandatory and not optional. Indeed, the failure to include the short, separate statement is fatal. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-45, 6 NRC 159, 163 (1977). Therefore, intervenors would urge the Licensing Board to reject the NRC Staff's response, and, as required by 10 CFR 2.749(a), admit all the material facts set forth in intervenors' statement.

In the event that the Licensing Board does choose to consider the NRC Staff's response, intervenors are replying to the arguments set forth therein. To the extent that arguments made by the Staff are duplicated by Licensees in their Answer and Cross Motion, intervenors' discussion below should be considered as responsive to the positions of both parties.

The NRC Staff cites the Appeal Board's decisions in Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979), Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419 (1980), and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62 (1986). These decisions concerned the requirements of the Atomic Energy Act, Section 182a, and 10 CFR 50.36 regarding the contents of technical specifications. Intervenors believe these decisions are irrelevant to the instant case. Intervenors are

not alleging that 10 CFR 50.36 requires the material withdrawal schedule to be in the plant technical specifications. Intervenors' contention is solely concerned with the loss of public hearing rights which results when items such as the schedule are removed from the license.

The Staff claims that "Intervenors' admission that removal of the withdrawal schedule does not violate the requirements of 10 CFR 50.36 is fatal to their Motion. The fundamental question at issue here is whether the withdrawal schedule is required by law or regulation to be included in the TS." Staff Response at 14. That is not the fundamental question in this case. The fundamental question is: "When is a regulatory or licensing action an amendment within the meaning of Section 189a of the Atomic Energy Act?" (1)

The Staff would apparently answer this question, "Whenever the NRC says it is." I.e., the only hearing rights possessed by the public are those which the NRC graciously decides to give them. But such a cavalier attitude is at odds with the judicial interpretation of Section 189a given in Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980), vacated on other grounds, 459 U.S. 1194 (1983): 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.

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(1) Compare Licensees' Answer and Cross Motion at 22: "The central question presented is whether a right to a hearing exists after a provision has been removed from Technical Specifications regardless of the other regulatory limits which remain."

The fact that 10 CFR 50 Appendix H requires that licensees submit the schedule and that the NRC approve the schedule prior to implementation clearly means that changes to the schedule meet the test of Sholly and thus are license amendments.

To evade this obvious conclusion, the Staff offers an inventive interpretation of Appendix H. In the affidavit filed with their response, the Staff affiants explain that if a licensee makes changes to its withdrawal schedule which are consistent with ASTM E 185-79 or -82, it may do so without prior NRC approval. Only if the licensee's proposed changes are inconsistent with this standard would the schedule need prior approval. Staff Affidavit at 8. Despite the convenience of this explanation to the instant case, the fact remains that the plain language of Appendix H requires licensee submittal of the schedule and prior NRC approval of the schedule before implementation.

II. Answer to Licensees' Cross Motion

Licensees correctly state that "Section 189a of the Act guarantees the public an opportunity for a hearing with respect to all license and license amendment applications." Licensees' Answer and Cross Motion at 4, emphasis added. However, this guarantee means little if the NRC can vanish these hearing opportunities through semantic sleight-of-hand.

Licensees cite Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983) as an example of judicial approval of NRC denial of hearing rights based on the NRC's own definition of what constituted a license amendment proceeding. However, an examination of the court's reasoning in Bellotti shows that heavy reliance was

placed on the availability of the 10 CFR 2.206 petition process as a meaningful alternative. "Petitioner Bellotti is in no sense left without recourse . . . Commission denials to institute proceedings under section 2.206 are subject to judicial review. [citations omitted] . . . A petition is not a futile gesture, for the Commission may not deny it arbitrarily." 725 F.2d at 1382-83. Of course, Bellotti was decided in 1983, before the Supreme Court's decision in Heckler v. Chaney, 470 U.S. 821 (1985), the application of which to the 2.206 process has virtually eliminated judicial review of NRC denials of such petitions. Since a major premise of the court's rationale in Bellotti has been undermined, it can hardly be considered a persuasive authority in the post-Chaney world.

Licensees state that "OCRE's underlying argument that it is entitled to a hearing any time Licensees modify plant operations in a manner within regulatory standards would establish intervenors as the regulators." Licensees' Answer and Cross Motion at 22. Intervenors do not seek to supplant the NRC as the regulator of nuclear energy. Indeed, it is absurd to equate the right to a hearing with the possession of regulatory authority. Rather, intervenors seek to retain their rights to participate in the regulatory process. "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). Intervenors cannot fulfill this role if hearing opportunities are being systematically eroded away by the practice of removing materials from plant licenses such that

changes to the materials so removed will no longer be officially deemed license amendments.

Licensees characterize intervenors' position as "once a Tech Spec, always a Tech Spec." Licensees' Answer and Cross Motion at 12. Intervenors do not dispute the NRC's authority to determine the contents of the technical specifications. Nor do intervenors object to the goal of improving and simplifying plant technical specifications. Intervenors do object to the "side effect" associated with the NRC's practice of removing items from the plant Tech Specs. This side effect, which does not appear to have been seriously considered by the agency, is that when items are removed from nuclear plant licenses, the universe of potential license amendment cases is diminished. Instead of the opportunity for a fair hearing before the Atomic Safety and Licensing Board, public participants are left with the 2.206 petition as the only mechanism for challenging revisions to the materials so removed. With the lack of judicial review of 2.206 cases in the post-Chaney world, the 2.206 petition is not a meaningful public participation option. "The Commission is entitled to great freedom in its efforts to structure its proceedings so as to maintain their integrity while ensuring meaningful public participation, but one of its goals must be to assure that there is meaningful public participation." UCS, supra, 735 F.2d at 1446, citation omitted (emphasis in original).

Licensees claim that "Generic Letter 91-01 clearly indicates the view of the NRC Staff that the withdrawal schedule is not material to its licensing decisions." Licensees' Answer and Cross Motion at 16. However, 10 CFR 50 Appendix H clearly makes

the schedule material by requiring its submittal and approval prior to implementation, notwithstanding the Staff's attempt to amend Appendix H by affidavit. The fact that Appendix H requires submittal and NRC approval of the schedule unquestionably establishes that the schedule is, in the words of Licensees, "so substantial and important as to influence the NRC's decision." Generic Letter 91-01 does not alter the materiality of the schedule. The only accomplishment of Generic Letter 91-01 is to cut the public out of the process. But this result cannot be sustained by the Licensing Board, since, by Licensees' own admission, Section 189a of the Atomic Energy Act does guarantee the right to a hearing on material issues. Licensees' Answer and Cross Motion at 14, citing UCS, supra.

III. Conclusion

For the foregoing reasons, intervenors urge the Licensing Board to deny Licensees' Cross Motion and to grant intervenors' motion for summary disposition.

Respectfully submitted,

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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 Specifications 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 5th day of April, 1994, to the following:

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