11229

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

APPELLATE BRIEF OF INTERVENOR OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.

Susan L. Hiatt
OCRE Representative

December 19, 1990

D503

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES page

STATUTES AND REGULATIONS

OTHER REFERENCES

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

APPELLATE BRIEF OF INTERVENOR OHIO
CITIZENS FOR RESPONSIBLE ENERGY, INC.

I. BACKGROUND OF THE CASE

On December 19, 1989 the Cleveland Electric Illuminating Company filed with the Nuclear Regulatory Commission ("NRC") a request for an amendment to Appendix A of the operating license for the Perry Nuclear Power Plant. The requested amendment would remove cycle-specific core operating limits and other cycle-specific fuel information from the plant Technical Specifications. Instead, this information would be placed in the Core Operating Limits Report, to be part of the Plant Data Book. This is in accordance with Generic Letter 88-16, "Removal of Cycle-Specific Parameter Limits from Technical Specifications," October 4, 1988.

The specific parameters and Technical Specification sections affected are Maximum Average Planar Linear Heat Generation Rate (MAPLHGR) and MAPLHGR Power and Flow Factor parametric curves, Section 3.2.1; Minimum Critical Power Ratio (MCPR) and MCPR Power and Flow Factor Parametric Curves,

Section 3.2.2; Linear Heat Generation Rate (LGHR), Section 3.2.3; fuel design description, Section 5.3.1, and associated Bases.

A new section 6.9.1.9 would be added to the Technical Specifications. This section would establish that core operating limits are to be documented in the Core Operating Limits Report; that the analytical methods used to determine the core operating limits shall be those previously reviewed and approved by the NRC; and that the Core Operating Limits Report, and any revisions or supplements thereto, shall be provided to the NRC upon issuance.

The Licensees conceded that this amendment will have the effect of "eliminating the majority of license amendment requests for changes in values of cycle-specific parameters in Technical Specifications." Attachment 1 to Dec. 19, 1989 amendment request, p. 5. It is precisely this effect that OCRE finds objectionable.

The Federal Register notice and opportunity for hearing regarding this amendment was published on February 7, 1990 (55 Fed. Reg. 4259, 4282). In response to this notice, OCRE filed a petition for leave to intervene and request for a hearing on March 8, 1990. In that petition, OCRE stated its intention to file one contention raising a pure issue of law. OCRE also agreed with the NRC Staff and the Licensees that the proposed amendment was a purely administrative matter which involved no significant hazards considerations.

On April 23, 1990, pursuant to the schedule set forth by

the Licensing Board, OCRE filed its contention and in addition responded to the arguments regarding standing raised by the Licensees and NRC Staff. The contention reads:

> 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.

The basis for the contention is as follows. The core operating limits subject to this amendment request have 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. If this amendment is granted, the Licensees will be able to change the core operating limits without any public notice or opportunity for participation. The NRC will still receive notice of any revisions to the Core Operating Limits Report; the NRC's jurisdiction and enforcement powers are not diminished by the proposed amendment. The only real effect of this amendment is that the public is excluded from the process.

This is contrary to the intent of Congress and the interpretation of the Atomic Energy Act by the Courts. 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 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).

If this amendment is approved, the only mechanism available for public participation 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 appropriate staff director 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); Nuclear Information and Resource Service v. NRC, No. 89-1381, (D.C. Cir., November 2, 1990), slip op. at 13-14.

Most significantly, judicial review is not available for denials of 2.206 petitions. OCRE 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.

This amendment request violates the Atomic Energy Act in that changes to cycle-specific parameters, with their tacit 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.

Licensees are trying to evade the clear 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, 651 F.2d 780, 791 (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 core operating limits, with tacit 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 Section 189a of the Atomic Energy Act. Licensees claim that the proposed amendment will provide a resource savings for both themselves and the NRC. However, the D.C. Circuit has addressed the question of whether the NRC may limit

public participation 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.

OCRE asked the Licensing Board to issue declaratory and injunctive relief by declaring the proposed amendment to be in violation of the Atomic Energy Act and by denying the amendment request.

After permitting Staff and Licensees to respond to OCRE's contention, and after allowing OCRE to reply to those responses, the Licensing Board tentatively granted OCRE's petition to intervene. LBP-90-15, June 11, 1990. The Board rejected arguments of the Licensees and Staff that OCRE lacked standing to intervene because it only raised an issue of law. Id., slip op. at 8. The Board also found that OCRE stated a valid contention. Id. at 9. However, the Board advanced a novel interpretation of OCRE's contention. The Board found that the proposed amendment would deprive OCRE of hearing rights only if substantial engineering judgement is needed to derive the core operating limits. The Board thought that the legal issue raised by OCRE depended on a factual issue:

> we see wrapped within the outer layer of the legal question a more recondite question of fact: To what extent does the material to be included within the new technical specifications inexorably specify the cycle-specific parameter limits which would be removed? If some engineering judgement is permitted, is it permissible under the Atomic Energy Act for CEI to exercise it? We believe that these issues would benefit from expert testimony. LBP-90-15 at 11.

Because the Board's opinion was based on arguments which

were not raised by any of the parties, the Board gave Staff and Licensees the opportunity to seek reconsideration of its Order. Both Staff and Licensees did seek reconsideration, and OCRE replied to their motions. The Board denied their motions for reconsideration and reiterated its belief that public hearing rights under Section 189a of the Atomic Energy Act with regard to core operating limits are completely dependent on the degree of discretion afforded the licensee in calculating those limits. The Board scheduled an evidentiary hearing on the issue of "the amount of discretion which would be vested in CEI by the proposed amendment." LBP-90-25, July 23, 1990, slip op. at 13.

After the completion of discovery and the informal submission of additional information from CEI to OCRE, the parties reached a settlement of the factual issue raised by the Board. Stipulation of Agreed Facts Between Licensees, NRC Staff, and Ohio Citizens for Responsible Energy, October 17, 1990. Therein the parties agreed that the methodology for calculating core operating limits does not permit substantial discretion on the part of Licensees and does not involve substantial engineering judgement to derive the core operating limits. Consequently, the Licensing Board concluded that the license amendment will not improperly deprive OCRE of its statutory hearing rights. LBP-90-39, November 1, 1990. The Board approved the issuance of the amendment, which had been issued by the Staff on September 13, 1990 as Amendment 33 to operating license NPF-58.

On November 19, 1990 OCRE filed a Notice of Appeal with the Commission seeking review of LBP-90-15, LBP-90-25, and LBP-90-39.

II. ARGUMENT

A. The Licensing Board Failed to Address the Legal Issue Raised by OCRE

In its petition for leave to intervene and in its explanation of the contention OCRE made it very clear that the contention raised a pure issue of law: that the amendment would violate the hearing rights provision of the Atomic Energy Act. The basis set forth for the contention, repeated above, clearly consisted of a legal analysis. The contention did not raise factual issues.

The NRC's rules of practice specify the manner in which pure issues of law are to be decided by a licensing board: "on the basis of briefs or oral argument . . ." 10 CFR 2.714(e). In promulgating this section, the Commission emphasized that purely legal contentions "will not be part of an evidentiary hearing, but rather, will be handled on the basis of briefs and oral arguments." 54 Fed. Reg. 33168, 33172 (August 11, 1989).

The Licensing Board agreed that OCRE had stated a valid contention. LBP-90-15 at 9. The Board further agreed that the loss of hearing rights "is one of the intended results of the license amendment at issue." LBP-90-25 at 5. The Board went on to agree with OCRE that loss of hearing rights is a direct

and immediate injury, and that "the hearing right it asserts is protected by the Atomic Energy Act." Id. The Board further acknowledged that "OCRE advanced no argument in support of its contention which centered on the safety implications of the change, but argued that Section 189a and the judicial decisions interpreting it prohibit the Commission from depriving OCRE of the right to a hearing on such changes . . ." LBP-90-25 at 8.

However, despite these conclusions, the Board did not set a schedule for briefing and argument on the contention, as required by 10 CFR 2.714(e), but rather scheduled an evidentiary hearing. This action was based on the Board's conclusion that "the terms of the contention inexorably raise a safety consideration" (LBP-90-25 at 9) and that "reduction of safety margins" was "the issue raised by OCRE's contention." LBP-90-15 at 10.

When the parties reached a stipulation of fact which obviated the need for the evidentiary hearing, the Board simply approved issuance of the amendment. LBP-90-39 at 4. The parties were never given the opportunity to brief the pure issue of law raised by OCRE.

The Licensing Board evaded its responsibilities under the Rules of Practice and the Administrative Procedure Act, which require the Board's initial decision to contain "findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record." 10 CFR 2.760(c)(1); 5 USC 557(c)(A). The Board failed to rule on the legal issue as presented on the record by

OCRE.

B. The Licensing Board Incorrectly Interpreted Section 189a of the Atomic Energy Act

The Licensing Board advanced a novel interpretation of Section 189a of the Atomic Energy Act in the decisions at issue here. The Board ruled that hearing rights on core operating limits depend entirely on whether the staff-approved methodologies for calculating core operating limits would vest excessive discretion in the licensee: "if excessive discretion were permitted the licensee, the amendment could constitute an unlawful abdication of Commission responsibility to pass on the question of whether a licensee's activities meet the standards of the Atomic Energy Act and the concomitant responsibility to provide the public an opportunity to participate in that process." LBP-90-15 at 10.

However, the Board's reasoning is not supported by either the plain language of the Act or by any judicial interpretations of the Act. The Board apparently believes that hearing rights under the Act are tied to the safety significance of the amendment. But this is not the case. The NRC must and does issue a notice and opportunity for hearing on all license amendments, even those which only make editorial changes or correct typographical errors. See, e.g., Biweekly Notice Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations, October 31, 1990, 55 Fed. Reg. 45874, 45881 (Georgia Power Company, Hatch

Units 1 and 2), 45885 (Northern States Power Company, Monticello), 45886 (Omaha Public Power District, Fort Calhoun). There are simply no de minimus amendments under the Atomic Energy Act.

The Court's decision in Sholly v. NRC, supra, clearly held that actions which are not labeled as amendments are still amendments within the meaning of the Act if the action grants "the licensee authority to do something that it otherwise could not have done. . . " Sholly, 651 F.2d 780, 791. Under Sholly, it matters not whether an item is required to be included in the Technical Specifications pursuant to 10 CFR 50.36 or Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 271-74 (1979) (see LBP-90-39 at 3, quoting from LBP-90-25). If changes to core operating limits in the Core Operating Limits Report allow the plant to be operated in manners not previously permitted, then such changes are de facto license amendments. It follows that there are no de minimus de facto amendments under the Act either.

The Licensing Board expressed its belief that, if licensees are not given excessive discretion in calculating core operating limits, "the Commission will exercise its statutory authority through approval of the methodology . . ." LBP-90-25 at 9. If so, then the Board should have recognized that hearing rights exist with this process, if such rights are exclusively tied to the NRC exercise of regulatory authority, as implied in LBP-90-15 at 10.

Plant-specific hearings on license amendments involving core operating limits are the only opportunity to challenge the adequacy of the NRC Staff-approved methodologies. As shown in OCRE's Response to Licensee and NRC Staff Motions for Reconsideration of LBP-90-15 (July 12, 1990, pp. 3-4), the methodologies approved by the Staff for calculating core operating limits have not always been correct. Even if Licensees are allowed to exercise zero judgement in applying these methodologies, OCRE still has hearing rights under the Act, not just for the purpose of checking arithmetic (see LBP-90-15 at 11), but for determining the validity of the analytical models approved by the Staff. To assume that the analytical models approved by the Staff are immune from challenge is to elevate the Staff, a party to the proceeding, to the trier of fact. The only way in which the Staff-approved methodologies can be exempt from challenge is if they are codified into 10 CFR as a regulation. Then the prohibition of 10 CFR 2.758, that the NRC's regulations may not be challenged in specific proceedings, would yield the result now apparently assumed by the Board: that only Licensees' application of and compliance with the methodologies can be scrutinized, and not the methodologies themselves. But the methodologies have not been codified, so they are open to challenge.

These analytical methodologies are approved through the licensing topical report review process. It is important to realize that the licensing topical report review process is not part of the hearing process. There is no notice and

opportunity for hearing on the licensing topical reports. Case-specific amendment proceedings present the only opportunity for a hearing on the validity of the methodologies. Thus, it is essential that parties be able to challenge the adequacy of the methodologies, as well as the application of the methodologies by the licensee, in case-specific license amendment proceedings. "Once a hearing on a licensing proceeding has begun, it must encompass all material factors bearing on the licensing decision raised by the requester." UCS v. NRC, supra, 735 F.2d at 1443. For core operating limits, the licensee must demonstrate that the appropriate regulatory requirements have been met. In demonstrating compliance with these provisions, the adequacy of both the analytical methodologies and the application of same are material to the appropriate regulatory findings. Being material, both of these factors must be included in the hearing if raised by a party.

The Board's response to OCRE's concerns in this regard is two-fold. First, the Board states that OCRE should have raised such challenges to methodologies in response to the notice of the instant amendment. LBP-90-25 at 10. Second, the Board states that future hearings could encompass this issue. Id. at footnote 13. In response to the latter argument, it is quite clear that if the Board's orders are upheld there will be no future hearings on core operating limits. With regard to the former argument, OCRE did not challenge the methodologies in the instant proceeding because, in OCRE's view, such a challenge is beyond the scope of the amendment proceeding. The

only change being sought by the licensee's amendment reque
was the relocation of specific values of core operating limits
from the Technical Specifications to the Core Operating Limits
Report. The methodologies used to calculate the limits did not
change. This amendment proceeding concerns administrative
changes and their legal ramifications, not technical issues.

III. CONCLUSION

For the foregoing reasons, the Commission should reverse the Licensing Board's orders and remand this matter to the Board for further proceedings consistent with the Commission's opinion, or, in the alternative, determine the legal issue itself.

Respectfully submitted,

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

Dec. 19, 1990

only change being sought by the licensee's amendment request was the relocation of specific values of core operating limits from the Technical Specifications to the Core Operating Limits Report. The methodologies used to calculate the limits did not change. This amendment proceeding concerns administrative changes and their legal ramifications, not technical issues.

III. CONCLUSION

For the foregoing reasons, the Commission should reverse the Licensing Board's orders and remand this matter to the Board for further proceedings consistent with the Commission's opinion, or, in the alternative, determine the legal issue itself.

Respectfully submitted,

Susan L. Hiatt

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

DATED: Dec. 19, 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 19th day of December, 1990 to the following:

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

Ms. Carol O'Claire
Ohio Emergency Management Agency
Technical Hazards Branch
2825 West Granville Road
Columbus, OH 43235-2712

Chairman Kenneth M. Carr
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commissioner Kenneth C. Rogers
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commissioner James R. Curtiss
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Commissioner Forrest J. Remick
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Susan L. Hiatt
OCRE Representative