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UNITES STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY, ET AL)
(Perry Nuclear Power Plant,)
Unit 1))

Docket No. 50-440-OLA-2

NRC STAFF BRIEF IN RESPONSE TO APPEAL BY NCRE

Colleen P. Woodhead
Counsel for NRC Staff

February 4, 1991

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I. INTRODUCTION

On November 1, 1990, the Atomic Safety and Licensing Board (the Licensing Board) issued an Initial Decision (Approving License Amendment) which approved issuance of an amendment removing cycle-specific core operating limits and other cycle-specific fuel information from the facility's Technical Specifications. *The Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-90-39, 32 NRC ____ (1990).¹ Furthermore, the Licensing Board found, as a matter of law, that the license amendment did not deprive the intervenor, OCRE, of hearing rights guaranteed to it by Section 189a of the Atomic Energy Act. LBP-90-39 *slip. op.*, at 4. On December 19, 1990, OCRE filed the "Appellate Brief of Intervenor Ohio Citizens for Responsible Energy, Inc," pursuant to 10 C.F.R. §

¹ As amended this technical specification provides, in part, in Section 6.9.1.9: that core operating limits shall be established and documented in the Core Operating Limits Report and the analytical methods used to determine the core operating limits are to be those previously reviewed and approved by NRC.

2.762 (1990). The Staff hereby files its response to the OCRE Brief.

II. ISSUES ON APPEAL

The issues raised in the OCRE Brief are:

1. Whether the Licensing Board failed to address the legal issue raised by OCRE.
2. Whether the Licensing Board incorrectly interpreted Section 189a of the Atomic Energy Act.

For the reasons explained below, the issues should be answered in the negative and the OCRE appeal denied.

III. BACKGROUND

This proceeding concerns an amendment which was requested by Cleveland Electric Illuminating Company *et al.* (CEI or Licensee) in response to the NRC Staff's Generic Letter 88-16, "Removal of cycle-specific parameter limits from Technical Specifications."² Ohio Citizens for Responsible Energy (OCRE) petitioned to intervene in response to a February 7, 1990 Federal Register notice of the proposed amendment (55 Fed. Reg. 4282). OCRE's petition stated that it sought to raise in the proceeding, a single legal issue concerning whether the amendment would deprive members of the public of the right to notice and opportunity for a hearing pursuant to Section 189a of the Atomic Energy Act on future changes to cycle-specific parameters. Petition for Leave to Intervene, March 8, 1990. Furthermore, OCRE agreed with the Staff and the Licensee that

² The amendment was issued on September 13, 1990 for the Perry Nuclear Power Plant operating license and removed the cycle-specific parameter limits from the Technical Specifications. 55 Fed. Reg. 38763 (1990).

the amendment was purely an administrative matter which involved no significant hazards consideration. *Id.* The Licensee and the Staff opposed OCRE's intervention for failure to show standing based on an injury-in-fact from the amendment.

Without ruling on standing, the Licensing Board directed OCRE to file a contention and to respond to Licensee and Staff arguments concerning standing. Memorandum and Order (Scheduling Filing of Contention), April 2, 1990 (unpublished). After receipt of OCRE's one contention and rebuttal arguments regarding standing, the Licensing Board asked for a reply to the contention from Licensee and Staff and a response to these replies from OCRE. Memorandum and Order, May 1, 1990 (unpublished). On June 11, 1990, the Licensing Board tentatively granted the petition to intervene, finding that the legal issue raised by OCRE actually involved a factual question of reduction of safety margins, because the amount of engineering judgment needed to derive the parameters was not specified. The Licensee and Staff were given the opportunity to seek reconsideration before a final ruling would be made. *The Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501. The Licensee and Staff moved for reconsideration, and OCRE responded to the motions. The motions were denied because the Board found that OCRE's contention was correct if cycle-specific parameter limits and fuel information are of such a nature as to be required to be in the Technical Specifications, since the *Trojan* decision requires some such limitations to be in the Technical Specifications.

The Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1),
LBP-90-25, 32 NRC, 21, 26 (1990).

An evidentiary hearing to address the factual issue of whether substantial discretion was to be vested in the Licensee by the proposed amendment, was scheduled by the Board. On October 17, 1990, however, the parties presented to the Licensing Board a stipulation of facts that, among other things, stated that the parties agreed that the methodology for setting cycle specific core operating limits does not permit substantial discretion on the part of the Licensee and does not require substantial engineering judgment to derive the cycle-specific parameter limits to be recorded in the Core Operating Limits Report. LBP-90-39 *slip op.* at 4. In light of this stipulation, the evidentiary hearing was cancelled and the Licensing Board approved the license amendment, finding that the amendment did not improperly deprive OCRE of hearing rights provided by Section 189a of the Atomic Energy Act. LBP-90-39, 32 NRC _____. OCRE appeals the Licensing Board's findings in LBP-90-15, LBP-90-25 and LBP-90-39.

IV. ARGUMENT

A. The Licensing Board Properly Addressed The Legal Issue Raised By OCRE.

1. The Issue

OCRE claims that, although the Licensing Board agreed that OCRE had raised a valid contention and that the loss of hearing rights is a direct and immediate injury, it did not set a schedule for briefing the legal issue as provided by 10 C.F.R. § 2.714(e), but found instead that the terms of the contention raised a

safety consideration that could only be resolved at a hearing.³ Brief at 9-10. OCRE also asserts that the Licensing Board failed to comply with 10 C.F.R. § 2.760(c)(1) because it did not provide reasons for its decision on the legal issue presented by OCRE. *Id.* at 10.

2. Staff Response

The thrust of OCRE's claim is that when the Licensing Board determined that OCRE had submitted a valid contention and had concluded that "it may well be that the amendment would improperly deprive OCRE of hearing rights with respect to future changes in cycle-specific parameter limits" (LBP-90-15 at 9), the Board should have required the parties to brief the legal question without an evidentiary hearing. However, the Board tentatively granted the petition to intervene on the basis that, if substantial engineering judgment is needed to establish the cycle parameters, the license amendment would be improper since it would enable the Licensee to make changes in the operation of the facility in the future, outside the appropriate license amendment process. In its Initial Decision (LBP-90-39), the Licensing Board referenced its ruling in LBP-90-15 and reiterated its conclusion that, since Section 189a provides for a hearing on license amendments and changes

³ OCRE's contention stated:

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 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.

to technical specifications, OCRE's contention was correct *if* cycle-specific parameters are required to be in the technical specifications, which would be the case if the required methodology allowed substantial discretion by the Licensee, citing *Portland General Electric Company* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 271-74 (1979).⁴ LBP-90-39, *slip op.* at 3, LBP-90-25, 32 NRC at 26. The Licensing Board explained that it was for this reason that it sought information about the safety significance of the cycle-specific parameter limits in relation to the required methodology for calculating these limits. *Id.* The reasoning underlying this determination is evident. Unless, as a matter of fact, the license amendment removes an existing operating parameter which is required for the safe operation of the facility and substitutes, in its place, a provision which vests in the licensee discretion to make changes to that provision in the future without scrutiny by the Staff or an opportunity for a hearing by a person with the requisite interest, the legal contention raised by OCRE would, as a matter of law, be unfounded. See LBP-90-39 *slip op.* at 3. In effect, the approach of the Licensing Board served only to fill a void not foreseen by OCRE, namely, the consequences of applying the methodology provided by the amended Technical Specification in terms of future changes in cycle-specific parameters. While OCRE

⁴ As noted by the Licensing Board, the *Trojan* decision states that 10 C.F.R. § 50.36 requires that information concerning conditions or limitations upon reactor operations deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety must be in the technical specifications. LBP-90-25, 32 NRC at 26.

did not challenge the methodology in the instant proceeding because, in OCRE's view, such challenge is beyond the scope of the amendment proceeding. (Brief at 14) OCRE's decision not to do so should not be laid at the Licensing Board's feet. Indeed, OCRE's stipulation of the facts provided the foundation upon which the Licensing Board was able to dispose of the legal issue OCRE had raised.

As noted earlier, it was entirely proper for the Licensing Board to first explore the safety significance of cycle parameters before deciding OCRE's legal issue. Having been informed by the parties' stipulation that there is no substantial discretion allowed by the required methodology for calculation of cycle-specific parameter limits - thus resolving the factual predicate for OCRE's legal issue - the Licensing Board concluded that the amendment would not improperly deprive OCRE of hearing rights in the future. LBP-90-39 *slip op.* at 4. The reasons for its decision to terminate the proceeding, including its disposition of OCRE's legal issue, were amply set forth by the Board in its decision in compliance with 10 C.F.R. § 2.760(c)(1).

Moreover, the legal issue raised by OCRE was indeed addressed by the parties on several occasions. While the Board ruled that resolving OCRE's admitted contention turned first on deciding whether the amendment would vest excessive discretion or judgment in the Licensee in determining the cycle-specific parameter limits, the several rounds of argument requested by the Licensing Board in fact provided ample opportunity for each of the parties to fully brief the legal issue

raised by OCRE. The Licensing Board had the benefit of the parties' positions with respect to the contention and relied on the following pleadings in determining the acceptability of OCRE's contention and in setting its limits:

1. OCRE's response to Licensee and Staff arguments which opposed intervention. *See*, "OCRE Filing of Contention and Response to Licensee and NRC Staff Answers to OCRE's Petition for Leave to Intervene", April 23, 1990.
2. Licensee and Staff responses to OCRE's contention and OCRE's response to these arguments. *See*, "Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. Contention", May 9, 1990.; "NRC Staff Response to the Contention Proposed by Ohio Citizens for Responsible Energy and to Arguments Concerning OCRE's Standing to Intervene", May 18, 1990.
3. Licensee and Staff motions for reconsideration of the Licensing Board's tentative grant of intervention and OCRE's response to these motions. *See*, "Licensees' Motion for Reconsideration of Licensing Board's Memorandum and Order (Granting Petition to Intervene)", June 28, 1990; "NRC Staff Motion for Reconsideration", July 3, 1990; "OCRE Response to Licensee and NRC Staff Motions for Reconsideration of LBP-90-15", July 12, 1990.

Consequently, the parties did brief OCRE's legal issue on three occasions. Since the sole issue discussed in the three rounds of the parties' arguments was OCRE's contention that the proposed amendment would violate Section 189a of the Atomic Energy Act, in conjunction with the Licensing Board's question of safety, the legal issue raised by OCRE was thoroughly briefed prior to the Licensing Board's Initial Decision. OCRE's claim that its legal issue was not briefed is not supported by this record. Nothing more was necessary for full exposition of the parties' views. Significantly, OCRE does not even suggest, in its Brief on appeal, any issue that it did not have the opportunity to explore below.

For the foregoing reasons, the first issue raised in OCRE's Brief has no merit and must be denied.

B. The Licensing Board Correctly Interpreted Section 189a Of The Atomic Energy Act.

1. The Issue

OCRE asserts that the Licensing Board erred by finding 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" and thus raised a safety question. OCRE Brief at 11. OCRE argues that the question of safety was incorrect because an opportunity for hearing is provided for all license amendments even if only for editorial changes and typographical errors. *Id.* OCRE relies upon *Sholly v. NRC*⁵, for the proposition that actions not labeled 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. *Id.* at 12. In OCRE's opinion, the *Sholly* case shows that "it matters not whether an item is required to be included in the Technical Specifications pursuant to 10 C.F.R 50.36 or [the definition in *Trojan*]" *Id.* On this basis OCRE argues that if future changes to core operating limits in the Core Operating Limits Report allow the plant to be operated in manners not previously permitted, then such

⁵ 651 F.2d 780, 791 (1980), *vacated and remanded on other grounds*, 459 U.S. 1194, *vacated*, 706 F.2d 1230 (1983).

changes are *de facto* license amendments. *Id.*⁶

2. Staff Response

First, OCRE has mischaracterized the Licensing Board ruling cited in OCRE's Brief. The Licensing Board stated "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, 31 NRC 507. In other words, the Board determined that if there was some possibility that the amendment would leave unresolved for the future, the possibility of a change in operation this would then constitute amendments, and OCRE should not be deprived of an opportunity for a hearing in the future in connection with such action. However, OCRE, from the very beginning of this proceeding took the position that the amendment did not raise a significant hazards consideration, and stipulated that it did not vest in the Licensee substantial discretion or otherwise require substantial engineering judgment in terms of deriving cycle-specific information. In taking these positions, OCRE has left nothing to justify its position

⁶ OCRE also states that because the Licensing Board found that [NRC approved computer code] methodology is the Commission's exercise of its statutory authority, this methodology should have been given hearing rights by the Licensing Board. OCRE Brief at 11. OCRE goes on to acknowledge that the methodology was not part of the proposed amendment, but states that the methodology has never been, but should be, subject to hearings. *Id.* at 13-14. OCRE is correct that no change was proposed to the computer code methodology in the subject amendment. It is significant to note, however, that OCRE did not seek to challenge that methodology in this proceeding. See OCRE Brief at 14.

that future changes accomplished under the Technical Specification as amended would involve a license amendment. Its reliance on *Sholly* is thus misplaced and its argument that the Board intended to tie hearing rights to the safety significance of the amendment, OCRE Brief at 11, is clearly wrong. As the Board stated:

But if the methodology specified for the calculation of those parameters and the specification of fuel design are such as to rigidly determine the cycle-specific parameter limits without the use of engineering judgment, OCRE would lose no legal rights by the change. (OCRE's greatest loss would be the dubious privilege of checking CEI's arithmetic).

LBP-90-15, 31 NRC at 507. Thus, the Licensing Board determined that OCRE's legal issue must necessarily rest on whether the cycle-specific parameters were required to be in the Technical Specifications so as to preclude unilateral changes by the licensee. Having determined that OCRE agreed that the amendment did not raise a significant hazards consideration and that OCRE agreed that CEI did not have excessive discretion in setting the core-specific operating limits, the question then became whether removing these items from the Technical Specifications eliminated any statutorily protected hearing rights in the event of future changes in the core-specific operating limits. *See, e.g. BPI v. AEC*, 502 F. 2d 424 (D.C. Cir. 1974); *Easton Utilities Commission v. AEC*, 424 F. 2d 847, (D.C. Cir. 1970), *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 10-1, 1045 (1983). In this case, OCRE did not establish that there is a right to litigate changes to the core-specific operating limits in the future given the change to the provision now authorized.

OCRE's application of the *Sholly* decision to this proceeding is inappropriate.

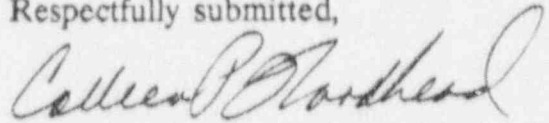
The *Sholly* case concerns an order modifying a license for which an opportunity for hearing was not provided, and states that when a license is changed to provide the licensee authority to do something that it could not have done, an opportunity for hearing must be provided. Although the license amendment here involved, removes the cycle-specific parameters from the Technical Specifications, it leaves in their place the methodology by which future changes must be made. In fact, the license amendment does not change how the core operating limits are determined, it only changes where they are recorded. Future cycle-specific parameters will continue to be limits for operation. Future calculations of these parameters will not allow operation of the plant in any manner not previously permitted, and will not be "de facto amendments" as stated by OCRE. In sum, the Licensing Board did not misinterpret Section 189a of the Act, but rather, noted that the only legal issue raised by OCRE's contention was whether the cycle parameters could lawfully be removed from the license, without depriving OCRE of an opportunity for a hearing in connection with future changes.

OCRE's second issue thus has no merit and should be denied.

V. CONCLUSION

For the reasons stated above, the appeal by OCRE is without merit and should be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Colleen P. Woodhead".

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of February, 1991.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO APPEAL BY OCRE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of February, 1991:

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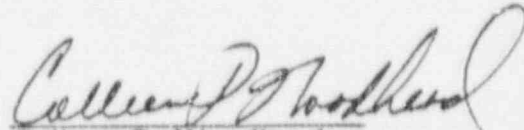
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