UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

APPELLATE BRIEF

Susan L. Hiatt
Petitioner Pro Se and
OCRE Representative

April 2, 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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APPELLATE BRIEF

Petitioners Ohio Citizens for Responsible Energy, Inc. ("OCRE") and Susan L. Hiatt hereby file this brief in support of their appeal of LBP-92-4 in the above-captioned proceeding.

I. BACKGROUND

On September 14, 1990 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 revise the Technical Specifications to provide new reactor vessel pressure-temperature limits, recalculated using the formulas of Regulatory Guide 1.99, Revision 2. On March 15, 1991, the Licensees filed a supplement to this request which would remove from the Technical Specifications the Reactor Vessel Material Surveillance Program - Withdrawal

Schedule (Technical Specification Table 4.4.6.1.3-1, p. 3/4 4-22) and place this schedule in the Updated Safety Analysis Report ("USAR"), pursuant to Generic Letter 91-01, "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications," January 4, 1991.

The NRC published a "Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing" regarding this amendment request in the Federal Register on July 24, 1991. 56 Fed. Reg. 33950, 33961. Pursuant to this notice, the Atomic Energy Act (Section 189a, 42 USC 2239) and the NRC's Rules of Practice (10 CFR 2.714), the Petitioners requested a hearing on this amendment request and filed a petition for leave to intervene.

Petitioners raised one issue of law: that the proposed amendment violates Section 189a of the Atomic Energy Act. Petitioners only challenged the portion of this amendment which would remove the reactor vessel material specimen withdrawal schedule from the Technical Specifications; they did not challenge the revisions to the reactor vessel pressure-temperature limits.

Petitioners agreed with the Licensee and NRC Staff that this portion of the proposed amendment is purely an administrative matter which involves no significant hazards considerations.

The contention and its bases are as follows:

Contention:

The Licensee's proposed amendment to remove 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 hearing on any changes to the withdrawal schedule.

The reactor vessel material specimen withdrawal schedule subject to this amendment request 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. If this amendment is granted, the Licensees will be 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 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 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) ("UCS I").

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. UCS I, 735 F.2d at 1443-4.

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 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 formal'y 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 'he 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 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 Section 189a 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. UCS I, 735 F.2d at 1444-1447.

Petitioners requested 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 providing the parties with an opportunity to brief the issue of whether Petitioners had standing to intervene, the Licensing Board issued its opinion, LBP-92-4, in which it found that Petitioners lacked standing. The Board concluded that Petitioners had failed to estublish an injury in fact resulting from the license amendment.

II. ARGUMENT

A. Petitioners Have Standing to Intervene

The Licensing Board based its finding that Petitioners lacked standing on three prongs: (1) that by agreeing that the amendment is an administrative matter with no significant hazards considerations, Petitioners cannot demonstrate any injury; (2) that legal injuries cannot confer standing; and (3) that Petitioners' claim of legal injury under the Atomic Energy Act can simply be disposed of by noting that Act does not confer an absolute right of intervention upon anyone. The Licensing Board erred on all counts.

1. No Significant Hazards Does Not Mean No Injury

The Board makes much of the fact that Petitioners agreed with the Licensees and the NRC Staff that the subject license amendment is an administrative matter which involves no significant hazards considerations. LBP-92-4, slip op. at 15-16, 22. In the Board's view, such an admission "precludes" a showing of "a clear potential for offsite consequences" resulting from the amendment which is necessary to prove an injury to support standing. Id.

Petitioners agreed that the amendment involved no significant hazards considerations because that is the only intellectually honest position which they could take. Petitioners' "concession" has no bearing whatsoever on their standing. The Board's

novel interpretation of the no significant hazards finding does violence to the Sholly amendments to the Atomic Energy Act.

Apparently the Board believes that no petitioner can ever show an injury, and thus have standing, in an operating license amendment proceeding involving no significant hazards considerations. Therefore, using the Board's logic, there can never be a hearing on a no significant hazards amendment. But the Sholly amendments to the Act clearly establish that hearing rights do exist for no significant hazards amendments. If Congress had intended to preclude hearing rights for no significant hazards amendments, it obviously would have eliminated them legislatively.

The "no significant hazards" finding is a classification scheme for establishing the timing of the issuance of the requested amendment with respect to any hearing which may be held. A no significant hazards amendment may be issued prior to the completion of the hearing; an amendment which does involve significant hazards may not be issued until after the hearing has been held and the Board has issued its decision. The "no significant hazards" finding is not meant to prejudge the merits of the case. "The Conference Committee Report accompanying the Sholly amendment, which is entitled to great weight in analyzing Congressional intent, . . . expressly states that the implementing regulations . . . 'should not require the NRC staff

to prejudge the merits of the issues raised by a proposed license amendment.'" San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268, 1270 (9th Cir. 1986) (citations omitted). The Licensing Board has twisted the "no significant hazards" timing classification into a final determination on the merits which obviates the need for a hearing.

Petitioners would note that although this particular amendment presents no significant hazards in and of itself, future changes to the reactor vessel specimen withdrawal schedule are of such safety significance as to require NRC staff review and approval. The potential for offsite consequences exists if changes to this schedule are such that the material specimens are not withdrawn frequently enough to assure that the reactor vessel has not become dangerously embrittled. What petitioners seek to preserve in this proceeding is the right to participate in a matter which the NRC's regulations have made material and which does have safety significance.

2. Legal Injuries Can Confer Standing

The Licensing Board apparently believes that legal injuries, as alleged by Petitioners, are insufficient to confer standing. This is simply not true.

The Supreme Court has declared that "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates

standing . . . '" Warth v. Seldin, 422 U.S. 490, 500 (1975) (citations omitted).

Indeed, the very case upon which the Board relies heavily, Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990) (UCS II), was a matter in which the petitioner claimed only legal injuries: that the NRC's new rules of practice violated Section 189a of the Atomic Energy Act. The petitioner therein did not, and could not, claim that radiological injuries would result from the new rules of practice. Yet the D.C. Circuit, an Article III court, had no reservations about the petitioner's standing.

Some other cases in which the Court of Appeals has addressed purely legal (and future) injuries include: UCS I (whether NRC regulation violated Section 189a); Nuclear Information and Resource Service v. NRC, 918 F.2d 189 (D.C. Cir. 1990) (whether 10 CFR Part 52 violated the Atomic Energy Act); Professional Reactor Operator Society v. NRC, 939 F.2d 1047 (D.C. Cir. 1991) (whether NRC regulation violated the Administrative Procedure Act's right to counsel provision). In none of these cases did the Court find that the petitioners lacked standing because they alleged only legal injuries that would or might occur in the future.

The Licensing Board also cites United Transportation Union v. ICC, 891 F.2d 908 (D.C. Cir. 1989) in support of its reasoning. The Board quotes a posited example from that case which it claims is "closely analogous to the situation at hand." Slip op.

at 20, footnote 48. However, upon close scrutiny, this example is readily distinguished from the instant case. The Court's example involved a hypothetical ICC rule allowing public participation which the ICC subsequently revoked. The Court found that any member of the public would not have standing to challenge the revocation based solely on procedural injuries. Apparently, this hypothetical agency rule was entirely discretionary and not in response to a statutory mandate. That is the crucial difference. This case is based on the mandate of Section 189a of the Atomic Energy Act.

Indeed, the Court in ICC specifically acknowledges that legal injuries can confer standing in its discussion of Dimond v. District of Columbia, 792 F.2d 179 (D.C. Cir. 1986). In that case, the plaintiff challenged the constitutionality of a no-fault insurance law enacted by the District of Columbia Council. The Court notes that the "plaintiff had alleged sufficient injury in fact - his inability to sue under the no-fault insurance bill . . ." ICC, 891 F.2d at 919.

Clearly, legal injuries such as those alleged by Petitioners are sufficient to establish standing, and the Licensing Board is in error to find otherwise.

3. UCS II Does Not Vitiate Section 189a

The Licensing Board relied heavily on one sentence in UCS II: "we have long recognized that Section 189a 'does not confer

the automatic right of intervention upon anyone.'" UCS II, 920 F.2d at 55, quoting BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974). LBP-92-4 at 18. The Board interprets this sentence to mean that Section 189a "bestows no legal or vested right . . . to participate in agency licensing actions." Id. This is a radical departure from the Court's intended meaning.

The Board apparently believes that the Court in UCS II essentially erased Section 189a from the Atomic Energy Act. Clearly the Court did no such thing. Considering the context of the quoted sentence, it is obvious that the Court meant only that the "NRC may exclude a party from a hearing if, for example, another party has presented a material issue identical to the one the excluded party seeks to raise." UCS II, 920 F.2d at 55.

Indeed, the UCS II Court endorsed the holding of UCS I: "UCS I thus stands for the proposition that Section 189a prohibits the NRC from preventing all parties from ever raising in a hearing on a licensing decision a specific issue it agrees is material to that decision." UCS II, 920 F.2d at 54. This is precisely the situation at hand. The amendment challenged herein will prevent all parties (not just Petitioners) from ever raising in a hearing a specific issue, the vessel specimen withdrawal schedule, which the NRC's own regulations have made material. Obviously that was the intent of Generic Letter 91-01.

Apparently the Licensing Board believes that the only hear-

ing rights possessed by members of the public are those which the NRC graciously decides to give them. This interpretation makes a mockery of the statute. If Section 189a means anything at all, it must set an independent standard that is not swayed by the whims of the implementing agency.

B. The Licensing Board Abused its Discretion

Assuming, arguendo that the Licensing Board was correct in determining that Petitioners lacked standing to intervene as a matter of right, the Board could have permitted discretionary intervention, pursuant to Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). A finding that a petitioner lacks standing does not automatically compel the denial of the petition. Clearly the instant case raises significant legal and policy issues which the Board had jurisdiction to address by permitting discretionary intervention. By denying the petition without even considering this option, the Board abused its discretion.

III. CONCLUSION

For the foregoing reasons, Petitioners request the Commission to reverse and vacate the Licensing Board's decision. Petitioners also request that the Commission itself rule upon the legal issue raised in the proffered contention.

Respectfully submitted,

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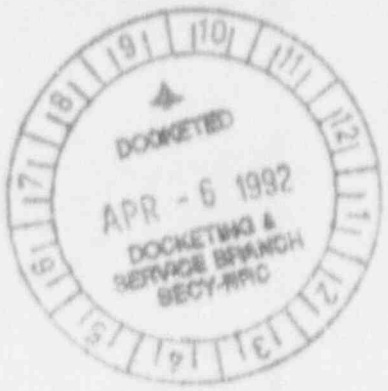
DATED: APRIL 2, 1992



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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 2ND day of APRIL, 1992, to the following:

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