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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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USNRC

'91 DEC 19 P4:01

December 19, 1991

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BRANCH

Thomas S. Moore, Chairman
Administrative Judge
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Richard F. Cole
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Charles N. Kelber
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

In the Matter of
CLEVELAND ELECTRIC ILLUMINATING COMPANY
(Perry Nuclear Power Plant, Unit 1)
Docket Nos. 50-440 OLA-3

Dear Administrative Judges:

The enclosed Staff Response in this proceeding was served to
the incorrect licensing board. I apologize for the inconvenience.

Very truly yours,

Colleen P. Woodhead
Colleen P. Woodhead
Counsel for NRC Staff

cc: Service List

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PDR ADOCK 05000440
G PDR

D507

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'91 DEC 19 P 4:06

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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BRANCH

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

Docket No. 50-440-OLA-3
ASLBP No. 91-650-13-OLA-3

NRC STAFF RESPONSE TO OCRE'S AMENDED PETITION

INTRODUCTION

Ohio Citizens for Responsible Energy, Inc. (OCRE) filed a timely petition to intervene in response to a *Federal Register* Notice regarding a proposed amendment to the operating license for the Perry Nuclear Power Plant. Both the NRC Staff (the Staff) and Cleveland Electric Illuminating Company (CEI or the Licensee) replied in opposition to OCRE's petition on the ground that OCRE failed to show standing. By Order dated October 28, 1991, the Atomic Safety and Licensing Board (the Board) provided OCRE twenty days to amend its petition in accord with 10 C.F.R. § 2.714(a)(3), and twenty days thereafter for responses from the Staff and Licensee. The Board suggested that OCRE address the standing argument made by the Licensee and Staff and to explain why the principles of standing set out in three Court of Appeals' decisions are not persuasive

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in the circumstances set forth in the intervention petition.¹ OCRE filed its amended petition on November 22, 1991. The Staff hereby files its response.

DISCUSSION

In response to the Board's Order, OCRE's amended petition addresses the Licensee's and the Staff's arguments relating to standing but, as set forth below, still fails to establish standing to participate in this proceeding. Furthermore, while OCRE addresses the cases referenced by the Licensing Board, it fails, also as indicated below, to explain why the principles established by those cases are not instructive to the determination of standing in this proceeding. OCRE claims that injury, and thus standing, may be shown merely by arguing that, because the Atomic Energy Act establishes an opportunity for a hearing under certain circumstances that there is a statutory right to a hearing in this case. Amended petition at 2-3. OCRE repeats its assertion in its petition that, *ipso facto*, if any matter, regardless of its significance to safety, is presently subject to hearing rights because contained in Technical Specifications, it must remain litigable, or an "injury" will occur. Amended petition at 3-4.

¹ The three cases cited by the Board are: *Capital Legal Foundation v. Commodity Credit Corporation*, 711 F.2d 253, 259-60 (D.C. Cir. 1983); *Wilderness Society v. Griles*, 824 F.2d 4, 19 (D.C. Cir. 1987); and *Telecommunications Research and Action Center v. F.C.C.*, 917 F.2d 585, 588 (D.C. Cir. 1990).

OCRE's amended petition does not address the requirements for standing set forth in the cases cited by the Licensee, the Staff, and the Board. OCRE has done nothing more than deny that judicial tests of standing apply to OCRE, and claims that an absolute right to litigate is provided by Section 189a of the Atomic Energy Act. This position is not supported by any case cited by OCRE or by the Act itself. As discussed in the cases cited in the Licensee's and Staff's prior responses, the zone of interest protected by the Atomic Energy Act is related to public health and safety and not litigation *per se*. Consequently, since OCRE's petition stated that there is no issue of safety attendant to removing the specimen withdrawal schedule from the Perry Technical Specifications (Petition at 5), OCRE's interest in preserving litigation rights is not within the zone of interest protected by the Atomic Energy Act. OCRE has not shown that a change in the surveillance schedule would have any nexus to safety, or how standing could be established in a future proceeding to amend the specimen withdrawal schedule.

OCRE suggests that the Licensee's reliance on *Warth v. Seldin*² and *O'Shea v. Littleton*³, represents a selective reading of these cases. Amended Petition, at 2. OCRE argues that these cases establish that where a statute creates a right to a hearing, a hearing cannot be denied even when the person requesting the hearing cannot establish a judicially cognizable injury. *Id.* Without authority or analysis, OCRE seems to assert that the Atomic Energy Act provides for a hearing even when there is no showing of judicially

² 422 U.S. 490, 514 (1975).

³ 414 U.S. 488, 493, n.2 (1974).

cognizable injury. The Staff can find no basis for this argument, which is inconsistent with long-standing Commission precedent. See, e.g., *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-82-25, 18 NRC 327, 332 (1983).

OCRE also distinguishes *Dellums*,⁴ another case relied upon by the Licensee, from the present situation because *Dellums* concerned political and ideological issues, whereas OCRE's interests are "related to a statutorily-created right." Amended petition at 2-3. This distinction is without merit. *Dellums*, in which standing was found *not* to exist, supports the determination that OCRE does not have standing here, since it has not asserted a "distinct and palpable" harm amounting to injury in fact. *Dellums*, 863 F.2d at 971.

OCRE further argues that if a hearing is denied in connection with the removal of the reactor vessel material specimen withdrawal schedule from the Perry Technical Specifications, a right established in Section 189a of the Atomic Energy Act will disappear. Amended Petition at 3-4. OCRE claims that removing the schedule for specimen withdrawal from the Technical Specification is within the zone of interest protected by the Atomic Energy Act, because public participation in license amendment proceedings is one of the goals of the Act. Amended Petition at 4. This argument is without merit and fails to provide OCRE with standing in this proceeding. As discussed above, hearing rights under the Atomic Energy Act must have a nexus to safety and OCRE has not established that nexus. It has been held, that an effort to assure that the

⁴ *Dellums v. NRC*, 863 F.2d 968 (D.C. Cir. 1988).

law is obeyed or a societal goal furthered does not constitute injury in fact. *Dellums* at 972. Similarly, OCRE's concern about being prevented in the future from raising issues in connection with changes in the specimen withdrawal schedule does not provide injury in fact.

In its Amended Petition, OCRE does not address the Staff's citations to cases that demonstrate that OCRE has not established standing. Those cases, however, like the cases cited by the Licensee and referred to by the Licensing Board, clearly demonstrate that OCRE lacks standing to participate in this proceeding.

OCRE provides a brief discussion of the applicability of the three cases cited by the Board, stating that "these cases are not persuasive in this context." Amended Petition at 6. OCRE distinguishes *Capital Legal Foundation* and *Wilderness Society, supra*, from this case on the ground that in those cases the plaintiffs claimed standing under the APA, whereas OCRE claims standing under the Atomic Energy Act. Amended Petition at 6-8. Furthermore, OCRE finds no parallel between OCRE's petition and the situation in *Telecommunications Research, supra*, where the plaintiff appealed a holding of the Federal Communication Commission entered in plaintiff's favor, but for different reasons than the plaintiff had argued. The Court stated that, an "interest in the Commission's legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is 'uncoupled' from any injury in fact caused by the substance of the FCC's adjudicatory action." *Id.* at 588. OCRE states that there is more than agency reasoning involved in the interest that OCRE is seeking to protect, since OCRE wants the

legal right to challenge any change in the Licensee's schedule for specimen withdrawal. Amended Petition at 8-9. This distinction is invalid. In both the pending matter and in *Telecommunications Research*, there was a failure of the party requesting a hearing to establish "injury in fact", regardless of the reason why such failure occurred.

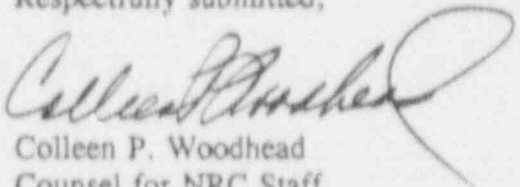
The cases cited by the Board, Licensee and Staff clearly show that OCRE has failed to show standing. In both *Capital Legal Foundation* and *Wilderness Society* the plaintiffs had shown only a speculative future injury by present agency action and thus, did not meet the injury-in-fact test for judicial standing. In addition, contrary to OCRE's reading of the cases, the court in *Wilderness Society* explained that § 702 of the Administrative Procedure Act (5 USC § 702) grants standing to a person "aggrieved by agency action within the meaning of a relevant statute" and that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." citing, *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). *Wilderness Society*, *supra*, at 18 n.11.

In sum, OCRE's amended petition does not cure its failure to show standing in its original petition. Since OCRE has not shown standing to intervene, its petition must be denied.

CONCLUSION

For the reasons stated, OCRE's petition to intervene in this proceeding should be denied.

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th of December, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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91 DEC 19 P4:02
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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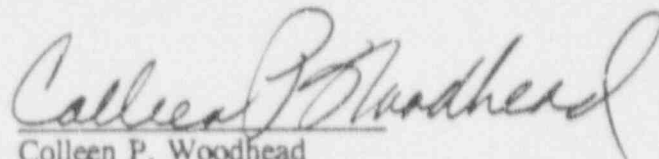
In the Matter of)
)
THE CLEVELAND ELECTRIC) Docket No. 50-440-OLA-3
ILLUMINATING COMPANY,) ASLBP No. 91-650-13-OLA-3
ET AL)
)
(Party Nuclear Power Plant, Unit 1))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with § 2.713(b), 10 C.F.R., Part 2, the following information is provided:

Name: Colleen P. Woodhead
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U.S. Court of Appeals in the
District of Columbia
The Supreme Court of the
United States
Name of Party: NRC Staff

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of December, 1991