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November 7, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commission

In the Matter of	Docket No. 50-440-OLA-3
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	License Amendment (Material Withdrawal Schedule)
(Perry Nuclear Power Plant, Unit No. 1)	ASLBP No. 90-605-02-OLA

PETITION FOR REVIEW

Pursuant to 10 C.F.R. § 2.786, The Cleveland Electric Illuminating Company, et al. ("Licensees") respectfully request the Nuclear Regulatory Commission ("Commission" or "NRC") to review the decision of the Atomic Safety and Licensing Board ("Board") , LBP-95-17, issued on October 4, 1995 with respect to the Perry Nuclear Power Plant ("Perry"). In granting the summary disposition motion of Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt ("Intervenors"), and denying Licensees' cross-motion for summary disposition, the Board erroneously concluded that the NRC must treat any future change to the reactor vessel material specimen withdrawal schedule "as a license amendment and provide notice and an opportunity for a hearing in accordance with section 189a of the Atomic Energy Act." LBP-95-17 at 23. This legal determination is incorrect and will have far reaching effects. It will transform the numerous routine requests for NRC approvals filed by licensees pursuant to NRC

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regulations into the equivalent of license amendments requiring notice and opportunity for hearing under the Atomic Energy Act.

I. SUMMARY OF DECISION AND STATEMENT OF ISSUES RAISED

The major issue raised by the Board's decision is whether every licensee action for which the Commission's regulations mandate prior NRC approval constitutes a material licensing action requiring a license amendment for which notice and opportunity for hearing must be provided under section 189a of the Atomic Energy Act (the "Act"). Licensees had requested an operating license amendment in accordance with Generic Letter 91-01 to remove from the Technical Specifications the schedule for withdrawing reactor vessel material surveillance specimens.[1/] Intervenors contended that the proposed amendment violated section 189a of the Act by depriving members of the public of their right to notice and opportunity for a hearing on any changes to the withdrawal schedule.[2/] According to Intervenors, NRC regulations require approval of changes to the withdrawal schedule, making such changes material licensing actions requiring a license amendment.[3/] The Board essentially adopted Intervenors' arguments and also concluded, at least implicitly, that any changes to the withdrawal schedule were to be treated as license amendments, regardless of materiality.[4/]

[1/] Under the proposed amendment, the withdrawal schedule would be included in the Updated Safety Analysis Report instead of the Technical Specifications. See Letter PY-CEI/NRR-1313L from Michael D. Lyster, Centerior Energy, to U.S. Nuclear Regulatory Commission, March 15, 1991.

[2/] See Petitioners' Supplemental Petition for Leave to Intervene, November 12, 1993.

[3/] See Petitioners' Motion for Summary Disposition, February 7, 1994.

[4/] Licensees had argued that even if section 189a guarantees a right to a hearing as to NRC approvals not requiring a license amendment which are material to the NRC's licensing decision, the withdrawal schedule of reactor vessel material specimens was not material to any licensing decision of the NRC. See Licensees' Cross Motion for Summary Disposition and Answer to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Motion for Summary Disposition, March 21, 1994.

The Board's decision also erroneously rejected the NRC Staff's interpretation of 10 C.F.R. Part 50, Appendix H, § II.B.3. That provision states:

> A proposed withdrawal schedule must be submitted with a technical justification as specified in § 50.4. The proposed schedule must be approved prior to implementation.

The NRC Staff interprets this provision to require Staff approval for changes to the withdrawal schedule only where the changed schedule deviates from the ASTM E 185 standard explicitly incorporated into Appendix H, § II.B by § II.B.1.[5/]

The Board rejected the NRC Staff's interpretation, finding the regulation to be unambiguous and holding that it required the NRC to "approve all proposed schedules prior to implementation." LBP-95-17 at 21 (emphasis in original). Notwithstanding the fact that the regulation makes no mention of changes to withdrawal schedules, the Board reasoned that, "[b]ecause Appendix H, § II.B.3 currently requires that a proposed withdrawal schedule be approved by the agency prior to implementation, any such requested change is a request for a material licensing action that triggers section 189a hearing rights." LBP-95-17 at 23 (citations omitted). The Board thus concluded that the NRC must "treat any future proposed withdrawal schedule as a license amendment and provide notice and opportunity for a hearing in accordance with section 189a of the Atomic Energy Act." Id.

II. STATEMENT WHY THE BOARD'S ORDER IS ERRONEOUS

The Board's decision is erroneous. First, it transforms licensee actions requiring prior NRC regulatory approval into the equivalent of license amendments for

[5/] See NRC Staff Response to Intervenors' Motion for Summary Disposition, March 7, 1994. The Staff filed an affidavit tracing the history of Appendix H in support of its interpretation.

which notice and opportunity for hearing must be afforded under section 189a of the Act. No support can be found in the law or the NRC regulations for this far reaching conclusion. Second, the Board's decision eliminates materiality as a prerequisite for section 189a hearing rights contrary to well established precedent that section 189a requires a hearing only for issues that are material to NRC licensing decisions. Third, the Board's decision is erroneous because it rejects the Staff's reasonable interpretation of Appendix H, § II.B.3.

A. The Order Is Erroneous Because It Turns Licensee Actions Requiring Prior NRC Approval Into License Amendments

The Board's decision, that the NRC's approval of a change to a withdrawal schedule under Appendix H, § II.B.3 requires notice and opportunity for hearing, rests on a fundamentally flawed assumption. It presumes that all licensee actions requiring NRC regulatory approval trigger the right to a hearing under section 189a. This assumption is wrong. The language of section 189a was carefully crafted "to guarantee hearings rights in certain classes of agency action, but not in others." San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1313 (D.C. Cir. 1984), vacated in part and rehearing granted in part, 760 F.2d 1320 (D.C. Cir. 1985) (en banc) (emphasis in original). "If a particular form of Commission action does not fall within one of the . . . categories set forth in [section 189a], no hearing need be granted by the Commission." San Luis Obispo, 751 F.2d at 1314; accord Kelley v. Selin, 42 F.3d 1501, 1515 (6th Cir.), cert. denied, 115 S. Ct. 2611 (1995); Commonwealth of Massachusetts v. NRC, 878 F.2d 1516, 1521 (lst Cir. 1989).

The categories of licensing actions for which section 189a grants a right to a hearing are "the granting, suspending, revoking, or amending of any license or

construction permit."[6/] The approval of a change to the withdrawal schedule for reactor vessel surveillance specimens does not fall within any of these categories. It is no different than numerous other approvals that the NRC requires as part of its continuing regulatory oversight to assure that the activities authorized under NRC licenses continue to be conducted with no undue risk to the public health and safety.[7/] None of these provisions contemplate license amendments.

The cases cited above refute the Board's ruling that such NRC approvals automatically trigger section 189a hearing requirements. Closely on point is the Sixth Circuit's recent Kelley decision. Petitioners in that case argued that the NRC's granting of an exemption to the vendor of the spent fuel storage casks to be installed at the Palisades facility and NRC's "approval of amendments to Palisades' security and

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[6/] Section 189a provides for notice and opportunity for hearing with respect to "any proceeding for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties . . . " 42 U.S.C. § 2239(a).

[7/] See, e.g., 10 C.F.R. § 50.46 (a)(3)(ii) (use of approved integrated scheduling system for showing compliance with § 50.46); 10 C.F.R. § 50.48(c)(5) (compliance with fire protection requirements); 10 C.F.R. § 50.54(a)(3) (changes to quality assurance programs that reduce commitments); 10 C.F.R. § 50.55(f)(3) (for construction permit holders, changes to quality assurance programs that reduce commitments); 10 C.F.R. § 50.54(i-1) (decrease in scope of an operator requalification program); 10 C.F.R. § 50.54(q)(changes to emergency plans which decrease plan effectiveness); 10 C.F.R. § 50.54(w)(4)(ii) (post-accident cleanup plan); 10 C.F.R. § 50.54(bb) (spent fuel management and funding plan); 10 C.F.R. § 50.55a(f)(4)(iv) (use of subsequent editions and addenda of ASME Code for inservice testing of pumps and valves); 10 C.F.R. § 50.55a(g)(4)(iv) (use of subsequent editions and addenda of ASME Code for inservice inspection of pumps and valves); 10 C.F.R. § 50.61(b)(6)&(7) (reactor operation beyond pressurized thermal shock screening criterion); 10 C.F.R. § 50.82(d) (updated detailed decommissioning plan prior to start of major dismantlement activities); 10 C.F.R. Part 50, App. G, § III.B (test methods for supplemental fracture toughness tests); 10 C.F.R. Part 50, App. G, § IV.A.1 (reactor vessel beltline material Charpy upper-shelf energy of less than 50 ft-lb); 10 C.F.R. Part 50, App. G § V.D (thermal annealing); 10 C.F.R. Part 50, App. G, § V.E (programs for satisfying requirements of App. G, §§ V.C. & D) 10 C.F.R. Part 50, App. H, § II.C (integrated reactor surveillance programs); 10 C.F.R. Part 50, App. J § III.A.6 (test schedule for Type A integrated leakage rate test); 10 C.F.R. Part 50, App. K, § I.C.5.c (ECCS evaluation models).

emergency plans" triggered section 189a's right to a hearing. 42 F.3d at 1514. The Sixth Circuit rejected the petitioners' arguments:

> There is no licensing decision being made here. . . . The decisions to which petitioners refer as site-specific do not grant Consumers the right to operate Palisades in any greater capacity than the plant had previously been allowed to operate, and the NRC did not exempt Consumers from operating under any specific safety requirements or change the rules applicable to Consumers to such an extent that it no longer followed otherwise applicable NRC rules and regulations.

42 F.3d at 1515 (emphasis added). The Sixth Circuit stated further that "the grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights." 42 F.3d at 1517; accord Commonwealth of Massachusetts, 878 F.2d at 1521; Duke Power Co. v. NRC, 770 F.2d 386, 389 (4th Cir. 1985). Similarly, the Kelly decision held that NRC's approval of the revised security and emergency plans for Palisades "[did] not require public participation." 42 F.3d at 1517.[8/]

Here too, the NRC's approval of a change to the withdrawal schedule will not grant Licensees, in the words of the Kelley decision, "the right to operate [Perry] in any greater capacity than the plant had previously been allowed to operate." Nor will it "exempt [Licensees] from operating under any specific safety requirements or change the rules applicable to [Perry] to such an extent that it no longer follow[s]

[8/] See also San Luis Obispo, where the court held that lifting of a license suspension did not fall within any of the categories set out in section 189a requiring notice and opportunity for hearing. Similarly, in Commonwealth of Massachusetts, the court held that the NRC's decision authorizing restart of a plant that had been shut down did not constitute a license amendment and did not trigger notice and opportunity for hearing under section 189a.

otherwise applicable NRC rules and regulations." Therefore, the NRC's approval should not trigger section 189a hearing rights.

The cases cited by the Board and Intervenors are not to the contrary. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied sub nom. Arkansas Power & Light Co. v. Union of Concerned Scientists, 469 U.S. 1132 (1985) involved a licensing proceeding explicitly within the scope of section 189a. The issue there was whether questions concerning emergency evacuations were material to the Commission's licensing decision so that they had to be heard in a hearing already required under section 189a.[9/] In Citizens Awareness Network v. NRC, 59 F.3d 284 (1st Cir. 1995), the court concluded that the NRC's approval of the licensee's "component removal project" had "substantially enlarged the [licensee's] authority" to engage in activities far beyond those previously authorized under its license. 59 F.3d at 294. The court did not lay down the broad rule of law promoted by the Board that NRC approvals which are part of its continuing regulatory oversight require notice and opportunity for hearing under section 189a. Such a rule of law is refuted by Kelley and other cases (San Luis Obispo, Commonwealth of Massachusetts and Duke Power) holding that such regulatory approvals by the NRC do not constitute amendments to a reactor's license that would trigger hearing rights[10/]

[9/] See San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 30 (D.C. Cir.) (en banc), cert. denied 479 U.S. 923 (1986) ("Union of Concerned Scientists holds only that the Commission cannot exclude from a section 189(a) hearing issues that its rules or regulations require it to consider in its licensing decisions.")

[10/] The intervenors also cite Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980), vacated and remanded, 459 U.S. 1194 (1983). However, the Supreme Court's vacating the Sholly decision "deprives [it] of precedential effect." County of Los Angeles v. Davis, 440 U.S. 625, 634 n. 6 (1979); see also Citizens Association For Sound Energy v. NRC, 821 F.2d 725, 728 (D.C. Cir. 1987) ("The Sholly decision is no longer of precedential value.")

B. The Order Is Erroneous Because It Eliminates Materiality As A Requirement For A Hearing Under Section 189a

Section 189a has been interpreted to require notice and opportunity for hearing only with respect to issues that are material to NRC licensing decisions. See, e.g., Union of Concerned Scientists, 735 F.2d at 1443. The Board's order would, however, require notice and opportunity for hearing on all NRC approvals of changes to withdrawal schedules for reactor vessel material surveillance specimens, regardless of their materiality.

The Board's Order would require NRC to provide notice and opportunity for hearing with respect to schedule changes even if those changes comply with the ASTM E 185 standards incorporated into Appendix H, § II.B.1, or are otherwise not material to the public health and safety. The regulatory history of Appendix H demonstrates, however, that withdrawal schedules conforming with ASTM E 185 standards satisfy NRC safety requirements and are therefore not material to any licensing decision.[11/]

C. The Board's Order Is Erroneous Because It Rejects The Staff's Reasonable Interpretation Of Appendix H, § II.B.3

Based on the history of Appendix H, the Staff interprets Appendix H, § II.B.3 to apply only to schedules not in conformance with the ASTM E 185 standards incorporated by reference in Appendix H, § II.B.1.[12/] The Board rejected the Staff's interpretation and held that "all proposed schedules" require the NRC's approval. LBP-95-17 at 21 (emphasis added). In its decision, the Board argues that § II.B.3 is

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[11/] See NRC Staff Response to Intervenors' Motion for Summary Disposition, supra at 17-23.

[12/] See NRC Staff Response to Intervenors' Motion for Summary Disposition, supra at 17-27, and the supporting affidavit of Barry J. Elliot, Jack R. Strosnider and Christopher I. Grimes.

clear and unambiguous on its face and that the Staff disregards its plain meaning. Id. at 15-18. However, the regulation is not so clear and unambiguous as the Board claims. It provides only that "[t]he proposed schedule must be approved prior to implementation ." It does not specify whether it is only the initial schedule that must be approved or whether changes to that schedule must also receive prior approval. While the Board criticizes the Staff for "the unwarranted insertion" of the word "initial" into the regulation (id. at 17), the Board itself without warrant inserts the word "all" in order to find no ambiguity in the provision. Id. at 21. The Staff's interpretation of Appendix H, § II.B.3 is a reasonable one based on that regulation's history and purpose, and the Commission should adopt it.

III. STATEMENT WHY THE COMMISSION SHOULD REVIEW THE BOARD'S ORDER

The Commission should review the Board's ruling because the Board's legal conclusion is a "departure from" and "contrary to established law." 10 C.F.R. § 2.786(b)(4)(ii). The Board erroneously concludes that NRC's approval of withdrawal schedules changes under 10 C.F.R. Part 50, Appendix H, § II.B.3 constitutes a material licensing action which must be treated as if it were a license amendment. The Board's decision would require the NRC to treat approvals required as part of its continuing regulatory oversight as if they were license amendments subject to the procedural requirements of section 189a. This result is contrary to well established case law and Commission practice. Also contrary to established case law, the Board's decision eliminates materiality as a prerequisite for section 189a licensing hearings.

Finally, the Commission should review the Board's decision because the decision raises "substantial and important question[s]" of law and policy. 10 C.F.R. §

2.786(b)(4)(iii). In addition to Appendix H, § II.B.3, the NRC's regulations contain many other provisions requiring NRC approval of licensee actions which are not otherwise subject to notice and opportunity for hearing under section 189a. See note 7, supra. The Board's rationale would emboss upon such regulatorily established Staff approvals the procedural trappings of license amendments. Generic application of the Board's ruling would have a significant impact on the both the NRC Staff and NRC licensees. It would greatly burden the NRC's regulatory oversight with new procedural requirements with no concomitant benefit to the public health and safety.

The Licensees therefore respectfully submit that the Commission's review of the Board's decision is appropriate under 10 C.F.R. § 2.786.

Respectfully submitted,

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Dated: November 7, 1995

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ILLUMINATING COMPANY, et al.)	(Material Withdrawal Schedule)
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(Perry Nuclear Power Plant,)	ASLBP No. 90-605-02-OLA
Unit No. 1))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review were sent by Federal Express on November 6, 1995 to the parties listed on the attached Service List (and identified by an *) and by first class mail, postage prepaid, to the remaining persons on the Service List.

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Dated: November 7, 1995

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