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LBP-92-4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of	Docket No. 50-440-OLA-3
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	ASLBP No. 91-650-13-OLA-3
(Perry Nuclear Power Plant, Unit No. 1)	March 18 1992

MEMORANDUM AND ORDER
(Ruling on Intervention Petition)

This matter is before us to determine whether the petitioners, Ohio Citizens for Responsible Energy, Inc. (OCRE) and Susan L. Hiatt, have standing to challenge an operating license amendment sought by the applicants, Cleveland Electric Illuminating Company, et al., for their Perry Nuclear Power Plant located on the shores of Lake Erie in Lake County, Ohio. The amendment removes the reactor vessel material surveillance program withdrawal schedule from the plant's technical specifications and relocates it in the updated safety analysis report for the facility. For

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the reasons that follow, we find that the petitioners lack standing to intervene. Accordingly, their petition to intervene is denied.

I.

A. To put the petitioners' standing claims in the proper context, it is helpful initially to sketch the regulatory background underlying this license amendment proceeding.

Pursuant to section 182(a) of the Atomic Energy Act,[1] the operating license for a commercial nuclear power plant must include the "technical specifications" for the facility. That section further provides that the technical specifications include, inter alia, information on "the specific characteristics of the facility, and such other information as the Commission ... deem[s] necessary ... to find that the [plant] ... will provide adequate protection to the health and safety of the public."[2] The Commission has implemented this statutory directive through 10 C.F.R. § 50.36. That provision states that each operating license "will include technical specifications ... [to] be derived

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[1] 42 U.S.C. § 2232(a) (1988).

[2] Id.

from the analyses and evaluation included in the safety analysis report, and amendments thereto, ... [and] such additional technical specifications as the Commission finds appropriate."[3] The regulation then generally describes, under six category headings, the types of items that must be included in the technical specifications, such as safety limits, limiting safety system settings, limiting control settings, limiting conditions for operations, surveillance requirements, and facility design features that, if altered, would have an effect on safety.[4]

The Commission has recognized, however, that the lack of well-defined criteria in the regulations for determining precisely what should be included in a plant's technical specifications has led licensees to be over-inclusive in developing them. As the Commission stated in its interim policy statement on technical specification improvements,

> [t]he purpose of Technical Specifications is to impose those conditions or limitations upon reactor operation necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety by establishing those conditions of operation which cannot be changed without prior Commission approval and by identifying

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[3] 10 C.F.R. § 50.36(b).

[4] Id. § 56.36(c).

those features which are of controlling importance to safety.[5]

The Commission went on to observe that, "since [the technical specification rule was promulgated], there has been a trend towards including in Technical Specifications not only those requirements derived from the analyses and evaluation included in the safety analysis report but also essentially all other Commission requirements governing the operation of nuclear power reactors."[6] According to the Commission, this trend has had the deleterious effect of increasing the volume of technical specifications to the point where they have become unnecessarily burdensome, diverting the attention of licensees and plant operators from the plant conditions most important to safety, and substantially increasing the number of license amendment applications to make minor changes in the technical specifications -- all of which "has resulted in an adverse but unquantifiable impact on safety."[7]

In an effort to eliminate these negative impacts, the Commission initiated, with the issuance of its interim

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[5] 52 Fed Reg. 3788, 3790 (1987). See generally Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 273 (1979).

[6] 52 Fed. Reg. at 3789.

[7] Id.

policy statement, a voluntary program designed to encourage licensees to improve their technical specifications. As a small part of this ongoing program, the staff issued Generic Letter 91-01, providing guidance on the preparation of a license amendment application to remove from the technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens.[8] In addition to explaining the ministerial function of the surveillance capsule withdrawal schedule and its relationship to other surveillance requirements designed to protect against reactor vessel embrittlement, the staff guidance letter states that the Commission's regulations already require that a licensee obtain NRC approval for any changes to the withdrawal schedule.[9] This, the staff maintains, makes it duplicative to retain regulatory control over the schedule through the license amendment process. Finally, the staff guidance letter directs that an application to effectuate this change should include the licensee's commitment to place the NRC-approved version of the specimen withdrawal schedule in the next revision of the licensee's updated safety analysis report.

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[8] Generic Letter 91-01 (Jan. 4, 1991).

[9] See 10 C.F.R. Part 50, Appendix H, § II.B.3.

B. After the staff issued the generic letter, the applicants filed a supplement to a pending license amendment application seeking to remove the reactor vessel material surveillance program withdrawal schedule from the Perry technical specifications. Thereafter, the agency published a notice of opportunity for hearing and a proposed no significant hazards consideration determination concerning the applicant's request.[10] In support of the staff's no significant hazards consideration determination,[11] the notice stated that the relocation of the surveillance capsule withdrawal schedule was purely an administrative change and hence did not (1) involve a significant increase in the probability or consequences of a previously evaluated accident; (2) affect any previous accident analyses; or (3) change any existing margin of safety.[12]

Responding to the Commission's notice, the petitioners filed a timely petition to intervene and request for a hearing on the capsule withdrawal schedule portion of the operating license amendment.[13] The applicants and the staff

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[10] 56 Fed. Reg. 33,950, 33,961 (1991). See generally 42 U.S.C. § 2239(a)(2)(A)-(B) (1988); 10 C.F.R. § 50.91.

[11] See generally 10 C.F.R. § 50.92(c).

[12] 52 Fed. Reg. at 33,962.

[13] Petition for Leave to Intervene and Request for a Hearing (Aug. 23, 1991) [hereinafter Petition].

opposed the intervention petition on the ground that the petitioners lacked standing to intervene.[14] We then issued an order that fixed a schedule for filing any amended petition, provided the petitioners with the opportunity to address the arguments of the applicants and the staff, and requested that the petitioners explain why several standing cases we cited were not persuasive in the circumstances presented.[15] The petitioners filed an "amended" intervention petition in which they addressed the arguments of the applicants and the staff and the cases we cited, but made no substantive changes in their standing claims.[16] Finally, the applicants and the staff filed replies to the petitioners' filing.[17]

The intervention petition asserts that petitioner OCRE is a nonprofit Ohio corporation whose purpose is to engage in reactor safety research and advocacy with the goal of advancing the use of the highest standards of safety for nuclear plants. The petition recites that some of OCRE's

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[14] Licensees' Answer to Petition for Leave to Intervene and Request for Hearing (Sept. 6, 1991); NRC Staff Answer to Petition for Leave to Intervene (Sept. 12, 1991).

[15] Order (Oct. 28, 1991) (unpublished).

[16] Petitioners' Amended Petition for Leave to Intervene (Nov. 22, 1991).

[17] Licensees' Response to Amended Petition for Leave to Intervene (Dec. 17, 1991); NRC Staff Response to Amended Petition (Dec. 17, 1991).

members live and own property within fifteen miles of the Perry plant and that one member, Susan L. Hiatt, has authorized OCRE to represent her interests in the proceeding. Attached to the petition is the affidavit of Ms. Hiatt stating that she is a member and officer of OCRE who resides about thirteen miles from the Perry facility. The affidavit states that, in addition to appearing pro se, Ms. Hiatt has authorized OCRE to represent her interests in this amendment proceeding and, in turn, OCRE has empowered her, as an officer of the organization, to represent it before the agency. With respect to petitioner Hiatt, the petition reiterates that she lives and owns property within fifteen miles of the Perry plant. The petition then states that

> Petitioners have a definite interest in the preservation of their lives, their physical health, their livelihoods, the value of their property, a safe and healthy natural environment, and the cultural, historical, and economic resources of Northeast Ohio. Petitioners also have an interest in preserving their legal rights to meaningful participation in matters affecting the operation of the Perry Nuclear Power Plant which may impact these above-mentioned interests.[18]

After setting forth the petitioners' purported interests, the petition states that the "Petitioners agree with the Licensee and NRC Staff that this portion of the

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[18] Petition at 2-4.

proposed amendment is purely an administrative matter which involves no significant hazards considerations."[19] The petition then claims that the petitioners wish only to raise a single legal issue, i.e., the challenged amendment violates section 189(a) of the Atomic Energy Act[20] by depriving the public of the right to notice and an opportunity for a hearing on any changes to the withdrawal schedule. According to the petition, the withdrawal schedule traditionally has been part of the applicants' technical specifications and hence the Perry operating license so that, pursuant to section 189(a), changes to the schedule can be made only after public notice and an opportunity for a hearing. The petitioners next argue that under the challenged amendment the licensees henceforth will be able to make de facto license amendments to the withdrawal schedule, without any notice or hearing, in violation of their rights under section 189(a).[21]

II.

A. Parroting the language of section 189(a) of the Atomic Energy Act, the Commission's regulations provide that

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[19] Id. at 5.

[20] 42 U.S.C. § 2239(a) (1988).

[21] Petition at 6-10.

"[a]ny person whose interest may be affected by a proceeding" may seek to intervene by filing a petition.[22] The regulations further provide that the petition shall "set forth with particularity the interest of the petitioner in the proceeding [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene."[23] The Commission long ago held that "contemporaneous judicial concepts of standing" are to be used in determining whether a petitioner has alleged a sufficient "interest" within the meaning of section 189(a) and the agency's regulations to intervene as a matter of right in an NRC licensing proceeding.[24] According to the Commission, those familiar standing principles require that a petitioner demonstrate an injury in fact from the action involved and an interest arguably within the zone of interests protected by the statutory provisions governing the proceeding.[25] The same showing is required regardless of whether the petitioner is

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[22] 10 C.F.R. § 2.714(a)(1).

[23] Id. § 2.714(a)(2).

[24] Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

[25] Id.; see Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983).

an individual or an organization seeking to intervene in its own right.[26] Additionally, when an organization seeks to intervene as the authorized representative of one of its members, the standing of the organizational petitioner is, inter alia, dependent upon that individual member having standing in his own right.[27]

As the Supreme Court has recognized, "[g]eneralizations about standing to sue are largely worthless as such."[28] It nevertheless is current judicial standing doctrine that the injury in fact requirement has three components: injury, cause, and remedial benefit. As articulated by the Supreme Court,

> the party who invokes the court's authority [must] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976).[29]

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[26] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991); see TMI, 18 NRC at 332.

[27] Turkey Point, 33 NRC at 530-31. See also Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977).

[28] Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

[29] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (continued...)

Although variously described, the asserted injury must be "distinct and palpable"[30] and "particular [and] concrete,"[31] as opposed to being "'conjectural ...[,] hypothetical,'"[32] or "abstract."[33] The injury need not already have occurred but when future harm is asserted, it must be "threatened,"[34] "'certainly impending,'"[35] and "'real and immediate'".[36] Additionally, there must be a causal nexus between the asserted injury and the challenged action. In other words, the alleged harm must have "resulted" in a "concretely demonstrable way" from the claimed infractions.[37] There also must be a sufficient causal connection between the alleged harm and the requested

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[29](...continued)
(1982). See generally 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531.4-.6 (1984).

[30] Warth v. Seldin, 422 U.S. 490, 501 (1975).

[31] United States v. Richardson, 418 U.S. 166, 177 (1974).

[32] Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

[33] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 40.

[34] Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

[35] Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

[36] Los Angeles v. Lyons, 461 U.S. at 102.

[37] Warth v. Seldin, 422 U.S. at 504.

remedy so that the complaining party "stand[s] to profit in some personal interest."[38]

B. Here, it is clear that the petitioners fail to satisfy the injury in fact test for standing. This being so, we need not reach any question concerning the zone of interest requirement. Further, we need address only Ms. Hiatt's standing claims because OCRE's standing as the representative of its member is, inter alia, dependent upon Ms. Hiatt's standing and, to the extent OCRE seeks to intervene as an organization in its own right, both petitioners have alleged the same interests.[39] Thus, because Ms. Hiatt has failed to establish an injury in fact, OCRE's claim likewise must fail.

1. In the intervention petition, Ms. Hiatt first asserts that she lives and owns property within fifteen miles of the Perry facility and that she has an interest in preserving her health, livelihood, property, and environment

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[38] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 39.

It should be noted that when the requested relief is the cessation of the putatively illegal conduct, the analysis of the causal nexus between the alleged injury and the challenged action (i.e., the "fairly traceable" analysis) and the asserted harm and the requested relief (i.e., the "redressibility" analysis), is the same. See Allen v. Wright, 468 U.S. 737, 759 n.24 (1984).

[39] See supra notes 26-27 and accompanying text.

as well as the cultural, historical, and economic resources of northeastern Ohio, all of which may be impacted by the operation of the plant. But petitioner's mere interest in these enumerated matters, without a great deal more, is woefully insufficient to establish that she has suffered some actual or threatened injury from the challenged license amendment. Generalized interests of the kind asserted by the petitioner do not comprise an injury that is distinct and palpable or particular and concrete. Rather, the petitioner's asserted interests are abstract and conjectural grievances that fall far short of the kind of real or threatened harm essential to establish an injury in fact.[40] As the Supreme Court has stated, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedure Act]."[41] Similarly, the concerns listed by the petitioner are inadequate to demonstrate her "interest" in this proceeding within the meaning of the Commission's regulations.

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[40] See TMI, 18 NRC at 332-33; Turkey Point, 33 NRC at 530.

[41] Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

As previously indicated, to satisfy the injury in fact requirement, the alleged harm to the petitioner also must have been caused by the challenged licensing action. Yet, the amendment at issue only removes the reactor vessel material surveillance withdrawal schedule from the Perry technical specifications and places it in the updated safety analysis report. Ms. Hiatt concedes that the license amendment is purely an administrative matter that involves no significant hazards considerations. As solely an administrative change, the instant licensing action has no effect on any of the petitioner's asserted interests in preserving her life, health, livelihood, property, or the environment. Hence, the essential causal nexus between the petitioner's alleged harm and the challenged license amendment is missing.

Nor is the petitioner's position enhanced by her claim that she lives within fifteen miles of the Perry facility and that her interests, therefore, may be impacted by matters affecting the operation of the plant. Such a speculative claim is far too tenuous a causal link between the petitioner's alleged injury and the licensing action at issue to meet the injury in fact test. The Commission has emphasized that, in proceedings other than those for construction permits and operating licenses, injury to individuals living in reasonable proximity to a plant must

be based upon a showing of "a clear potential for offsite consequences" resulting from the challenged action.[42] Not only has the petitioner not made any such showing here, but her gratuitous admission in the intervention petition that the license amendment is purely an administrative matter with no significant hazards considerations precludes it.

2. Ms. Hiatt's second claim of injury is as unavailing as her first. She asserts that she has an interest in preserving her "legal right" to meaningful participation in matters affecting the operation of the Perry facility. This claim of injury, however, also fails to meet the injury in fact test.

Setting aside for the moment the petitioner's declaration that she has a legal right to participate in NRC licensing proceedings, we note initially that the injury claimed by Ms. Hiatt is a future one. She does not allege any actual present harm from the license amendment. Indeed, she concedes it is merely an administrative matter with no safety implications. Instead, the petitioner complains that if future changes in the withdrawal schedule occur, there will be no future license amendment proceedings so she will

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[42] St. Lucie, 30 NRC at 329.

lose her right to participate meaningfully in matters affecting the operation of the Perry plant.

Although a future injury can meet the injury in fact test, it must be one that is realistically threatened and immediate.[43] Here, however, the petitioner's alleged future injury is speculative.[44] Before the petitioner's alleged harm can occur, a number of uncertain and unlikely events must take place including, most obviously, a change in the withdrawal schedule. But Ms. Hiatt has not asserted that future changes in the withdrawal schedule will be made or even that such changes are likely.[45]

Equally damaging to her argument, however, is the fact that the speculative harm asserted by the petitioner is

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[43] See supra notes 34-36 and accompanying text.

[44] See Juidice v. Vail, 430 U.S. 327, 332-33 & n.9 (1977) (plaintiff previously imprisoned and fined for contempt for ignoring deposition subpoena regarding outstanding judgment lacked standing to enjoin future enforcement of state statutory contempt procedures because prospect of future contempt was speculative conjecture even though judgment remained unsatisfied). See also Los Angeles v. Lyons, 461 U.S. at 105; O'Shea v. Littleton, 414 U.S. 488, 496-97 (1974); United Transp. Union v. ICC, 891 F.2d 908, 913-14 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 3271 (1990).

[45] Additionally, the petitioner has failed to identify the chain of circumstances culminating in "offsite consequences" that must be linked to those future changes before she reasonably can claim to be threatened by the operation of the Perry facility. See supra pp. 15-16.

footed on an erroneous premise. Without citing any direct authority, Ms. Hiatt declares that pursuant to section 189(a) of the Atomic Energy Act she has a "legal right" to participate in NRC license amendment proceedings. From this thesis, she argues that the challenged license amendment violates that right with respect to future changes in the specimen withdrawal schedule -- changes she characterizes as de facto license amendments made without notice and an opportunity for a hearing. Contrary to the petitioner's apparent belief, section 189(a) does not give the petitioner an absolute, automatic right to intervene in NRC licensing proceedings. That provision bestows no legal or vested right on her to participate in agency licensing actions. As the United States Court of Appeals for the District of Columbia Circuit recently stated, "we have long recognized that Section 189(a) 'does not confer the automatic right of intervention upon anyone.'"[46] Rather, section 189(a) grants participatory rights only to those persons who first establish, inter alia, that they have standing to intervene. Here, of course, the petitioner has not demonstrated that she has standing so section 189(a) cannot be used as the bootstrap to establish it.

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[46] Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C. Cir. 1990) (quoting BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974)).

Finally, the purported harm claimed by the petitioner fails to pass the injury in fact test for another reason: it has no causal link to any substantive regulatory impact. For example, the petitioner does not allege that the removal of the withdrawal schedule from the Perry technical specifications violates 10 C.F.R. § 50.36, the Commission's substantive rule prescribing the matters that must be included in a plant's technical specifications. Rather, Ms. Hiatt claims only the deprivation of a purported procedural right to have notice and an opportunity to request a hearing on future changes to the withdrawal schedule. Stated otherwise, she alleges a right to participate in a license amendment hearing as an end in itself.[47] But standing cannot be properly predicated upon the denial of a purported procedural right that is uncoupled from any injury caused by the substance of the challenged license amendment. As the

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[47] Additionally, the petitioner argues that, if the amendment is granted, the only mechanism available for public participation in future changes to the withdrawal schedule is through 10 C.F.R. § 2.206. According to the petitioner, that provision provides neither meaningful participation nor a right to judicial review. This argument, like the one above, is bottomed on the erroneous, albeit implicit, notion that the petitioner has a legal right, without more, to participate in NRC license amendment proceedings. As previously stated, section 189(a) of the Atomic Energy Act grants no right to the petitioner to participate in agency proceedings for the sake of participating. Whether Ms. Hiatt has other avenues to challenge future changes in the specimen withdrawal schedule is irrelevant to the determination of her standing to intervene in <u>this</u> license amendment proceeding, which must rest on a showing that the instant amendment results in an actual or threatened injury in fact.

District of Columbia Circuit has stated, "before we find standing in procedural injury cases, we must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer ... standing. Without such a nexus, the procedural injury doctrine could swallow [the injury in fact] standing requirements."[48]

Illustrative of this substantive nexus principle is the same circuit's decisions in Capital Legal Foundation v. Commodity Credit Corp.[49] There, Capital Legal Foundation

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[48] United Transp. Union v. ICC, 891 F.2d at 918 (citation omitted).

Interestingly, in its decision, the court of appeals went on to posit an example that is closely analogous to the situation at hand:

> Consider, for example, what would happen if the ICC adopted a rule stating that any American could intervene in an ICC proceeding to challenge any interlocking directorate between two railroads, and then later repealed that rule. Would every American be entitled to sue alleging that he or she suffered a procedural injury when the right to intervene was revoked? Surely some showing that interlocking directorates would be likely to injure the complainant should be required. Indeed, if a procedural injury alone suffices to confer Article III standing, any American could sue any agency alleging that it is arbitrary and capricious not to have a procedure by which they can challenge agency action.

Id. at 918-19.

[49] 711 F.2d 253 (D.C. Cir. 1983).

(Capital) sought declaratory and injunctive relief against the Commodity Credit Corporation (CCC) for offering to assume certain Polish government debts owed to American creditors and guaranteed by the agency, without first complying with the requirement of the CCC's regulation that the creditors declare the Polish debts in default. Capital, an organization involved in monitoring agencies engaged in economic regulation, claimed that the CCC's violation of the default provisions in its regulations was a de facto rule amendment undertaken without compliance with the notice and comment rulemaking procedures of the Administrative Procedure Act. Capital alleged it was harmed by the CCC's action because it had been deprived of its procedural right to comment on the rule change. It also conceded that it suffered no other injury stemming from the CCC's action. The court held that Capital lacked standing because it was not injured by the CCC's action.[50]

Capital's injury claim directly parallels Ms. Hiatt's claim that the challenged license amendment harms her procedural right to notice and an opportunity to request a

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[50] 711 F.2d at 255-57, 259-60. See also United Transp. Union v. ICC, 891 F.2d at 918-19; Telecommunications Research and Action Center v. FCC, 917 F.2d 585, 588 (D.C. Cir. 1990); Wilderness Society v. Griles, 824 F.2d 4, 19 (D.C. Cir. 1987).

hearing on future changes to the withdrawal schedule.[51] And like Capital, Ms. Hiatt effectively concedes she has no other injury by admitting the challenged amendment is purely an administrative matter with no significant hazards considerations. Given these circumstances, the same result must obtain here for Ms. Hiatt and OCRE which stands her stead.

C. Although the petitioners do not rely upon or even mention it in their filings, we think it incumbent upon us to account for our divergence from another Licensing Board's decision in an earlier Perry license amendment proceeding that the applicants and the staff brought to our attention.[52] There, in circumstances indistinguishable from those before us, the Board found that OCRE had standing. We decline to follow that ruling.

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[51] The petitioner seeks to distinguish Capital Legal Foundation on the ground that Capital claimed injury only to procedural rights conferred upon everyone by the Administrative Procedure Act. In contrast, she argues that her injury is to the substantive right to a hearing on license amendments given by the Atomic Energy Act to the special class of citizens living in close proximity to a nuclear plant. The petitioner's argument is meritless. As previously indicated, section 189(a) of the Atomic Energy Act does not confer upon anyone an automatic right of intervention in NRC licensing proceedings. See supra p. 18. Further, mere residence in the vicinity of a nuclear plant is insufficient by itself to confer standing on a person seeking to intervene in an operating license amendment proceeding. See supra pp. 15-16.

[52] LBP-90-15, 31 NRC 501, 506, rehearing denied, LBP-90-25, 32 NRC 21, 24 (1990).

In the earlier proceeding, OCRE, as the representative of its member Ms. Hiatt, challenged a license amendment that removed the cycle-specific core operating limits and other cycle-specific fuel information from the Perry technical specifications and replaced them with an agency-approved calculation methodology and acceptance criteria. As in this case, OCRE conceded that the amendment involved purely an administrative matter that involved no significant hazards considerations. And, as here, OCRE claimed that it was harmed because the challenged license amendment would permit future core operating limit changes without notice and an opportunity to request a hearing. Similarly, OCRE asserted that it wished to raise the single legal issue of whether the challenged amendment violated section 189(a) of the Atomic Energy Act by depriving the public of the right to notice and an opportunity to request a hearing on future core operating limit changes.[53]

In holding that OCRE had standing, it appears the Board determined that, because the Commission's regulations allow the filing of a contention raising only a legal issue, and OCRE raised such an issue, OCRE had standing to intervene.[54]

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[53] 31 NRC at 503-05.

[54] Id. at 506.

Further, in its ruling denying motions for reconsideration, the Board appears to have concluded that OCRE's injury claim was sufficient because the challenged amendment deprived OCRE of its "legal right" to notice and an opportunity to request a hearing on future cycle-specific parameter limits. Additionally, the Board apparently found persuasive OCRE's argument that if the amendment were granted OCRE would have no effective opportunity to confront future cycle-specific operating limit changes.[55]

In our view, the regulatory requirement that a petitioner must establish standing to intervene is independent of, and unrelated to, the type of issue, i.e., legal or factual, a petitioner seeks to raise. The requirement of 10 C.F.R. § 2.714(b)(1) that a petitioner must proffer at least one admissible legal or factual contention in order to obtain a hearing has nothing to do with the separate requirement that the petitioner establish its standing. Moreover, for the reasons already detailed herein, we conclude that section 189(a) of the Atomic Energy Act grants no automatic hearing rights and that the lack of other avenues for challenging the changes permitted by the amendment is irrelevant to the determination of the

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[55] 32 NRC at 24.

petitioner's standing.[56] Accordingly, we do not concur with the reasoning or the ruling of the previous Perry Board.

Order

For the foregoing reasons, we find that both petitioner Hiatt and petitioner OCRE lack sufficient interest within the meaning of 10 C.F.R. § 2.714(a)(1) to intervene in this operating license amendment proceeding. Accordingly, the intervention petition of Ms. Hiatt and OCRE is denied.

Pursuant to 10 C.F.R. § 2.714a, the petitioners, within 10 days of service of this Memorandum and Order, may appeal

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[56] See supra pp. 15-16, 18, 19 n.47.

this Order to the Commission by filing a notice of appeal and accompanying brief.

It is so ORDERFD.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Bethesda, Maryland

March 18, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

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

Docket No.(s) 50-440-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M & O LBP-92-4 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-440-OLA-3
LB M & O LBP-92-4

Dated at Rockville, Md. this
19 day of March 1992

Helen Byrd
Office of the Secretary of the Commission