17305

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)	)	
	)	
	)	

INTERVENORS' ANSWER TO LICENSEES' PETITION FOR REVIEW

On November 7, 1995 the Licensees filed a Petition for Review requesting that the Commission review the decision of the Atomic Safety and Licensing Board, LBP-95-17, issued October 4, 1995, in which the Board granted the summary disposition motion filed by Intervenors Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt. Pursuant to 10 CFR 2.786(b)(3), Intervenors are filing this answer in opposition to Licensees' petition.

I. SUMMARY OF DECISION AND STATEMENT OF ISSUES RAISED

In LBP-95-17, the Licensing Board ruled that de facto license amendments involving material issues (materiality dictated by regulations requiring prior NRC approval before licensee implementation) carry the same procedural safeguards for public participation, as defined in Section 189a of the Atomic Energy Act, as license amendments explicitly labeled as such. Licensees had requested an operating license amendment for the Perry Nucle-

D503

ar Power Plant to remove from the Technical Specifications the schedule for withdrawing reactor vessel material surveillance specimens, in accordance with Generic Letter 91-01. Intervenors contended that the proposed amendment violated Section 189a by depriving members of the public of their right to notice and opportunity for a hearing on any changes to the withdrawal schedule. The Board essentially adopted Intervenors' arguments.

Licensees complain in their petition that the Board "erroneously" rejected the NRC Staff's interpretation of 10 CFR 50 Appendix H Section II.B.3, and that the Board's decision "will transform the numerous routine requests for NRC approvals filed by licensees pursuant to NRC regulations into the equivalent of license amendments requiring notice and opportunity for hearing under the Atomic Energy Act." Petition at 1-2.

II. THE LICENSING BOARD'S ORDER IS NOT ERRONEOUS

Contrary to Licensees' assertions, the Licensing Board's decision is not erroneous. It is entirely consistent with the Atomic Energy Act, the governing case law, and the NRC's Principles of Good Regulation, i.e., "Openness - nuclear regulation is the public's business . . ."

A. Licensees' first complaint in their petition is that the Licensing Board's order "transforms licensee actions requiring prior NRC regulatory approval into the equivalent of license amendments for which notice and opportunity for hearing must be afforded under section 189a of the Act." Petition at 3-4.

Licensees apparently missed the point of the Board's order and of the governing court decision, Citizens Awareness Network v. NRC, 59 F.3d 284 (1st Cir. 1995) ("CAN") (see Board's Order at 23, n. 24): that a licensee action for which NRC approval is required prior to implementation already is a license amendment, even if it is not explicitly designated as such.

The CAN decision is directly on point. It is instructive to consider the Court's language on petitioner CAN's AEA arguments:

> CAN contends that Commission approval of YAEC's CRP violated AEA section 189(a), which requires the Commission to grant a hearing upon request by any party in interest whenever it undertakes any proceeding to "amend" a license. 42 U.S.C. 2239(a)(1)(A). CAN argues that Commission approval of YAEC's CRP was a de facto "amendment" of YAEC's POL because it authorized YAEC (as well as other extant and prospective licensees) to engage in materially different conduct not permitted under the pre-1993 POL, namely, major component dismantling absent prior NRC approval of a final decommissioning plan. . . .
>
> The Commission elevates labels over substance. It would have us determine that a "proceeding" specifically aimed at excusing a licensee from filing a petition to amend its license is not the functional equivalent of a proceeding to allow a de facto "amendment" to its license. As this construct would eviscerate the very procedural protections Congress envisioned in its enactment of section 189(a), we decline to permit the Commission to do by indirection what it is prohibited from doing directly. . . . We therefore hold that CAN was entitled to a hearing under section 189(a) in connection with the NRC decision to permit YAEC's early CRP.

CAN, 1995 WL 419188, *8-*9 (1st Cir.).

It is of crucial importance that petitioner CAN's AEA argument was virtually identical to that of Intervenors in this proceeding. The Court indeed did lay down the broad rule of law that de facto license amendments are in fact subject to the

public hearing provisions of the AEA.

When the Commission decided not to seek rehearing or to file a petition for certiorari in the U.S. Supreme Court of the CAN decision, the NRC bound itself to its holdings. CAN is now the governing precedent on this matter, and any previous decisions to the contrary, including those cited by Licensees, are simply no longer controlling.

After the First Circuit's mandate issued, the Licensing Board simply could not have reached any other conclusion.

B. Licensees' second complaint is that the Board's order eliminates materiality as a requirement for a hearing under the AEA. In reality, the Board's order does no such thing.

The Licensing Board specifically addressed materiality in its decision: "the arguments of both the Applicants and the Staff accept the Intervenors' premise that material licensing issues trigger section 189a hearing rights." Order at 11. The Board, after outlining the positions of the parties, found the crux of the issue to be "the Staff's interpretation of the Commission's regulations. Accordingly, resolution of the Intervenors' summary disposition motion rests upon the proper interpretation of Appendix H, Section II.B.3." Id.

Licensees do not agree with the Licensing Board's interpretation of 10 CFR 50 Appendix H. But that hardly equates with eliminating materiality as a condition of Section 189a hearing rights.

C. Finally, Licensees assert that the Board's order is errone-

ous because it rejects the Staff's "reasonable" interpretation of Appendix H. However, it is Licensees who are in error.

Licensees imply that the Staff's interpretation of the NRC's regulations should somehow be binding on the Licensing Board. However, nothing in the NRC's body of case law supports this hypothesis.

In fact, the case law supports the opposite conclusion. "[T]he staff does not occupy a favored position at hearings. . . In short, the staff's views 'are in no way binding upon' the boards; they cannot be accepted without passing the same scrutiny as those of the other parties." Consolidated Edison Co. of New York (Indian Point, Units 1, 2, & 3), ALAB-304, 3 NRC 1, 6 (1976).

Although they find fault with the result, Licensees do not refute the detailed legal reasoning developed by the Licensing Board in interpreting Appendix H. The Board's analysis is a thorough and well-reasoned paragon of regulatory construction. Employing the rules of statutory construction, the Board found the unambiguous language of the regulation, and not the subsequent revisionist regulatory history supplied by the Staff, to be persuasive. Order at 12-22. Licensees do not cite any authority that would contradict that relied upon by the Board. Disregarding the Board's detailed analysis, Licensees merely make the broad assertion that "the regulation is not so clear and unambiguous as the Board claims." Petition at 9.

Licensees find ambiguity in Appendix H, Section II.B.3 in that "[i]t 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." Id. This argument is sophistry.

Any proposed schedule is a proposed schedule. It matters not whether it is a proposed initial schedule or a proposed revised schedule. It is still a proposed schedule, and, under Appendix H, must receive NRC approval prior to implementation. As the Licensing Board clearly stated, under the regulation's "literal terms, a new schedule or any change to an already implemented schedule, significant or otherwise, must be considered a 'proposed' schedule and, as such, must be submitted to the agency and approved prior to implementation. This is what the plain words of the regulation say and this is what it means." Order at 18.

Finding no ambiguity in the regulatory language, the Board could have simply ceased its analysis with no further regard for the Staff's interpretation. But the Board did consider the Staff's position, and found it wanting. Order at 18-22. Licensees describe the Staff's interpretation as "reasonable," but they do not supply rational arguments to refute the thorough and decisive Board examination which found it unreasonable.

III. THE COMMISSION SHOULD NOT REVIEW THE BOARD'S ORDER

Licensees argue that the Commission should review the Board's decision because its legal conclusion is a "departure from" and "contrary to established law" (10 CFR 2.786(b)(4)(ii)) and because it raises "substantial and important question(s)" of law and policy (10 CFR 2.786(b)(4)(iii)). Petition at 9-10. In

reality, neither standard has been met.

As shown above, the Board's order is not contrary to established law, but rather is entirely consistent with it. The Licensing Board has faithfully implemented the holding of the First Circuit Court of Appeals in the CAN decision, a case directly on point.

Nor does the Order raise substantial and important questions of law and policy that were not previously considered when the Commission declined to appeal the CAN decision. Having bound itself to the CAN holding, the NRC must now achieve its generic application.

Intervenors and the petitioners in CAN raised the same legal issue: whether Section 189a hearing rights attach to de facto license amendments. CAN won the race to the courthouse, and they won their case, which the Commission has accepted. The Licensing Board's Order is merely an implementation of that precedent.

Intervenors conclude that the Commission should not review the Board's decision.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt
Intervenor Pro Se and Representative of
Ohio Citizens for Responsible Energy, Inc.
8275 Munson Road
Mentor, OH 44060-2406
(216) 255-3158

DATED: November 15, 1995

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 15th day of November, 1995, to the following:

John F. Cordes, Jr., Acting Director
Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary
Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

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

Colleen P. Woodhead, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jay E. Silberg, Esq.
Shaw, Pittman, Potts, and Trowbridge
2300 N Street, NW
Washington, DC 20037

Susan L. Hiatt

Susan L. Hiatt