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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF BRIEF IN RESPONSE TO APPEAL BY OCRE AND SUSAN L. HIATT

Joseph Rutberg
Deputy Assistant General Counsel

April 17, 1992

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TABLE OF AUTHORITIES

FEDERAL CASES

ADMINISTRATIVE DECISIONS

STATUTES

REGULATIONS

TABLE OF CONTENTS

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By Memorandum and Order dated March 18, 1992 (LBP-92-4), the Atomic Safety and Licensing Board ("Licensing Board") ruled that the Petitioners, Ohio Citizens for Responsible Energy ("OCRE") and Susan L. Hiatt ("Hiatt") had failed to establish standing to intervene in this license amendment proceeding, and denied their request for hearing. Pursuant to 10 C.F.R. §2.714a, on April 2, 1992, OCRE and Ms. Hiatt filed a Notice of Appeal and Appellate Brief ("Appeal Brief").

The NRC Staff ("Staff") hereby files its brief in opposition to Ms. Hiatt and OCRE's appeal. For the reasons stated below, the Licensing Board's Order of March 18, 1992, should be affirmed.

INTRODUCTION

Petitioners OCRE and Hiatt requested a hearing in response to the Commission's July 24, 1991 Notice of Opportunity for Hearing concerning a proposed license

amendment for the Perry Nuclear Power Plant, Unit 1.[1] The amendment proposed deleting the withdrawal schedule for the reactor vessel material surveillance program from the Perry technical specifications ("TS"), and relocation of that material in the updated safety analysis report for the facility. The Staff determined that no significant hazards considerations were involved in the proposed amendment since the amendment request was filed in response to the Staff's Generic Letter 91-01, which had suggested removal of the withdrawal schedule as part of the Commission's technical specification improvement program. As indicated in the Generic Letter, a notice of change in the withdrawal schedule is required by Commission regulation, so that inclusion of this matter in the technical specifications constituted an unnecessary repetition of the regulation.

In their request for hearing, the Petitioners stated their agreement with the Staff's "no significant hazards" finding, and agreed the amendment was merely an administrative matter. Appeal Brief at 2. Nonetheless, the Petitioners indicated that they opposed the issuance of the amendment and wished to raise the following issue of law:

> 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.

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[1] 56 Fed. Reg. 33961 (July 24, 1991).

Petition at 6-10; Appeal Brief at 3. Petitioners claimed standing to intervene by alleging a possible risk to their physical and environmental health and safety, as residents living within 15 miles of the Perry plant. Petition at 2-4.

In its Memorandum and Order, the Licensing Board reviewed the requirements for technical specifications in the Atomic Energy Act (the "Act") and 10 C.F.R. §50.36, as well as the Commission's policy statement on technical specification improvement (52 Fed. Reg. 3788 (1987)) and Generic Letter 91-01. LBP-92-4, slip op. at 2-5. The Board noted that Generic Letter 91-01 was prepared by the Staff as part of the Commission's ongoing program to improve the technical specifications included in Commission licenses. *Id.* This program was initiated based upon the Commission's determination that, because of the extensive use of technical specifications, they had become unnecessarily burdensome and had taken attention away from the plant conditions most important to safety. *Id.*, at 4.

With this background, the Board addressed the Petitioners' standing to intervene in this proceeding. The Board noted (1) that the petitioners' claim of standing rested on nearby residency and ownership of property within fifteen miles of the plant; (2) that the Petitioners agreed with the Staff's finding that the amendment posed no significant safety hazard, being a purely administrative matter; and (3) that the only issue Petitioners sought to raise was an assertion that the amendment violated Section 189(a) of the Act, by depriving the public of the right to a future hearing on any change to the withdrawal schedule. *Id.*, at 7-9. The Board concluded that the Petitioners had failed to demonstrate

any injury in fact as is required to support a petitioner's standing to intervene, and accordingly denied the Petition. LBP-92-4, slip op. at 25.

ARGUMENT

On appeal, the Petitioners argue that the Board erred in denying their petition to intervene for failure to establish standing, asserting that they do have standing to intervene in this proceeding. Appeal Brief at 8. Further, Petitioners contend that even if they failed to show standing to intervene, they should have been admitted and a hearing held as a matter of discretion. *Id.* These arguments are without merit, for the following reasons.

A. Standing to Intervene.

The Petitioners challenge the Licensing Board's decision on standing, which they characterize as follows:

> 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.

Id., at 8. The Petitioners' characterization of the Licensing Board's decision is incorrect, and their assertions should be rejected, for the reasons discussed below.

1. No Significant Hazards.

In their appeal, the Petitioners assert that, notwithstanding their acknowledgement that this particular amendment presents no significant hazard, future changes in the withdrawal schedule might warrant their participation. *Id.*, at 10. Further, they assert that removal of the withdrawal schedule from the TS will deprive them of the opportunity to participate in future proceedings, and that this loss of hearing rights constitutes a legal harm which provides standing. *Id.*, at 10-12. In addition, Petitioners assert that the removal of the withdrawal schedule from the TS acts to preclude the public from having an opportunity for hearing with respect to any future change to the withdrawal schedule, and thus is contrary to the intent of Congress and the Act. *Id.*, at 3-4.[2]

Petitioners' argument is without merit. First, the Board did not find, as asserted by Petitioners, that "no petitioner can ever show an injury, and thus have standing, in an operating license amendment proceeding involving no significant hazards consideration." Appeal Brief at 9. To the contrary, the Licensing Board's decision was premised upon Petitioners' failure to show any threatened harm to their interests that would be caused by this amendment -- regardless of whether or not the amendment involved a "no significant hazards" consideration.

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[2] Petitioners argue that the Atomic Energy Act reflects a strong Congressional intent to provide meaningful public participation. Appeal Brief at 4. The Staff does not disagree with that proposition. However, the fact that certain standards must be met in order to participate in an NRC proceeding does not preclude meaningful public participation. *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974).

In addressing Petitioners' standing to intervene, the Board noted that the Commission applies judicial concepts of standing,[3] and that to show standing to intervene, it is necessary to show a personal and distinct "injury in fact" which is within the zone of interests protected by the governing statute.[4] *Id.*, at 9-11. Given this standard, the Board found that the Petitioners in this proceeding had failed to satisfy the injury in fact test, because the interests described were generalized and they did not show a particular, concrete injury. To the contrary, the Board concluded that the Petitioners had expressed a mere "abstract" or intellectual interest, which is not sufficient to render a petitioner adversely affected or aggrieved within the meaning of the Atomic Energy Act, the Administrative Procedure Act or the Commission's regulations. *Id.*, at 13-14. Since the amendment was solely an administrative change, the Board concluded that the action had no effect on the Petitioners' asserted interests in life, health, property and the environment, and no causal nexus was shown between the amendment and the alleged harm. *Id.*, at 15.

Further, the Board found that Ms. Hiatt's claimed interest in preserving her "legal right" to meaningfully participate in matters affecting operation of Perry was insufficient to show standing. *Id.*, at 16. The Board noted that this claim was speculative, since Ms. Hiatt did not even assert that future changes in the withdrawal schedule will be made or

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[3] LBP-92-4, slip op. at 10, *citing Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

[4] *Id.*, at 11, *citing Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

are likely to be made. *Id.*, at 16-17. In addition, the Board stated that the speculative harm asserted was based on an erroneous premise that section 189(a) of the Act gives an absolute, automatic right to intervene in NRC licensing proceedings; the Board indicated this is not correct, since § 189(a) grants hearing rights only to those persons who first establish that they have standing to intervene. *Id.*, at 16-18.

The Petitioners altogether fail to address the Licensing Board's observation that while Section 189(a) of the Atomic Energy Act provides a hearing right for any person whose interest may be affected by a proceeding, the Commission's regulations require a showing of a personal and distinct "injury in fact" in order to establish that an interest is affected. *See* LBP-92-4 at 10. Other than to assert the potential loss of opportunity to litigate possible future changes in the withdrawal schedule, no effort is made by Petitioners to establish that they will suffer an "injury in fact" resulting from the issuance of this amendment, nor do they address the Board's finding that the type of injury they assert is not the "injury in fact" required under the Commission's regulations. *Id.*, at 9-13. Indeed, Petitioners do not assert that they will suffer "injury in fact" as a result of this amendment; on the contrary, they acknowledge that the instant amendment is an "administrative change" with no associated safety hazard, and the only injury they allege is that their right to a hearing on any future schedule change will be adversely affected if this amendment should be approved.

In this regard, the Petitioners "note" on appeal that any future schedule changes might have offsite consequences if "the material specimens are not withdrawn frequently

enough to assure that the reactor vessel has not become dangerously embrittled." Appeal Brief at 10. In addition to not providing any basis for this position, the Petitioners raise this assertion for the first time on appeal; for this reason, alone, it should be rejected. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 28 NRC 127, 133 (1987). Moreover, as noted by the Licensing Board, the Petitioners have heretofore not even alleged that "future changes in the withdrawal schedule will be made or even that such changes are likely." LBP-92-4, slip op. at 17. Further, while the Petitioners now claim they may suffer injury in the future, as noted by the Board such a potential future injury is, at best, speculative, and the Petitioners made no attempt to show how a future change would violate any Commission regulation or otherwise cause them an "injury in fact." LBP-92-4, slip op. at 16-18. Accordingly, the Licensing Board correctly found that any asserted future injury was entirely speculative.

The Licensing Board found the Petitioners had failed to show standing to intervene because they had not supported their claim of an alleged risk of harm to persons and property resulting from the amendment. *Id.*, slip op. at 15-16. This finding is beyond dispute. Indeed, the Petitioners, themselves, stated that the amendment -- *i.e.*, removal of the specimen withdrawal schedule from the TS -- poses no significant safety hazards, and is purely an administrative matter. On appeal, the Petitioners fail to address this inherent contradiction in their petition to intervene; they fail to suggest how it is error for the Board to deny intervention to those who agree, at the outset, that no possible

harm to their health and safety or environmental interests could occur from a proposed amendment; and they fail to show any other "injury in fact" that may result from this amendment. In sum, by failing to show an interest which may be adversely affected by the instant amendment, the Petitioners have failed to demonstrate that they have standing to intervene and a right to hearing with respect to this amendment proceeding.

2. Legal Injury.

The Petitioners next assert that the Licensing Board erroneously found they lacked standing because it "apparently believes that legal injuries, as alleged by Petitioners, are insufficient to confer standing." Appeal Brief at 10. This characterization of the Licensing Board's decision is wholly inaccurate.

Contrary to Petitioners' assertion, the Board did not find that injury to one's "legal" interests cannot support standing to intervene. Indeed, the Board recognized that a person may suffer "procedural injury" such as the deprivation of one's procedural right to notice and an opportunity for a hearing, but found that "standing cannot be uncoupled from any injury caused by the substance of the challenged license amendment." LBP-92-4, slip op. at 19-20, *citing United Transp. Union v. ICC*, 891 F.2d 908, 918 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3271 (1990).[5] Further, the Board correctly concluded that standing is independent of and unrelated to the type of issue -- legal or factual -- which a petitioner seeks to raise. *Id.*, at 19-24.

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[5] The Board also discussed *Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253 (D.C. Cir. 1983), where the court found that the petitioner had failed to show standing by an assertion very similar to Ms. Hiatt's allegation. LBP-92-4, slip op. at 20-22.

Also, as discussed *supra* at 7, the Board found that Section 189(a) of the Act does not afford an absolute, automatic right to intervene in NRC licensing proceedings, but only affords hearing rights to those persons who first establish that they have standing to intervene. *Id.*, at 16-18. In this regard, the Board correctly concluded that a future injury could meet the "injury in fact" test, but it must be "realistically threatened and immediate," *Id.*, at 17; and it properly found that the assertion of some speculative future harm is insufficient to satisfy the requirement to demonstrate standing. *Id.* at 17-18.

Further, the Licensing Board noted that Ms. Hiatt did not allege the amendment violates the requirements in 10 C.F.R. §50.36, but, rather, that she claimed a right to participate in amendment hearings as an end in itself. *Id.*, at 19. The Board correctly concluded 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 petitioner's standing." *Id.*, at 24-25. In sum, the Board denied the petition to intervene filed by Ms. Hiatt and OCRE because they had failed to establish standing to intervene, and not because it viewed a "legal injury" as insufficient to confer standing.

In addition, the Petitioners assert that the withdrawal schedule traditionally had been part of the technical specifications and accordingly, pursuant to Section 189(a) of the Act, future changes to the schedule could be made only after notice and opportunity for hearing is provided. Appeal Brief at 3. In this regard, the Petitioners argue that changes in the withdrawal schedule are "material," because there must be prior

Commission approval (as delegated to the Staff) before changes can be made in the withdrawal schedule. Appeal Brief at 5-7. Based on this premise, they argue that if the withdrawal schedule is removed from the TS, any subsequent changes to the schedule would constitute a *de facto* amendment requiring an opportunity for a hearing under Section 189(a) of the Act, citing *Union of Concerned Scientists v. NRC (UCS)*, 735 F.2d 1437, 1444-47 (D.C. Cir. 1984). Appeal Brief at 5-7.

This argument is unavailing. In *UCS*, the court held that any matter determined by the Commission to be material to a licensing decision cannot be excluded as an issue in a proceeding. *Id.*, 735 F.2d at 1451. However, in its subsequent *UCS II* decision, the court clarified that its prior *UCS* decision did not mean that even if an issue is material, any person raising the issue would thereby have a right to intervene.[6] In fact, as noted by the Board, the court in *UCS II* concluded that Section 189(a) "does not confer the automatic right of intervention upon anyone." LBP-92-4 at 18, *citing UCS II*, 920 F.2d at 55.

Moreover, the fact that Staff approval will be necessary prior to changing the withdrawal schedule does not mean that the schedule must be included in the Technical Specifications. As the Board explained (LBP-92-4, slip op. at 1), the Atomic Energy Act requires technical specifications to contain "the specific characteristics of the facility, *and such other information as the Commission...deem[s] necessary....*" 42 U.S.C. § 2232(a); emphasis added. The types of plant-specific requirements that must be included in a

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[6] *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990).

plant's technical specifications are described in 10 C.F.R. § 50.36; the Petitioners make no effort to address whether, pursuant to these or any other Commission regulations, a reactor vessel specimen withdrawal schedule must be included in the technical specifications for a nuclear plant. The Board thoroughly discussed the subjects required to be included in the technical specifications, and pointed out that the Commission's technical specification improvement program is intended to remove those items which are not required to be in the TS. LBP-92-04, slip op. at 2-5.[7] In fact, in Generic Letter 91-01, the Staff determined that it is not necessary to include this type of information in a plant's Technical Specifications. Indeed, the Petitioners here agreed that the amendment removing the specimen withdrawal schedule from the TS does not raise a safety matter, and they show no reason to conclude that such removal would violate any Commission regulation.

3. The Effect of UCS II.

In their brief on appeal, the Petitioners contend that the Licensing Board incorrectly interpreted a single sentence in *UCS II*,[8] where the court stated, "we have long recognized that Section 189a 'does not confer the automatic right of intervention upon anyone.'" Appeal Brief at 12-13, *citing* LBP-92-4, slip op. at 18. According to

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[7] Because Petitioners have not established that the information being removed from the technical specifications by the instant amendment is required to be included in the technical specifications, the cases they rely upon that deal with the need to provide adequate notice for *de facto* amendments as well as actual changes in technical specifications (Appeal Brief at 6) are inapposite to this proceeding.

[8] *UCS II*, 920 F.2d at 55, quoting *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974).

Petitioners, the Licensing Board incorrectly "interprets this sentence to mean that Section 189a 'bestows no legal or vested right . . . to participate in agency licensing actions.'" *Id.* Further, the Petitioners contend that "the Board apparently believes that the Court in *UCS II* essentially erased Section 189(a) from the Atomic Energy Act." *Id.* at 13.

These assertions are incorrect. As set out above, the Board discussed the hearing provisions of the Act in some detail, and correctly recognized that the Act confers no absolute right to a hearing, but rather, affords a right to hearing only to those persons who show standing to intervene -- i.e., to those persons who demonstrate that they possess an interest which may be adversely affected by the action in question and that the affected interest is within the zone of interests sought to be protected by the Act. LBP-92-4, slip op. at 18. The Board correctly analyzed the rights afforded by Section 189(a) of the Act, recognizing that any right to hearing requires a prior demonstration of standing to intervene. Because the Petitioners here had failed to make such a demonstration of standing in connection with the instant amendment, their Petition was correctly denied. *Id.*, at 18-20.[9]

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[9] The Petitioners also assert that if this amendment is approved, the only alternative method which may be available to them in the future for raising concerns about future schedule changes would be through 10 C.F.R. § 2.206; and they contend that this procedure does not provide an opportunity for meaningful participation with regard to any safety issues they may seek to raise. Appeal Brief at 4. However, as noted by the Board, whether 10 C.F.R. § 2.206 provides Petitioners a suitable method for addressing *future* concerns in a licensee's operation is not relevant to *this* proposed issuance of this amendment. *See* LBP-92-4, slip op. at 19 n.47. That regulation has not been suggested as a substitute for hearing rights on *this* proposed amendment -- and indeed, hearing rights do exist with respect to *this* amendment, for any person (unlike the Petitioners here) who establishes that he has standing to intervene. For these reasons, Petitioners' (continued...)

B. Discretionary Intervention.

Finally, the Petitioners argue that the Board abused its discretion by not granting a "discretionary" hearing, even if they failed to show standing as of right. Appeal Brief at 14. This argument is altogether lacking in merit. First, the Petitioners have raised this argument for the first time in this appeal, and it rightfully should be rejected for this reason alone. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 28 NRC 127, 133 (1987). Secondly, while the Petitioners cite *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976), they fail to address any of the criteria set forth in that decision as to whether discretionary intervention should be granted. Moreover, the Petitioners have failed to provide a citation to any authority which would suggest that a discretionary hearing should be held when, absent the petitioner's request, there would be no hearing at all.

CONCLUSION

For the reasons discussed above, the Petitioners have failed to sustain their burden of showing that the Licensing Board committed error in denying their petition based on their failure to establish standing to intervene. Accordingly, the appeal by OCRE and

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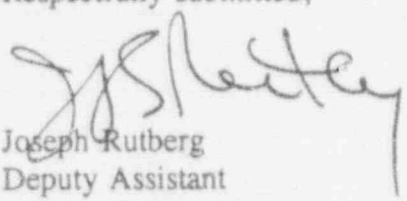
[9](...continued)
arguments (and cases cited) concerning the limitations of 10 C.F.R. § 2.206 are irrelevant.

Susan L. Hiatt from the Licensing Board's decision in LBP 92-4 should be denied, and the decision of the Board should be affirmed.

Respectfully submitted,



Joseph Rutberg
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Dated at Rockville, Maryland
this 17th day of April, 1992

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO APPEAL BY OCRE AND SUSAN L. HIATT" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 17th day of April, 1991:

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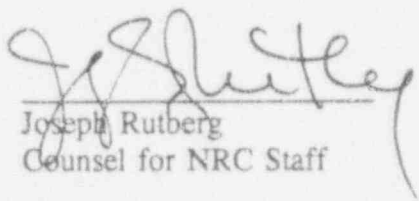

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