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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commissioners

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

LICENSEES' BRIEF IN OPPOSITION TO THE APPEAL OF OCRE AND SUSAN L. HIATT

Jay E. Silberg, P.C.
David R. Lewis

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037

Tel. 202 663 8000

Counsel for Licensees

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ADMINISTRATIVE DECISIONS:

STATUTES:

REGULATIONS:

MISCELLANEOUS:

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INTRODUCTION AND SUMMARY

Pursuant to 10 C.F.R. § 2.714a(a), The Cleveland Electric Illuminating Company, et al. ("Licensees") submit this brief in opposition to the appeal of Ohio Citizens for Responsible Energy Inc. (OCRE) and Susan L. Hiatt (together, the "Petitioners") in the above-captioned proceeding. In their Appellate Brief ("App. Br.") dated April 2, 1992, Petitioners challenge the Atomic Safety and Licensing Board's ruling that Petitioners failed to demonstrate standing to intervene in this license amendment proceeding. Petitioners' arguments lack merit and must be rejected.

The gravamen of Petitioners' appeal is that a mere allegation that a proposed action violates procedures under the Atomic Energy Act is sufficient to confer standing upon a petitioner, without any showing of an actual or threatened substantive

injury. Petitioners' proposition is not only wrong as a matter of law (conflicting both with the language of the Atomic Energy Act and established precedents on standing) but also unworkable. If Petitioners' proposition were accepted, a proposed license amendment for the Perry plant in Ohio could be challenged, for example, by residents of Alaska. The standing requirement that a petitioner demontrate a distinct and palpable injury in fact exists to avoid such unbounded intervention and ensure that the agency's limited resources are focused on immediate, real controversies. Petitioners have simply failed to demonstrate the requisite palpable injury.

STATEMENT OF CASE

On March 15, 1991, Licensees filed with the NRC a supplement to a previously proposed license amendment to remove the reactor vessel material surveillance program withdrawal schedule from the Technical Specifications of the Perry license and relocate the schedule to the Updated Safety Analysis Report (USAR). This action was proposed in furtherance of the NRC's Policy Statement on Technical Specification Improvement (52 Fed. Reg. 3788 (1987)) and pursuant to Generic Letter 91-01. Generic Letter 91-01 encourages licensees to relocate the reactor vessel material surveillance program schedule because approval of the schedule is already governed by 10 C.F.R. Part 50, App. H, and Technical Specification provisions are duplicative.

On July 24, 1991, the NRC published in the Federal Register a notice that it was considering the amendment, a proposed determination that the amendment involves no significant hazards consideration, and a notice of opportunity to request a hearing. 56 Fed. Reg. 33961 (1991). The notice advised that any petition to intervene "shall set forth with particularity the interest of the petitioner in the proceeding."

On August 23, 1991, OCRE and Susan Hiatt jointly filed a Petition for Leave to Intervene and Request for Hearing (the "Petition"). Petitioners sought to challenge only the proposed withdrawal of the reactor vessel material surveillance program schedule from the Technical Specifications and to do so only on the legal theory that any license amendment that might deprive members of the public of future hearing opportunities violates section 189 of the Atomic Energy Act. OCRE claimed representational standing based on the interest and authorization of its member, Susan Hiatt. Susan Hiatt indicated that she lived within 15 miles of the plant, but alleged no injury other than to an asserted right under the Atomic Energy Act to participate in changes in plant operation. Affidavit of Susan L. Hiatt (Aug. 21, 1991), attached to the Petition.

The Petition was referred to an Atomic Safety and Licensing Board for ruling, and Licensees and the NRC Staff filed answers opposing the Petition because Petitioners had not demonstrated

standing.[1/] Both Licensees and the NRC Staff argued that the purely legal interest asserted by Petitioners was, without more, insufficient to confer standing. By Order dated October 28, 1991, the Licensing Board afforded Petitioners an opportunity to amend the Petition and address the arguments of Licensees and the NRC Staff.

On November 22, 1991, Petitioners filed Petitioners' Amended Petition for Leave to Intervene. Petitioners continued to argue that their purely legal interest was sufficient and alleged no other injury or basis for standing. Licensees and the NRC Staff responded to the Amended Petitioner and reaffirmed their arguments that Petitioners lacked standing.[2/]

In a Memorandum and Order (Ruling on Intervention Petition), dated March 18, 1992, the Licensing Board denied the Petition because of Petitioners' failure to demonstrate standing. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit No. 1), LBP-92-4, __ N.R.C. ____ (slip op. March 18, 1992). The

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1/ Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Petition for Leave to Intervene and Request for Hearing (Sept. 6, 1991); NRC Staff Answer to Petition for Leave to Intervene Filed By Ohio Citizens for Responsible Energy and Susan L. Hiatt (Sept. 12, 1991).

2/ Licensees' Response to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Amended Petition for Leave to Intervene (Dec. 17, 1991); NRC Staff Response to OCRE's Amended Petition (Dec. 17, 1991).

Licensing Board found Petitioners' assertion of purely legal injury insufficient for three reasons.

First, the Licensing Board found that Petitioners' allegation that their future participation in NRC proceedings might be affected was too remote and speculative to establish standing. Id. at 16-17. Relying on well established judicial precedents, the Board ruled that "[a]lthough a future injury can meet the injury in fact test, it must be one that is realistically threatened and immediate." Id. at 17. The Board noted that Petitioners claimed no actual present harm, but only that future changes in the withdrawal schedule might occur, that Petitioners might not receive notice of the changes, and that Petitioners might lose an opportunity to participate in the future matter. Id. at 16-17. The Board therefore found that any possibility of future harm depended on a number of uncertain and unlikely events. Id. at 17.

Second, the Licensing Board found that the speculative harm asserted by Petitioners was founded on an erroneous premise. Id. at 17-18. As explained by the Board, contrary to Petitioners' presupposition of an absolute right under section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1988), to participate in any future license amendment proceedings,

> . . . Section 189(a) 'does not confer the automatic right of intervention upon anyone.' Rather, section 189(a) grants participatory rights only to those

> persons who first establish, inter alia, that they have standing to intervene.

Id. at 18, citing Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C. Cir. 1990) (footnote omitted). Because Petitioners had not demonstrated that they would have standing to intervene in a future proceeding considering changes to the reactor vessel material surveillance program schedule, there was no basis to assume that the proposed removal of the schedule from the Technical Specifications would have any affect on their future participation. The Board concluded, "the petitioner has not demonstrated . . . standing so section 189(a) cannot be used as the bootstrap to establish it." Id.

Finally, the Licensing Board ruled that the purported harm claimed by Petitioners failed to pass the injury-in-fact test because it had no causal link to any substantive regulatory impact.

> . . . [S]tanding 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 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."

Id. 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).

ARGUMENT

Petitioners raise four arguments in their challenge to the Licensing Board's ruling on standing: (1) that Petitioners' admission that the proposed withdrawal of the reactor vessel material surveillance program schedule involves no significant hazards consideration does not signify lack of injury (App. Br. at 8); (2) that legal injuries can confer standing (App. Br. at 10); (3) that section 189(a) does vest absolute hearing rights; and (4) that the Licensing Board abused its discretion by failing to consider discretionary intervention. Licensees address seriatim below each of Petitioners' arguments, which are in large measure irrelevant.[3/]

3/ Petitioners also discuss, in the "Background" section of their brief, the merits of the legal contention they sought to raise in the license amendment proceeding. This issue is not a proper subject for appeal, because the Licensing Board, having denied the Petition for lack of standing, never reached the issue. In any event, Petitioners are clearly wrong in contending the withdrawal of the reactor vessel material specimen schedule from the Technical Specifications violates Section 189(a) of the Atomic Energy Act by reducing a member of the public's ability to participate in future proceedings. If Petitioners' contention were accepted, no requirement could ever be deleted from a license because the deletion would eliminate the possibility of a proceeding to change the requirement in the future. Contrary to the inflexible implication of Petitioners' contention, section 182(a) of the Atomic Energy Act, 42 USC § 2232(a) (1988), confers on the NRC broad discretion to define what Technical Specifications are necessary in a license, and this authority necessarily carries with it the power to redefine such requirements.

I. PETITIONERS NEITHER ALLEGED NOR DEMONSTRATED ANY IMMEDIATE, PALPABLE HARM ESTABLISHING STANDING

Petitioners' first argument, that the NRC's no significant hazards consideration finding does not signify lack of injury, is irrelevant and misses the point of the Licensing Board's ruling. The Board's decision did not depend on the NRC Staff's no significant hazards finding, but on Petitioners total failure to allege or demonstrate a distinct, real, and palpable harm constituting injury in fact, as is required by Supreme Court decisions.[4/]

In examining Petitioners' claims, the Licensing Board did note Petitioners' statement that

> Petitioners agree with the Licensee and NRC Staff that this portion of the proposed amendment [the withdrawal of the schedule] is purely an administrative matter which involves no significant hazards considerations.

Petition at 5. But what was of manifest significance to the Licensing Board was not the reference to no significant hazards consideration, but to Petitioners' description of the license amendment as "purely an administrative matter." The Licensing Board concluded, based on this concession and absolutely no allegation or demonstration by Petitioners to the contrary,

> 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

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4/ See, e.g., Warth v. Seldin, 422 U.S. 490, 501 (1975); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); United States v. Richardson, 418 U.S. 166, 177 (1974).

> essential causal nexus between the petitioner's alleged harm and the challenged license amendment is missing.

LBP-92-4, slip op. at 15 (emphasis added).

Even now, Petitioners cannot and do not allege any immediate, real, palpable harm. As the petitioner and proponent of an order granting intervention, the demonstration of standing was Petitioners' burden, which they failed to meet. There is not one whit of evidence or the slightest suggestion that the license amendment will have a real, palpable affect on Petitioners. The only purported injury that Petitioners have ever alleged is asserted diminishment of possible opportunity to participate in future proceedings--the so-called legal injury which the Licensing Board found insufficient.

II. THE MERE ALLEGATION OF A PROCEDURAL INJURY, WITHOUT ANY DEMONSTRATION OF SUBSTANTIVE HARM, WAS NOT SUFFICIENT TO CONFER STANDING

Petitioners' second argument, that legal injuries can confer standing, is also off the mark, because Petitioners fail to recognize the difference between substantive and procedure rights. Petitioners' argument also flies in the face of considerable case law.

First, the issue that the Licensing Board faced was not whether standing could ever be predicated in any case on an infringement of a legal right. Clearly, there are important substantive rights, such as [illegible] rights or the right to counsel,

which are created by statute and if infringed confer standing in an appropriate forum. Rather, the issue the Licensing Board faced was whether the mere allegation that an asserted procedural right to participate in future proceedings might be diminished by a proposed action is, without more, sufficient to confer standing. The possibility that an alleged injury to other types of legal rights and interests under other statutes might confer standing in other proceedings is irrelevant to this limited issue.

In considering whether mere allegations of a procedural injury create standing, the Licensing Board reviewed a number of judicial decisions on point and placed particular reliance on United Transp. Union, supra, and Capital Legal Foundation v. Commodity Credit Corp., 711 F.2d 253 (D.C. Cir. 1983).[5/]

5/ The Licensing Board's rejection of procedural injury as a basis for standing, in the absence of an actual substantive injury, is also supported by Wilderness Society v. Griles, 824 F.2d 4, 19 (D.C. Cir. 1987); Telecommunications Research and Action Center v. FCC, 917 F.2d 585, 588 (D.C. Cir. 1990). Additional support may be garnered from cases considering noncompliance with procedures under the National Environmental Policy Act (NEPA). See People for the Ethical Treatment of Animals v. HSS, 917 F.2d 15, 17 (9th Cir. 1990) (allegation of failure to comply with NEPA requirements was not sufficient to confer standing when plaintiffs did not allege that any environmental deterioration resulted from the NEPA violations); Bowker v. Morton, 541 F.2d 1347, 1350 (9th Cir. 1976) (same); Los Angeles v. NHSTA, 912 F.2d 478, 492 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 1225 (1992) ("The procedural and informational thrust of NEPA gives rise to a cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental harm may occur") (emphasis added); Foundation on Econ. Trends v. Lyng, 943 F.2d 79, 84 (D.C. Cir. 1991).

Petitioners identify no error in the Licensing Board's analysis or application of these precedents,[6/] and consequently no provide no basis to overturn the Licensing Board's ruling.

As discussed above, in United Transp. Union, the U.S. Court of Appeals for the D.C. Circuit held, "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." 891 F.2d at 918. In the

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6/ In their Appellate Brief (App. Br. at 11-12), Petitioners do attempt to distinguish an example that was posited in United Transp. Union (891 F.2d at 918-19) and repeated in the Licensing Board's decision (LBP-92-4, slip op. at 20 n.48). In United Transp. Union, the Court mused:

> 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 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 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.

Petitioners claim that this example is readily distinguished, because the hypothetical agency rule is entirely discretionary whereas this case is based on the mandate of section 189(a) of the Atomic Energy Act. This distinction fails, because the NRC defines the contents of licenses and hence license amendment proceedings under section 189(a), and section 189(a) only allows participation by persons who demonstrate standing.

case at bar, Petitioners established no nexus between their legal complaint and a substantive injury.

This same principle is repeated in Capital Legal Foundation v. Commodity Credit Corp., 711 F.2d 253 (D.C. Cir. 1983). Like Petitioners, Capital Legal Foundation sought to raise a purely legal challenge to an action taken by a government entity. It argued that Commodity Credit Corporation ("CCC") had violated its regulations in the way that it had dealt with certain U.S. creditors of Poland. Capital argued that is was injured because the CCC's actions jeopardized Capital's task of informing the public of the economic impact of proposed regulatory changes and deprived it of the opportunity to have its comments considered before the CCC reached its final decision. Id. at 253. Capital conceded that it had suffered no injury from the underlying substantive action by CCC, and Court concluded that Capital therefore lacked standing.

The Licensing Board found that the injury alleged and found insufficient in Capital Legal Foundation directly paralleled Petitioners' claims in the proceeding before it, and further found no basis to distinguish the cases. Remarkably, Petitioners do not even mention Capital Legal Foundation in their Appellate Brief, provide no basis to distinguish that case or United Transp. Union, and point to no weakness or error in the Licensing Board's reasoning. In the absence of any meaningful challenge or

argument, the Licensing Board's application of Capital Legal Foundation and United Transp. Union is dispositive.

III. EVEN IF A LEGAL OR PROCEDURAL INJURY WERE SUFFICIENT TO CONFER STANDING, PETITIONERS FAILED TO DEMONSTRATE SUCH INJURY

Even if one assumed arguendo that a procedural injury alone could confer standing, the Licensing Board's ruling must still be sustained, because Petitioners never demonstrated that they had a legal right that would be injured. Petitioners never demonstrated their entitlement to participate in future proceedings. More specifically, Petitioners never showed or alleged that they would have standing to intervene in the future proceeding; and without this showing, there was no basis for their claim of a "legal right" that was being diminished.

In their third argument, Petitioners now seek to sidestep this fatal defect in their pleading by asserting an absolute right to a hearing under section 189(a). App. Br. at 12-14. Petitioners take issue with the Licensing Board's assertion that section 189(a) "bestows no legal or vested right . . . to participate in agency licensing actions." Id. at 13. Petitioners claim that in making this pronouncement, the Licensing Board misinterpreted Union of Concerned Scientists v. NRC, 920 F.2d. 50 (D.C. Cir. 1990), as vitiating section 189(a). Id.

Petitioners' arguments lack merit. One need only examine section 189(a) itself to recognize that it vests no absolute

hearing right in anyone. Section 189(a) requires a hearing in a license amendment proceeding only when such a hearing is requested by a "person whose interest may be affected by the proceeding." 42 USC § 2239(a) (1988). Thus, any entitlement to a hearing under section 189(a) is predicated on a showing of standing.

In two separate decisions, the U.S. Court of Appeals for the D.C. Circuit has recognized this limitation. UCS, supra; BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974). In those cases, the Court stated that section 189(a) "does not confer the automatic right of intervention upon anyone." UCS, 920 F.2d at 55; BPI v. AEC, 502 F.2d at 428. Contrary to Petitioners' assertions (App. Br. at 13), the Licensing Board's interpretation of these cases was correct and did not purport to "erase[] Section 189a from the Atomic Energy Act." The Board's interpretation was consistent with the express limitation in section 189(a).

Referring to this obvious and well recognized limitation in section 189(a), the Licensing Board stated:

> 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 [petitioner] to participate in agency licensing actions.

LBP-92-4, slip op. at 18. Because section 189(a) does not confer absolute and automatic rights of intervention upon Petitioners,

and because Petitioners did not demonstrate that they would have standing entitling them to intervene in a future proceeding considering changes to the withdrawal schedule, Petitioners did not demonstrate any "legal right" that was being diminished.

IV. PETITIONERS FAILED TO ADVOCATE DISCRETIONARY INTERVENTION IN THE PROCEEDING BELOW AND CANNOT RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL

Petitioners' last argument is that the Licensing Board abused its discretion by failing to consider the option of discretionary intervention. At the outset, it is unclear whether the concept of "discretionary intervention" is or should be applicable to license amendment proceedings such as the case at bar.[7/]

The Commission, however, need not reach this issue. Even if the concept of discretionary intervention did apply, it was Petitioners' responsibility to raise the issue with the Licensing Board, and the burden of convincing the Licensing Board lies with

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7/ Discretionary intervention is a concept that was developed in construction permit proceedings, where hearings are mandatory and a Licensing Board has substantive jurisdiction over all issues even in the absence of intervention. See generally Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 N.R.C. 610, 616 (1976). In that setting, where a hearing is proceeding in any event, it is not a remarkable proposition that a Licensing Board could allow a person to participate on an issue even though formal standing requirements had not been met. But in a license amendment proceeding such as this, the Licensing Board has no substantive jurisdiction--no authority to proceed with a hearing--until it finds that a hearing has been requested by an intervenor with standing and until an admissible contention is admitted.

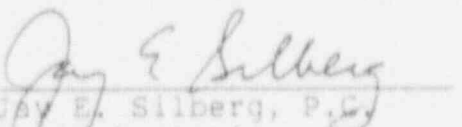
the petitioner. Nuclear Engineering Co., Inc. (Sheffield, Ill., Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 N.R.C. 737, 745 (1978). Petitioners made no attempt to raise this issue with the Licensing Board or to justify intervention on this basis.

Having failed to raise the issue of discretionary intervention with the Licensing Board, Petitioners cannot now raise this issue for the first time on appeal. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 N.R.C. 127, 132 n.13, 133 (1987); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 N.R.C. 1167, 1177 n.29 (1983); Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 N.R.C. 34, 37 (1981). "Failing either to raise satisfactorily a particular factual issue or . . . to express himself in the prescribed manner regarding how that issue should be resolved, [an intervenor] is scarcely in a position, legally or equitably, to protest the determinations made by the Board in connection with it." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 A.E.C. 857, 864 (1974).

CONCLUSION

For all of the reasons stated above, the Licensing Board's Memorandum and Order (Ruling on Intervention Petition) should be affirmed and Petitioners' appeal denied.

Respectfully submitted,



Jay E. Silberg, P.C.
David R. Lewis

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
Tel. (202) 663 8000

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensees' Brief in Opposition to the Appeal of OCRE and Susan L. Hiatt," dated April 17, 1992, were served by deposit in the U.S. Mail, first class, postage prepaid, this 17th day of April, 1992, upon the person listed on the attached service list.

Jay E. Silberg

Dated: April 17, 1992

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of Commission Appellate Adjudication
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Washington, D.C. 20555

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Washington, D.C. 20555

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U.S. Nuclear Regualtory Commission
Washington, D.C. 20555

Commissioner Forrest J. Remick
U.S. Nuclear Regualtory Commission
Washington, D.C. 20555

Commissioner E. Gail de Planque
U.S. Nuclear Regualtory Commission
Washington, D.C. 20555

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

Thomas S. Moore, Esq., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ms. Susan Hiatt
8275 Munson Road
Mentor, Ohio 44060