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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commission

In the Matter of	)	
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THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket No. 50-440-OLA-2
	)	ASLBP No. 90-605-02-OLA
(Perry Nuclear Power Plant, Unit No. 1)	)	
	)	

LICENSEES' BRIEF IN RESPONSE TO APPELLATE BRIEF OF INTERVENOR OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.

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LICENSEES' BRIEF IN RESPONSE TO APPELLATE BRIEF OF INTERVENOR OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.

This proceeding involves an operating license amendment sought by The Cleveland Electric Illuminating Company, et al. ("Licensees") to revise the Technical Specifications for the Perry Nuclear Power Plant, Unit 1 ("PNPP"). The amendment involves the relocation of certain cycle-specific parameter limits from the Technical Specifications into a new plant document known as the Core Operating Limits Report (the "COLR"), and substituting in the Technical Specifications a reference to the COLR, a requirement that PNPP be operated within the limits contained in the COLR, and a requirement that the core operating limits be determined in accordance with Nuclear Regulatory Commission ("NRC") approved methodologies specified in the Technical Specifications. Ohio Citizens for Responsible Energy, Inc.

("OCRE") was granted the right to a hearing to contest this license amendment.

On November 1, 1990, the Atomic Safety and Licensing Board presiding over this proceeding (the "Board") issued its Initial Decision. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1), LBP-90-39, __ N.R.C. ___ (1990). OCRE appealed, and on December 19, 1990, filed its Appellate Brief of Intervenor Ohio Citizens for Responsible Energy, Inc. ("OCRE's Brief").[1/] Pursuant to 10 C.F.R. § 2.762(c), Licensees file this brief in reply and opposition to the appeal.

COUNTERSTATEMENT OF THE CASE

Section 182(a) of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2232(a), requires the applicant for a nuclear power plant operating license to submit Technical Specifications as part of its license application. These Technical Specifications become a part of the operating license. Consequently, no change can be made to a plant's Technical Specifications without first obtaining a license amendment. A license amendment application triggers the public's right to request a hearing as provided in Section 189(a) of the Act, 42 U.S.C. § 2239(a).

1/ Pursuant to the NRC's recently revised Rules of Practice, 55 Fed. Reg. 42,944 (1990), this appeal was filed directly with the Commission.

Historically, limits associated with reactor physics parameters that change with each reload core (the cycle-specific core operating parameters) were included in a plant's Technical Specifications. The values of these parameters may change with each reload. Because the values of the core operating parameters were located in Technical Specifications, a license amendment was needed before a plant could be operated in accordance with any changed values.

The NRC recognized that Technical Specifications had become extremely cumbersome and a hindrance to safe plant operation and expressed its intention to simplify Technical Specifications, in part by removing all information which was not essential to the safe operation of a nuclear power plant. See Proposed Policy Statement on Technical Specification Improvements for Nuclear Power Plants, 52 Fed. Reg. 3788 (1987). Consistent with this simplification process was the NRC's issuance on October 4, 1988 of Generic Letter 88-16, "Removal of Cycle-Specific Parameter Limits from Technical Specifications."

Generic Letter 88-16 encouraged licensees to streamline their plant Technical Specifications by (i) relocating the values of cycle-specific parameters from the plant's Technical Specifications into a COLR for that plant, (ii) substituting in the Technical Specifications in place of cycle-specific parameter values a reference to the COLR and a requirement that the plant

be operated within the limits set forth in the COLR, (iii) requiring the cycle-specific parameter values to be determined in accordance with NRC-approved methodologies referenced in the Technical Specifications, and (iv) requiring licensees to submit a copy of the COLR to the NRC.

The NRC anticipated that changing Technical Specifications in the manner suggested in Generic Letter 88-16 would significantly decrease the number of requests for license amendments and result in a resource savings for both licensees and the NRC. See Generic Letter 88-16 enclosure at 1. Since Generic Letter 88-16 was issued, the NRC has approved approximately 70 license amendments consistent with the guidance of Generic Letter 88-16.

On December 19, 1989, Licensees submitted to the NRC an application to amend the PNPP operating license in accordance with Generic Letter 88-16.[2/] This amendment application was supplemented by letter dated March 30, 1990.

On February 7, 1990, the NRC published a notice of consideration of this amendment application and afforded an opportunity

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2/ The amendment relocates the values of the Average Planar Linear Heat Generation Rates, the Maximum Average Planar Linear Heat Generation Rate Factor Curves, the Minimum Critical Power Ratio Factor Curves, and the Linear Heat Generation Rates from PNPP's Technical Specifications to the COLR.

for a hearing.[3/] The license amendment was issued on September 13, 1990.[4/]

OCRE petitioned to intervene in the proceeding and requested a hearing on the proposed amendment.[5/] Both Licensees and the NRC Staff filed objections to OCRE's petition.[6/] Without ruling on these objections, the Board directed OCRE to file its contention.[7/] OCRE filed the following contention:

> The Licensee's proposed amendment to remove cycle-specific parameter limits and other cycle-specific fuel information from the plant Technical Specifications to the Core Operating Limits 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

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3/ 55 Fed. Reg. 4282 (1990).

4/ Because the NRC Staff determined (and OCRE acknowledged) that the amendment involved no significant hazards considerations, see 55 Fed. Reg. 4248 (1990); 55 Fed. Reg. 18,690 (1990), the amendment could be issued notwithstanding the pending request for a hearing. See 10 C.F.R. § 50.91 (1990).

5/ Petition for Leave to Intervene and Request for a Hearing, March 8, 1990.

6/ Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. Petition for Leave to Intervene and Request for Hearing, March 23, 1990; NRC Staff Response to Petition to Intervene Filed by Ohio Citizens for Responsible Energy, March 28, 1990.

7/ Memorandum and Order Scheduling Filing of Contention, April 2, 1990.

changes to the cycle-specific parameters and fuel information.[8/]

Licensees and the NRC Staff responded to OCRE's contention,[9/] and OCRE responded to these answers.[10/] The Board then admitted OCRE as a party to the proceeding.[11/] Although the Board noted that OCRE's contention was, on its face, a purely legal one, 31 N.R.C. at 507, the Board went on to find a factual issue subsumed within the legal question. In particular, the Board found that:

> [t]he question here at issue, while ostensibly only a question of law, is not barren of subtle factual content. . . . Thus, we see wrapped within the outer layer of the legal question a more recondite question of fact: To what extent does the material to be included within the new technical specifications inexorably specify the cycle-specific parameter limits which would be removed?

Perry, LBP-90-15, 31 N.R.C. at 507.

8/ OCRE Filing of Contention and Response to Licensee and Staff Answers to OCRE's Petition for Leave to Intervene, April 23, 1990.

9/ Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. Contention, May 9, 1990; NRC Staff Response to the Contention Proposed by Ohio Citizens for Responsible Energy and to Arguments Concerning OCRE's Standing to Intervene, May 18, 1990.

10/ OCRE Response to Licensee and NRC Staff Answers to OCRE's Contention, June 1, 1990.

11/ Memorandum and Order (Granting Petition to Intervene), LBP-90-15, 31 N.R.C. 503 (1990).

Licensees and the NRC Staff subsequently filed motions for reconsideration.[12/] After OCRE's response,[13/] the Board denied the motions and established a discovery and hearing schedule.[14/]

At the conclusion of discovery, OCRE, Licensees and the NRC Staff reached agreement on a statement of stipulated facts that obviated the need for a hearing.[15/] In particular, the parties agreed that calculating the values of the cycle-specific parameters which were relocated from PNPP's Technical Specifications to the COLR does not involve the exercise of substantial discretion or substantial engineering judgment on Licensees' part.[16/] Because this question, the sole issue which was to have been decided at the scheduled evidentiary hearing, had been resolved,

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12/ Licensees' Motion for Reconsideration of Licensing Board's Memorandum and Order (Granting Petition to Intervene), June 28, 1990; NRC Staff Motion for Reconsideration, July 3, 1990.

13/ OCRE Response to Licensee and NRC Staff Motions for Reconsideration of LBP-90-15, July 12, 1990.

14/ Memorandum and Order (Denying Staff's and Licensee's Motions for Reconsideration), LBP-90-25, 32 N.R.C. 21 (1990).

15/ Stipulation of Agreed Facts between Licensees, NRC Staff and Ohio Citizens for Responsible Energy, Inc., October 17, 1990.

16/ Id. at 5.

the Board cancelled the hearing[17] and rendered its initial decision approving the NRC Staff's issuance of the amendment.[18]

ARGUMENT

I. INTRODUCTION

OCRE makes two arguments in its Brief. First, OCRE argues that the Board failed to address the legal issue raised by OCRE in its contention.[19] OCRE claims that the Board should have followed the the procedure established in 10 C.F.R. § 2.714(e) for resolving "pure issues of law." OCRE should be estopped from making this argument because it took the contrary position before the Board. In any event, the Board ultimately addressed OCRE's legal issue.

Second, OCRE argues that the Board incorrectly interpreted Section 189(a) of the Act by, in OCRE's view, linking the hearing rights granted under that section to the safety significance of the license amendment.[20] This argument is also without merit. The Board correctly interpreted Section 189(a) as guarantying a right to a hearing on changes to cycle-specific parameters only

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17/ Memorandum and Order (Cancelling Scheduled Hearing), October 18, 1990.

18/ Perry, LBP-90-39, __ N.R.C. at __.

19/ OCRE's Brief at 9.

20/ OCRE's Brief at 11.

if the values of such parameters are required to be included in Technical Specifications.

II. THE BOARD ADDRESSED THE LEGAL ISSUE RAISED IN OCRE'S CONTENTION.

A. OCRE Is Estopped From Arguing That The Board Incorrectly Interpreted Its Contention.

Licensees believe that OCRE is not entitled to argue that the Board incorrectly transformed OCRE's purely legal contention into a factual one. When Licensees in their Motion for Reconsideration suggested that the Board had gone outside of the scope of OCRE's contention by raising a factual question,[21/] OCRE explicitly rejected such a claim and asserted that in finding a factual question within OCRE's legal contention, "the Board merely made an interpretation of OCRE's contention. . . . The Board simply saw the need for additional analysis, including factual information, to resolve the issue raised by OCRE."[22/] Having accepted the benefits of the Board's order permitting it to intervene

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21/ Licensees' Motion for Reconsideration at 7.

22/ OCRE Response to Licensee and NRC Staff Motions for Reconsideration of LBP-90-15 at 7-8.

based on the Board's interpretation of the contention, OCRE cannot now appeal and seek a reversal of this decision.[23/]

OCRE's current claim -- that the Board should have followed the procedures set forth in 10 C.F.R. § 2.714(e) to resolve OCRE's contention -- is totally inconsistent with the position OCRE asserted before the Board. OCRE should be estopped from now asserting a contrary position.[24/] OCRE should not be allowed to take one position before the Licensing Board and then, being dissatisfied with the Board's decision on the merits, espouse a diametrically opposite position before the Commission. Cf. Telecommunications Research and Action Center v. FCC, 917 F.2d 585 (D.C. Cir. 1990) (petitioner lacks standing to challenge agency

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23/ See Deweese v. Investors Title Co., Inc., 792 S.W.2d 40, 42 (Mo. App. 1990) (the general rule is that a litigant who has voluntarily and with knowledge of all material facts accepted the benefits of an order, decree or judgment cannot afterwards take or prosecute an appeal to reverse it). See also Cingolani v. Utah Power & Light Co., 790 P.2d 1219, 1221 (Utah App. 1990) ("[u]nder the general acceptance-of-the-benefits doctrine, one who accepts a benefit under a judgment is estopped from later attacking the judgment on appeal . . . ").

24/ Cf. Arrowhead Construction Company of Dodge City, Kansas, Inc. v. Esse Corporation, 233 Kan. 241, 662 P.2d 1195, 1201 (1983), overruled on other grounds, 246 Kan. 557, 792 P.2d 1043 (1990) ("parties to an action are bound by their pleadings and judicial declarations and are estopped to deny or contradict them when the other parties to the action relied thereon and changed their positions by reason thereof").

order where petitioner argued before the agency for the end result it now contests on appeal).

B. The Board Ultimately Addressed The Legal Issue Raised By OCRE's Contention.

Despite the fact that OCRE, Licensees and the NRC Staff all believed that the contention presented by OCRE involved only a legal question, the Board nonetheless concluded that the correctness of the contention could not be determined without first conducting some factual analysis. See Perry, LBP-90-25, 32 N.R.C. at 26. The Board believed OCRE's contention could only be correct if cycle-specific parameters were required to be included in Technical Specifications. Id. If the values of these parameters were not required to be in Technical Specifications, then there would be no Section 189(a) right to a hearing with respect to subsequent changes to these values. Id.

Although the Board's method for dealing with OCRE's contention was not the method set forth in 10 C.F.R. § 2.174(e), which OCRE presumably anticipated the Board would use, the Board, nevertheless, addressed the legal issue contained in OCRE's contention. The Board ultimately determined that, inasmuch as the values of cycle-specific parameters are not required to be included in PNPP's Technical Specifications, OCRE does not have a right to a Section

189(a) hearing on changes to these values. Thus, the amendment does not violate OCRE's rights under Section 189(a).[25/]

In any event, whether or not the Board's decision addressed OCRE's legal issue, that issue is now presented by OCRE's appeal to the Commission. OCRE's complaint about the Board's procedures is therefore moot.

III. THE BOARD CORRECTLY INTERPRETED SECTION 189(a) OF THE ACT.

In approving the NRC Staff's issuance of the amendment, the Board interpreted Section 189(a) of the Act as granting OCRE the right to a hearing on changes to cycle-specific parameters only if those parameters were required to be included in Technical Specifications. See Perry, LBP-90-25, 32 N.R.C. at 26. Because (as stipulated by OCRE) the derivation of these values does not require substantial engineering judgment, the Board concluded that the values need not be in Technical Specifications and OCRE therefore was not deprived of any hearing rights. The Board's interpretation is correct.

Section 189(a) of the Act guarantees the public an opportunity for a hearing with respect to all license and license amendment applications. Because Technical Specifications are a part

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25/ See discussion in Sections IIIA and IIIB below explaining why cycle-specific parameters are not required to be included in PNPP's Technical Specifications.

of a plant's operating license, a proposal to change Technical Specifications involves a license amendment and the public therefore has a right to request a hearing. If the Technical Specifications include a particular provision that is not required by statute or regulation, the Commission is entitled to delete that item from Technical Specifications. Once it has been deleted, changes to that item may be made without the opportunity for a public hearing because no changes to Technical Specifications are required. The public would not have any independent right to a hearing with respect to such information. Thus, if the actual values of cycle-specific parameters are not required to be included in Technical Specifications, OCRE does not have a right to a hearing with respect to changes to such values once those values have been deleted from Technical Specifications. Because neither statute nor regulation requires the inclusion of cycle-specific parameter values in Technical Specifications, the Board correctly concluded that relocating such values from PNPP's Technical Specifications into the COLR did not deny OCRE any hearing rights.[26/]

26/ See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 N.R.C. 62, 66 (1986) (the Appeal Board refused to reopen a hearing to determine if relocating certain portions of PNPP's fire protection plan from PNPP's Technical Specifications into its FSAR violated 10 C.F.R. § 50.36 in part because OCRE failed to carry its burden of demonstrating that the excluded portions of the fire protection program were required to be in PNPP's Technical Specifications).

A. The Atomic Energy Act Does Not Require That Technical Specifications Include Cycle-Specific Parameter Values.

Technical Specifications for nuclear power plants are governed by Section 182(a) of the Act which provides that:

> In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued.

The statutory language provides the NRC with broad discretion to determine the information that it "deem[s] necessary" to assure adequate protection for public health and safety. This expansive statutory charter is consistent with the great latitude which the Act in general provides to the NRC. See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983); Carstens v. NRC, 742 F.2d 1546, 1551 (D.C. Cir. 1984), cert. denied, 471 U.S. 1136 (1985) (the "Act vests broad discretion in the NRC to establish qualifications for licensees of nuclear facilities"). See also Union of Concerned Scientists v. NRC, slip opinion No. 89-1617 at 6 (D.C. Cir. 1990) (NRC procedural rules are given great deference because of the unique

degree of authority the NRC is given to decide the means to achieve its statutory objectives); Public Service Company of New Hampshire v. NRC, 582 F.2d 77, 82 (1st Cir.), cert. denied, 439 U.S. 1046 (1978) ("[t]he Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends [of protecting the health and safety of the public]"); Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968) (the Act's regulatory scheme "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective").

Section 182(a) in particular has been interpreted as giving the NRC extremely broad discretion to carry out its statutory mandate. In addition to authorizing the NRC to determine what information should be included in Technical Specifications, Section 182(a) of the Act authorizes the NRC to determine the financial qualifications of license applicants. The court in Coalition for the Environment, St. Louis Region v. NRC, 795 F.2d 168, 174 (D.C. Cir. 1986) determined that Section 182(a) gives "'the NRC complete discretion to decide what financial qualifications are appropriate'" (quoting New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93 (1st Cir. 1978)). The language in Section 182(a) governing financial qualifications ("such information as the Commission, by rule or regulation, may determine to

be necessary . . ."") is essentially the same as the Section 182(a) language governing Technical Specifications. The NRC's discretion in the Technical Specifications context is therefore equally broad as the NRC's discretion with respect to financial qualifications.

B. NRC Regulations Do Not Require Technical Specifications To Include Cycle-Specific Parameter Values.

The NRC has implemented its authority under Section 182(a) of the Act by promulgating 10 C.F.R. § 50.36. Subsection (b) of that regulation provides that operating licenses shall include technical specifications to be derived from the analyses and evaluations included in the safety analysis reports, and amendments thereto, and such additional technical specifications as the NRC finds appropriate. Subsection (c) further provides that "Technical Specifications will include items in the following categories": (i) safety limits and limiting safety system settings, (ii) limiting conditions for operation, (iii) surveillance requirements, (iv) design features and (v) administrative controls.

The terms of 10 C.F.R. § 50.36 are very general in nature. The regulation merely requires that Technical Specifications "will include items" in specified "categories." It does not require that all "items" which could conceivably fit within these categories be included in Technical Specifications. The language

of this regulation clearly gives the NRC the discretion to determine what must be included in Technical Specifications.

By revising the Technical Specifications of some 70 units to relocate cycle-specific parameter values from Technical Specifications to core operating limits reports (as recommended in Generic Letter 88-16), the NRC has acted well within the discretion afforded by 10 C.F.R. § 50.36 and Section 182(a) of the Act. That exercise of discretion would certainly be upheld by the courts. See, e.g., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 54 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990) (courts reviewing agency actions are even more deferential when reviewing an agency's application and interpretation of its own regulations); San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 30 (D.C. Cir.)(en banc), cert. denied, 479 U.S. 923 (1986) (an agency's interpretation of its own rules should be set aside only if it is plainly inconsistent with the language of the regulations).

The NRC license amendments relocating cycle-specific parameters clearly are not inconsistent with the broad language of 10 C.F.R. § 50.36. Nothing in 10 C.F.R. § 50.36 requires that Technical Specifications include cycle-specific parameter values. The interpretation of 10 C.F.R. § 50.36, as reflected in Generic Letter 88-16 and in the license amendment at issue here, is a reasonable one and should not be undone.

The leading case interpreting the statutory and regulatory requirements for Technical Specifications is Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 N.R.C. 263 (1979). In that case, the licensees submitted a license amendment application, supported by a "design report," which proposed to expand the capacity of the plant's spent fuel pool. The State of Oregon, the intervenor in the proceeding, sought to have certain information in the "design report" included in Technical Specifications. The Atomic Safety and Licensing Appeal Board ruled that 10 C.F.R. § 50.36 did not require such information to be included.

The Appeal Board concluded that 10 C.F.R. § 50.36 does not require that every operational detail be included in Technical Specifications, but rather that:

> the contemplation of both the Act and the regulations is that technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.

Id. at 273. The Appeal Board found that the information requested by the State to be included in Technical Specifications did not meet this test.

Nor do the cycle-specific parameter values at issue in this proceeding meet the Trojan test. Generic Letter 88-16 and the

license amendments which follow it are based on the conclusion that plant operation governed by appropriate core operating limits will be assured by Technical Specifications which require the use of NRC-approved methodologies to develop core operating limits and which mandate adherence to those core operating limits. OCRE has not challenged this conclusion. Thus, the amendment modified PNPP's Technical Specifications in a manner that is entirely consistent with the requirements of 10 C.F.R. § 50.36 and Trojan. Although the Board in the instant case vaguely noted that Trojan requires "some such limitations" to be included in Technical Specifications, see Perry, LBP-90-25, 32 N.R.C. at 26, the Board did not conclude that cycle-specific parameters themselves must appear in Technical Specifications.

OCRE has already agreed that the methodologies referenced in PNPP's Technical Specifications which are used to calculate the core operating parameters have been approved by the NRC and cannot be changed without NRC approval.[27/] OCRE has also agreed that these methodologies do not permit Licensees substantial discretion or require substantial engineering judgment on Licensees' part in deriving the numerical values of the cycle-specific parameters.[28/] All that has been taken away from OCRE as a result of the amendment is OCRE's right to a hearing to check

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27/ Stipulation of Agreed Facts at 3.

28/ Id. at 5.

Licensees' arithmetic in determining the actual values of the parameters. See Perry, LBP-90-15, 31 N.R.C. at 507.[29/]

The amendment approved by the Licensing Board in this proceeding is very similar to the situation confronted by the Appeal Board in Perry, ALAB-831, 23 N.R.C. 62. In determining whether Licensees could relocate portions of the fire protection plan from PNPP's Technical Specifications into the final safety analysis report, the Appeal Board took into consideration the fact that the licensing action which carried out the relocation included the additional license requirement that Licensees comply with the fire protection program contained in the final safety analysis report. Id. at 66. The Appeal Board concluded that this condition made it impossible for any party to claim that transferring portions of the fire protection plan from PNPP's Technical Specifications to the Final Safety Analysis Report impaired Licensees' commitment to carry out the PNPP fire protection program. Id.

29/ OCRE suggests that approval of the amendment at issue here will deny OCRE the "opportunity to challenge the adequacy of the NRC Staff-approved methodologies." OCRE's Brief at 13. The short answer to this suggestion is that OCRE's right to challenge the adequacy of the methodologies is outside the scope of OCRE's contention, which is limited to "cycle-specific parameter limits and other cycle-specific fuel information," not methodologies. See OCRE Filing of Contention at 1.

C. That Cycle-Specific Parameters Traditionally Have Been Included In Technical Specifications Does Not Bar Their Removal From Technical Specifications.

OCRE has asserted that the values of cycle-specific parameters must remain in PNPP's Technical Specifications because they have traditionally been included in Technical Specifications.[30/] In essence, OCRE is arguing that "once a Tech Spec, always a Tech Spec." This argument clearly lacks merit.

As discussed above, Section 182(a) of the Act gives the NRC the discretion to determine what information is and is not included in Technical Specifications. To hold that information once contained in Technical Specifications can never be removed would be to strip the NRC of the authority granted to it under the Act. The only constraint on the NRC's authority to control the contents of Technical Specifications is 10 C.F.R. § 50.36, not whether such information has traditionally been included in Technical Specifications. As shown above, 10 C.F.R. § 50.36 does not require inclusion of cycle-specific parameter values in Technical Specifications.

The NRC has added provisions to Technical Specifications in the past without considering whether those provisions were

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30/ OCRE's Filing of Contention at 3.

actually required.[31/] The NRC would be prohibited from eliminating such extraneous material from Technical Specifications if the Commission were to rule that cycle-specific parameters cannot be removed from PNPP's Technical Specifications simply because such values have "traditionally" been included. As the Appeal Board observed in Perry, ALAB-831, 23 N.R.C. at 66 n.11:

> It is of little moment here that, as the staff's response observes (ibid.), fire protection requirements have been included in the technical specifications of other operating licenses. For it does not follow from that fact that such inclusion is required by Commission regulations. Cf. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-824, 22 NRC 776, 781 (1985).

IV. SECTION 189(a) OF THE ACT DOES NOT GUARANTEE OCRE THE RIGHT TO A HEARING ON CHANGES TO THE VALUES OF CYCLE-SPECIFIC PARAMETERS.

Section 189(a)(1) of the Act provides:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . ., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

31/ 55 Fed. Reg. 3788, 3789 (1987).

A. Section 189(a) Of The Act Does Not Guarantee The Right To A Hearing On All Issues.

1. Section 189(a) Guarantees The Right To A Hearing Only On Matters Which Are Material To The NRC's Licensing Decisions.

The courts have interpreted Section 189(a) to require a hearing only as to the issues which are material to the NRC's licensing decision. See Bellotti v. NRC, 725 F.2d 1380, 1382 (D.C. Cir. 1983); Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1449 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985). Accord, Union of Concerned Scientists, slip opinion No. 89-1617.

In Bellotti, the NRC issued an order modifying a reactor operating license which required the licensee to develop a plan for reappraisal and improvement of management functions. The State Attorney General sought to intervene and requested a Section 189(a) hearing on the content of the plan, namely the continued operation of the plant, the nature of improvements to the plant, and the adequacy of the licensee's reappraisal and its implementation. The NRC denied the request for a hearing. The court upheld the NRC's denial on the grounds that the development of the plan took place outside of the license amendment proceeding and therefore, was not a part of the NRC's decision to amend the license. Id. at 1382. Because the substance of the plan was not a part of the NRC's decision to modify the license, it was

not a material factor in the NRC's decision, and therefore, Section 189(a) of the Act did not guarantee a right to a hearing on the substance of the plan. See Id.

In Union of Concerned Scientists, 735 F.2d 1437, the NRC adopted a rule which provided that atomic safety and licensing boards did not have to consider the results of emergency preparedness exercises in licensing hearings before authorizing a full power license to operate a nuclear power plant. The NRC, however, would not actually issue the license until emergency preparedness exercises were satisfactorily completed.

Union of Concerned Scientists claimed that this rule violated its Section 189(a) right to a hearing on an issue material to the licensing proceedings. Id. at 1438. The NRC admitted that it would not issue a license until emergency preparedness exercises were satisfactorily completed. As a result, the court concluded that such exercises were material to the NRC's licensing decision. Id. Therefore, the court held that the NRC rule removing consideration of these exercises from the scope of a Section 189(a) hearing denied the public its right to a hearing. Id. at 1438.

2. The Values Of Cycle-Specific Parameters Are Not Material To The NRC's Licensing Decisions.

With respect to the NRC's licensing decisions, information is material only if it is so substantial and important as to influence the NRC's decision. See Black's Law Dictionary 880 (5th ed. 1979) ("material" defined as relating to a matter that is so substantial and important as to influence a party). Courts have held that the NRC has great discretion to decide what matters are and are not material to its licensing decisions. Siegel, 400 F.2d at 783.

Generic Letter 88-16 clearly indicates the view of the NRC Staff that cycle-specific parameter values are not material to its licensing decisions. When it issued Generic Letter 88-16, the NRC Staff was fully aware that it would no longer approve cycle-specific parameter values as part of its approval of license amendment applications submitted in connection with fuel reloads.[32/] Generic Letter 88-16 expressed the NRC Staff's view that so long as Technical Specifications specify NRC-approved methodologies used to derive such values and a requirement that the plant operate within those values, there is no need to approve the actual values. Thus, the specific values of cycle-specific parameters are not material to the NRC's licensing decisions.

32/ See Generic Letter 88-16.

A comparison of the NRC's treatment of cycle-specific parameter values with its treatment of the emergency preparedness exercises at issue in Union of Concerned Scientists, 735 F.2d 1437, further demonstrates that these values are not material to the NRC's licensing decisions. In Union of Concerned Scientists, the NRC conceded that emergency preparedness exercises had to be satisfactorily completed before the NRC would issue an operating license. Id. at 1438. Consequently, such exercises were found to be material to the NRC's licensing decision. In contrast, through Generic Letter 88-16, the NRC has clearly indicated that it does not need to approve cycle-specific parameter values. Therefore, these values are not material to its licensing decisions.

Because the values of cycle-specific parameters are not material to the NRC's licensing decision, Section 189(a) of the Act does not guarantee the right to a hearing with respect to changes of these values. Thus, OCRE has no statutory right to a Section 189(a) hearing on changes to the values of PNPP's cycle-specific parameters once those values are removed from Technical Specifications. OCRE cannot rightfully claim that relocating such values from PNPP's Technical Specifications into the COLR violates OCRE's rights under Section 189(a).

B. Future Changes To The Values Of Cycle-Specific Parameters Will Not Be De Facto License Amendments Entitling OCRE To A Section 189(a) Hearing.

OCRE argues that:

> [c]hanges to core operating limits, with tacit approval by the NRC, will give [Licensees] the authority to operate in ways in which they otherwise could not. Thus, they are de facto license amendments, and the public must have notice and opportunity to request a hearing. Anything less is a violation of Section 189a of the Atomic Energy Act.[33]

The essence of OCRE's argument is that inasmuch as the values of cycle-specific parameters were part of PNPP's Technical Specifications and OCRE had a Section 189(a) right to a hearing with respect to changes of such values, OCRE will always have a right under Section 189(a) to such a hearing, whether the values are located in PNPP's Technical Specifications or in the COLR.

OCRE relies on Sholly v. NRC, 651 F.2d 780 (D.C. Cir. 1980), vacated on other grounds, 459 U.S. 1194 (1983), for the proposition that the public is entitled to notice and an opportunity for hearing when there is a de facto license amendment. OCRE's Brief at 6. In Sholly, the NRC issued an order allowing the licensee to vent radioactive gas from Three Mile Island Unit 2, something that could not be done under the existing license. The NRC did

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33/ OCRE's Brief at 6.

not provide notice or an opportunity for hearing on the venting order. The court held that an action which grants a licensee the authority to do something it otherwise could not have done under its existing license authority is a license amendment within the scope of Section 189(a). An opportunity for hearing on the amendment was therefore required. Id. at 791.

Even if the Sholly decision has any remaining validity, OCRE's reliance on it is misplaced. In Sholly, the existing license authority did not permit the licensee to release the radioactive gas in the manner permitted by the venting order. In the instant case, however, the PNPP operating license authority has been amended to relocate the cycle-specific parameter values to the COLR, a document which can be changed without a license amendment. Thus, when the values of cycle-specific parameters are changed in the future, no license amendment will be needed. At that time, Licensees will be doing what their license authority permits them to do and therefore will not be taking any action which could be considered a de facto license amendment. The right to a Section 189(a) hearing will not be triggered as it was in Sholly.

C. Verifying Mathematical Calculations Is Not The Kind Of Matter As To Which Section 189(a) Of The Act Guarantees A Hearing.

As discussed above, because the Technical Specifications require that PNPP be operated in compliance with cycle-specific parameters determined in accordance with NRC-approved methodologies referenced in the Technical Specifications, the only right which OCRE is being denied as a result of the amendment is the right to check Licensees' arithmetic in deriving these values.[34/] A hearing on such matters would be of little value.

In Union of Concerned Scientists, 735 F.2d 1437, the court noted that "although the Act does not provide any exceptions to Section 189(a), . . . Congress did not mean to require a hearing where a hearing serves no purpose." Id. at 1449. To determine the scope of such an exception, the court looked to the Administrative Procedure Act, 5 U.S.C. § 554(a)(3) (1982), which exempts from the formal hearing process agency decisions that rely solely on inspections, tests or elections because such methods of determination do not lend themselves to the hearing process. Id.

Unlike the emergency preparedness exercises at issue in Union of Concerned Scientists, 735 F.2d 1437, the arithmetic used in calculating the values of cycle-specific parameters does not raise questions of credibility, conflicts, or sufficiency of

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34/ See Section IIIB, supra.

information, the ordinary reasons for requiring a hearing.[35/] As OCRE, the NRC Staff and Licensees have agreed, neither a substantial degree of discretion nor engineering judgment is involved in deriving the values of cycle-specific parameters.[36/] Thus, none of the concerns expressed in Union of Concerned Scientists as reasons for requiring a hearing are present in the calculation of the values of cycle-specific parameters. This straightforward mathematical calculation would appear to be the kind of "test" Congress had in mind as being exempted from the formal hearing requirements of the Administrative Procedure Act. Like the Administrative Procedure Act, Section 189(a) of the Act does not guarantee the right to a hearing with respect to such "tests."

CONCLUSION

It is clear that the Atomic Energy Act vests the NRC with the authority to control the contents of Technical Specifications. The values of cycle-specific parameters are not required to be included in Technical Specifications under Section 182(a) of the Act, 10 C.F.R. § 50.36, or the Trojan decision. Consequently, Section 189(a) of the Act does not guarantee a right to

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35/ See Union of Concerned Scientists, 735 F.2d at 1450 (emergency preparedness exercises involves a central decisionmaker's consideration and weighing of other persons' observations and first hand experiences which give rise to questions of credibility, conflicts and sufficiency bringing into play the ordinary reasons for requiring a hearing).

36/ Stipulation of Agreed Facts at 5.

a hearing with respect to changes to such values if those values are no longer included in a plant's Technical Specifications.

Section 189(a) of the Act guarantees the public the right to a hearing only on issues that are material to the NRC's licensing decision. Although the NRC considers it to be material whether approved methodologies are being used to calculate the values of cycle-specific parameters, the actual values of such parameters are not. Also, verification of mathematical computations is not the kind of issue for which the Administrative Procedure Act requires a hearing. For these and all the other reasons discussed above, OCRE's rights to a hearing under Section 189(a) are not violated by relocating the values of cycle-specific parameters from PNPP's Technical Specifications to the COLR.

The Initial Decision issued by the Board should be affirmed.

Respectfully submitted,

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Dated: January 23, 1991

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January 23, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket No. 50-440-OLA-2
	)	ASLBP No. 90-605-02-OLA
(Perry Nuclear Power Plant, Unit No. 1)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensees' Brief in Response to Appellate Brief of Ohio Citizens for Responsible Energy, Inc. were mailed, postage prepaid, this 23rd day of January, 1991 to those listed on the attached Service List.

Jay E. Silberg
Counsel for Licensees

B:473DMB5430.90

January 23, 1991

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