10300

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'90 APR 30 P5:01

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket No. 50-440-OLA-2
	)	
(Perry Nuclear Power Plant, Unit 1)	)	
	)	

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

OCRE FILING OF CONTENTION AND RESPONSE TO LICENSEE AND NRC STAFF ANSWERS TO OCRE'S PETITION FOR LEAVE TO INTERVENE

Pursuant to the Atomic Safety and Licensing Board's Memorandum and Order (Scheduling Filing of Contention) of April 2, 1990, petitioner Ohio Citizens for Responsible Energy, Inc. ("OCRE") hereby files the contention it intends to litigate in this proceeding and responds to the arguments made by the Licensees and NRC Staff in their answers to OCRE's intervention petition.

I. CONTENTION

OCRE proposes that the following contention be admitted to this proceeding:

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 changes to the cycle-specific parameters and fuel information.

D503

10 CFR 2.714(b)(2) requires petitioners to set forth the following information when filing a contention: (i) a brief explanation of the bases of the contention; (ii) a concise statement of the alleged facts supporting the contention; and (iii) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. With the instant contention, these factors are inextricably intertwined and therefore are addressed together below.

On December 19, 1989 the Cleveland Electric Illuminating Company filed with the Nuclear Regulatory Commission ("NRC") a request for an amendment to Appendix A of the operating license for the Perry Nuclear Power Plant. The requested amendment would remove cycle-specific core operating limits and other cycle-specific fuel information from the plant Technical Specifications. Instead, this information would be placed in the Core Operating Limits Report, to be part of the Plant Data Book. The specific parameters and Technical Specification sections affected are Maximum Average Planar Linear Heat Generation Rate (MAPLHGR) and MAPLHGR Power and Flow Factor parametric curves, Section 3.2.1; Minimum Critical Power Ratio (MCPR) and MCPR Power and Flow Factor Parametric Curves, Section 3.2.2; Linear Heat Generation Rate (LGHR), Section 3.2.3; fuel design description, Section 5.3.1, and associated Bases.

A new section 6.9.1.9 would be added to the Technical Specifications. This section would establish that core

operating limits are to be documented in the Core Operating Limits Report; that the analytical methods used to determine the core operating limits shall be those previously reviewed and approved by the NRC; and that the Core Operating Limits Report, and any revisions or supplements thereto, shall be provided to the NRC upon issuance.

The Licensees concede that this amendment will have the effect of "eliminating the majority of license amendment requests for changes in values of cycle-specific parameters in Technical Specifications." Attachment 1 to Dec. 19, 1989 amendment request, p. 5. It is precisely this effect that OCRE finds objectionable.

The core operating limits subject to this amendment request have traditionally been part of the Technical Specifications and could not be changed without notice in the Federal Register and opportunity for a hearing, as required by Section 189a of the Atomic Energy Act. If this amendment is granted, the Licensees will be able to change the core operating limits without any public notice or opportunity for participation. The NRC will still receive notice of any revisions to the Core Operating Limits Report; the NRC's jurisdiction and enforcement powers are not diminished by the proposed amendment. The only real effect of this amendment is that the public is excluded from the process.

This is contrary to the intent of Congress and the interpretation of the Atomic Energy Act by the Courts. Section 189a of the Atomic Energy Act states that "(i)n any proceeding

under this Act for the granting, suspending, revoking, or amending 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." Operating license amendment proceedings under the Act are formal, on-the-record adjudicatory proceedings, conducted pursuant to the NRC's rules of practice in 10 CFR Part 2, where the parties have the opportunity to present evidence and cross-examine witnesses. Review of initial decisions is available within the NRC by the Atomic Safety and Licensing Appeal Board and by the Commission. Judicial review of final orders in operating license amendment proceedings is clearly established by statute. Atomic Energy Act, Section 189b; Administrative Orders Review Act, 28 USC 2342(4).

The Atomic Energy Act reflects a strong Congressional intent to provide for meaningful public participation. "Congress vested in the public, as well as the NRC Staff, a role in assuring safe operation of nuclear power plants." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984).

If this amendment is approved, the only mechanism available for public participation is through 10 CFR 2.206. However, this option does not provide meaningful participation, nor does it measure up to the type of proceeding afforded by Section 189a. This regulation permits any person to file a request with the appropriate staff director seeking to

institute a proceeding to suspend, revoke, or modify a license, or for any other action which may be appropriate. 10 CFR 2.206 does not give the requester the right to a hearing, and simply filing a request under section 2.206 does not give the requester the right to present evidence and cross-examine witnesses. There is no right under section 2.206 to appellate review within the agency; while the Commission, at its own discretion, may review a director's decision, petitions for review of same are not to be entertained. 10 CFR 2.206(c). As the D.C. Circuit has ruled, a 2.206 request is not a Section 189a proceeding. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443-4 (D.C. Cir. 1984).

Most significantly, judicial review is not available for denials of 2.206 petitions. OCRE v. NRC, No. 88-1676 (D.C. Cir., Jan. 23, 1990) (attached); Safe Energy Coalition of Michigan v. NRC, 866 F.2d 1473 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223 (7th Cir. 1989); Massachusetts Public Interest Research Group v. NRC, 852 F.2d 9 (1st Cir. 1988). These decisions have held that 2.206 denials are not reviewable because they are "committed to agency discretion by law." 5 USC 701(a)(2). This provision of the Administrative Procedure Act was interpreted by the Supreme Court in Heckler v. Chaney, 470 U.S. 821 (1985), to include those agency actions in which the governing statute provided no meaningful standards for judicial review.

This amendment request violates the Atomic Energy Act in that changes to cycle-specific parameters, with their tacit

approval by the NRC, will be de facto license amendments, but will not be formally labeled as license amendments and noticed as such in the Federal Register with opportunity for a hearing. Licensees are trying to evade the clear mandate of the Atomic Energy Act by calling these amendments by another name to avoid invoking the notice and hearing provisions of the Act.

However, the law cannot be so easily evaded. Section 189a requires notice and opportunity for hearing on de facto license amendments as well as for those actions explicitly labeled as amendments. As the D.C. Circuit has held, an action which grants a licensee the authority to do something it otherwise could not have done under the existing license authority is a license amendment within the meaning of the Atomic Energy Act. Sholly v. NRC, 651 F.2d 780, 791 (1980), vacated on other grounds, 435 U.S. 1194 (1983). See also Commonwealth of Massachusetts v. NRC, 878 F.2d 1516, 1521 (1st Cir. 1989): "the particular label placed upon (its action) by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive," citing Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942).

Changes 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 in violation of Section [illegible] of the Atomic Energy Act. Licensees

claim that the proposed amendment will provide a resource savings for both themselves and the NRC. However, the D.C. Circuit has addressed the question of whether the NRC may limit public participation in the interest of making the process more efficient. The Court held that it may not. Union of Concerned Scientists v. NRC, 735 F.2d at 1444-1447.

OCRE asks the Licensing Board to issue declaratory and injunctive relief by declaring the proposed amendment to be in violation of the Atomic Energy Act and by denying the amendment request.

II. RESPONSE TO CEI AND NRC STAFF ANSWERS

Both the Licensees and the NRC Staff claim that OCRE's intervention petition should be denied due to OCRE's purported lack of standing. Since OCRE's contention raises only an issue of law, they assert that no injury-in-fact exists within the zone of interests established by the Atomic Energy Act.

Licensees cite a variety of cases which they believe establish that interest in legal rights does not meet judicial standing requirements, which require injury that is distinct and palpable, not abstract, conjectural or hypothetical. Warth v. Seldin, 422 U.S. 490 (1975); Allen v. Wright, 468 U.S. 737 (1983); Los Angeles v. Lyons, 461 U.S. 95 (1983); O'Shea v. Littleton, 414 U.S. 488 (1974). Nor is judicial standing acquired by asserting "the right, possessed by every citizen, to require that the Government be administered according to law." Dellums v. NRC, 863 F.2d 968 (D.C. Cir. 1988).

However, Licensees have selectively read these cases. Contrary to Licensees' interpretation, Warth clear establishes that "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" 422 U.S. at 500 (citation omitted). "Congress may create a statutory right of entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absense of statute." 422 U.S. at 514 (citation omitted). O'Shea likewise acknowledges this principle. 414 U.S. at 493, n. 2.

Dellums also cannot support Licensee's claim. Dellums concerned alleged violations by the NRC of the Comprehensive Anti-Apartheid Act of 1986. Clearly, none of the petitioners in that case could establish any specific injury because "the only injury alleged is widely-held, non-quantifiable, and of a political or ideological nature." Dellums, 863 F.2d at 972. Indeed, in a case such as Dellums concerning foreign policy issues, such "injuries" are all that can be claimed.

However, OCRE's interest in this proceeding does not concern political or ideological issues. Rather, OCRE has met the standard of Warth in that the amendment sought by Licensees would deprive OCRE of a statutorily-created right.

As the NRC Staff has correctly noted, Dellums has established that a petitioner must affirmatively address three factors to show standing: (1) the petitioner has personally suffered or will suffer a distinct and palpable harm that

constitutes injury-in-fact; (2) the injury can be traced to the challenged action; and (3) the injury is likely to be remedied by a favorable decision. Dellums, 863 F.2d at 971. Staff also notes that the injury must be within the zone of interests protected by the Atomic Energy Act. Staff Answer at 3.

OCRE has met all of these standards. Right now, any changes to the PNPP core operating limits must be accomplished through a license amendment, with the attendant notice and opportunity for hearing. OCRE would have the opportunity to intervene in the operating license amendment proceeding, to present evidence and cross-examine witnesses, and to file a petition for review of any final order in that proceeding with the Court of Appeals. If the proposed amendment to remove the core operating limits from the Technical Specifications is approved, all these rights, established by Congress in Section 189a of the Atomic Energy Act, will be taken away. Licensees concede as much when they admitted in their application that this amendment will have the effect of "eliminating the majority of license amendment requests for changes in values of cycle-specific parameters in Technical Specifications." This injury is real, distinct, and palpable. It is not hypothetical, conjectural or abstract. Moreover, the injury is obviously traceable to the challenged action and can clearly be remedied by a favorable decision.

Furthermore, this injury is within the zone of interests established by Congress in the Atomic Energy Act. Meaningful public participation in NRC license amendment proceedings is

one of the goals of the Act. As the D.C. Circuit has so forcefully stated, "Congress vested in the public, as well as the NRC Staff, a role in assuring safe operation of nuclear power plants." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984).

Incredibly, both CEI and the NRC Staff assert that 10 CFR 2.206 provides an adequate mechanism for any challenges to core operating limits in the future. As pointed out above, section 2.206 is a woefully inadequate mechanism which does not meet the requirements of a Section 189a hearing. The unavailability of judicial review especially renders 2.206 a meaningless option. For example, if this amendment is granted, OCRE could try to assert that any changes in the Core Operating Limits Report are de facto amendments and request a hearing. However, such a hearing request would be treated as a 2.206 petition by the Commission, even if it were not so labeled. With classification as a 2.206 petition comes the lack of judicial review. OCRE would never have the opportunity to present this issue before the Court of Appeals. Clearly, this is a matter which must be decided now or not at all. If the requested amendment is granted without affording OCRE the opportunity to challenge its legality at this time, OCRE will suffer irreparable injury which cannot be redressed by future legal remedies. This situation meets "the basic requisites of the issuance of equitable relief in these circumstances: the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." O'Shea, 414 U.S. at 502.

See also Lyons, 461 U.S. at 103.

III. CONCLUSION

For the foregoing reasons, OCRE has met the standing requirements and should be admitted as a party to this proceeding. OCRE's contention should also be admitted and litigated in this proceeding.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt
OCRE Representative
8275 Munson Road
Mentor, OH 44060
(216) 255-3158

DATED: April 23, 1990

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1676 September Term, 19 89

Ohio Citizens for Responsible Energy, Inc.,
Petitioner

v.

U.S. Nuclear Regulatory Commission and the United States of America,
Respondents

PETITION FOR REVIEW OF AN ORDER
OF THE NUCLEAR REGULATORY COMMISSION

Before: Mikva, Silberman, and Buckley, Circuit Judges.

J U D G M E N T

This case was considered on petition for review of an order of the Nuclear Regulatory Commission ("NRC"), and on briefs filed by the parties and argument by counsel. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. R. 14(c).

We affirm the decision of the NRC denying petitioner's request for the institution of enforcement proceedings, pursuant to 10 C.F.R. 2.206, against the owners and operators of the Perry Nuclear Power plant in Ohio. As this court held in Safe Energy Coalition v. NRC, 866 F.2d 1473 (D.C. Cir. 1989), denials by the NRC of 2.206 enforcement requests are not reviewable by article III courts in the absence of judicially manageable statutory, regulatory, or agency standards. Having found no such standards implicated in this case, it is

ORDERED and ADJUDGED that the petition for review is denied. It is

FURTHER ORDERED, by the court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15 (August 1, 1987). This instruction to the clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per curiam
For the court

Constance L. Dupre
Clerk

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 23rd day of APRIL, 1990 to the following:

DOCKETED
USNRC

'90 APR 30 P5:01

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

Administrative Judge
John H. Frye, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Frederick J. Shon
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Jay E. Silberg
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037

Susan L. Hiatt
OCRE Representative