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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

Before the Commission

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

INTERVENORS' BRIEF IN SUPPORT OF COMMISSION AFFIRMATION OF LBP-95-17

INTRODUCTION

Pursuant to CLI-96-4, Intervenors Ohio Citizens for Responsible Energy, Inc. ("OCRE") and Susan L. Hiatt hereby file their brief in response to the briefs filed by Licensees and NRC Staff, both filed on April 26, 1996.

STATEMENT OF THE CASE

Intervenors hereby adopt the Statement of the Case presented by Licensees in their brief.

ARGUMENT

I. THE LICENSING BOARD'S ORDER IS NOT ERRONEOUS

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

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

A. Licensees complain that the Licensing Board's order "transforms licensee actions requiring prior NRC regulatory approval into the equivalent of license amendments for which notice and opportunity for hearing must be afforded under section 189a of the Act." Licensees' Brief at 6, 8. Licensees apparently missed the point of the Board's order and of the governing court decision, Citizens Awareness Network v. NRC, 59 F.3d 284 (1st Cir. 1995) ("CAN") (see Board's Order at 23, n. 24): that a licensee action for which NRC approval is required prior to implementation already is a license amendment, even if it is not explicitly designated as such.

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

> CAN contends that Commission approval of YAEC's CRP violated AEA section 189(a), which requires the Commission to grant a

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

CAN, 59 F.3d at 294-295.

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

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

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

B. Licensees also complain that the Board's order eliminates

materiality as a requirement for a hearing under the AEA. Licensees' Brief at 21-23. In reality, the Board's order does no such thing.

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

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

C. Licensees assert that the Board's order is erroneous because it rejects the Staff's "reasonable" interpretation of Appendix H. Licensee's Brief at 23-24. However, it is Licensees and the Staff who are in error.

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

In fact, the case law supports the opposite conclusion. "[T]he staff does not occupy a favored position at hearings. . . In short, the staff's views 'are in no way binding upon' the

boards; they cannot be accepted without passing the same scrutiny as those of the other parties." Consolidated Edison Co. of New York, (Indian Point, Units 1, 2, & 3), ALAB-304, 3 NRC 1, 6 (1976).

Although they find fault with the result, Licensees do not refute the detailed legal reasoning developed by the Licensing Board in interpreting Appendix H. The Board's analysis is a thorough and well-reasoned paragon of regulatory construction. Employing the rules of statutory construction, the Board found the unambiguous language of the regulation, and not the subsequent revisionist regulatory history supplied by the Staff, to be persuasive. Order at 12-22. Licensees do not cite any authority that would contradict that relied upon by the Board. Disregarding the Board's detailed analysis, Licensees merely make the broad assertion that "the regulation is not so clear and unambiguous as the Board claims." Licensees' Brief at 24.

Licensees find ambiguity in Appendix H, Section II.B.3 in that "[i]t does not specify whether it is only the initial schedule that must be approved or whether changes to that schedule must also receive prior approval." Id. This argument is sophistry.

Any proposed schedule is a proposed schedule. It matters not whether it is a proposed initial schedule or a proposed revised schedule. It is still a proposed schedule, and, under Appendix H, must receive NRC approval prior to implementation. As the Licensing Board clearly stated, under the regulation's "literal terms, a new schedule or any change to an already imple-

mented schedule, significant or otherwise, must be considered a 'proposed' schedule and, as such, must be submitted to the agency and approved prior to implementation. This is what the plain words of the regulation say and this is what it means." Order at 18.

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

In its brief before the Commission, the Staff repeats its interpretation of 10 CFR 50 Appendix H. Given the discrepancy between the Staff's interpretation and the plain language of the regulation and the agency's statements in Generic Letter 91-01, the Licensing Board was entirely correct and reasonable in labeling the Staff's interpretation as "subsequent revisionist history," which is not valid regulatory history. Order at 20, n. 21. The Commission should similarly disregard such an obviously invalid interpretation.

The Staff's argument that agency review of withdrawal schedules is merely a pro forma determination of compliance with ASTM standards, and thus, not appropriate for an adjudicatory hearing (cf. 5 USC 554(a)(3)) (Staff's Brief at 22) is at odds with the agency's practice of offering the opportunity for a hearing for correction of typographical errors in technical specifications. Under agency practice, there is the opportunity for a hearing on

any license amendment, no matter how trivial. It is the determination that an action is a license amendment, not the significance of the amendment, that triggers Section 189(a) hearing rights. But, under CAN, the agency is not entitled to cavalierly wield its power to designate actions as license amendments:

> The Commission correctly points that we have observed that the term "amend," as used in section 189(a), is to be construed quite literally. See Commonwealth of Mass. v. United States Unclear Regulatory Comm'n, 878 F.2d 1516, 1522 (1st Cir. 1989). But we were careful to note as well that it is the substance of the NRC action that determines entitlement to a section 189(a) hearing, not the particular label the NRC chooses to assign to its action. Id. at 1521 (citing Columbia Broadcasting Syst. Inc. v. United States, 316 U.S. 407, 416, 62 S.Ct. 1194, 1199-1200, 86 L.Ed. 1563 (1942)).

CAN, 59 F.3d at 295 (emphasis in original, footnote omitted). Cf. Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980), vacated on other grounds, 459 U.S. 1194 (1983): 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.

II. THE SIGNIFICANCE OF 5 USC 551(8) AND (9)

Although not argued in the proceedings below, the Commission in CLI-96-4 directed the parties on review to address the significance for this case of 5 USC 551(8) and (9). While basing their argument before the Licensing Board on AEA Sec. 189(a), Intervenors find that the APA bolsters their argument and further compels affirmation of LBP-95-17.

These specific provisions of the APA state:

> (8) "license includes the whole or a part of an agency permit, certificate, approval, registration, charter, mem-

bership,statutory exemption or other form of permission;

> (9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(emphasis added). As the courts have noted, these definitions are extremely broad. Air North America v. Department of Transportation, 937 F.2d 1427, 1437 (9th Cir. 1991); Atlantic Richfield Co. v. United States, 774 F.2d 1193, 1200 (D.C. Cir. 1985); Blackwell College of Business v. Attorney General, 454 F.2d 928, 933 (D.C. Cir. 1971).

As Licensees and Staff point out, the underlying substantive statute, not the APA, determines the obligation of an agency to hold a hearing on agency actions. However, since the fundamental question presented below was "When is a regulatory or licensing action an amendment within the meaning of Section 189(a) of the Atomic Energy Act?" (1), the breadth of the APA definitions serves to buttress the holding of Sholly, supra.

CONCLUSION

As shown above, the Board's order is not contrary to established law, but rather is entirely consistent with it. The Licensing Board has faithfully implemented the holding of the

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(1) See Intervenors' Answer to NRC Staff Response to Intervenors' Motion for Summary Disposition and Licensees' Cross Motion for Summary Disposition, April 5, 1994, at 3.

First Circuit Court of Appeals in the CAN decision, a case directly on point.

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

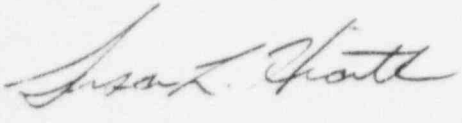
Intervenors and the petitioners in CAN raised the same legal issue: whether Section 189(a) hearing rights attach to de facto license amendments. CAN won the race to the courthouse, and they won their case, which the Commission has accepted. The Licensing Board's Order is merely an implementation of that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

The instant matter is but one example of the massive removal of items from nuclear power plant technical specifications, the consequence of which is the diminished universe of potential operating license amendments for which the AEA guarantees hearing rights. Intervenors hope that this is not the intended consequence of simplified technical specifications; however, others may not be as charitable in their assessment of the NRC's motives. Regardless of the intentions, the result is that public hearing rights are eroded. "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) (emphasis added). The public cannot fulfill this role if hearing rights are being vanished through semantic sleight-of-hand.

The erosion of opportunities for a hearing by labeling agency actions as something other than license amendments may at face value seem a clever ruse, but it has not withstood judicial scrutiny in CAN. The Licensing Board likewise has declined to endorse such a ploy.

Intervenors conclude that the Commission should affirm the Licensing Board's decision.

Respectfully submitted,



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DATED: May 29th, 1996

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 29th day of May, 1996, to the following:

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