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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Richard T. Kennedy
John F. Ahearne



In the Matter of

THE TOLEDO EDISON COMPANY AND
THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY

Davis-Besse Nuclear Power Station,
Unit No. 1

Docket No. 50-346

ORDER

By a confirmatory Order dated May 16, 1979, the Commission directed that the Davis-Besse facility, then in a shutdown condition, should remain shut-down until certain actions specified in the Order were satisfactorily completed, as confirmed by the Director of the Office of Nuclear Reactor Regulation. The Order also directed the licensees to accomplish, as promptly as practicable, certain long-term modifications. The Order states further:

Within twenty (20) days of the date of this Order, the licensees or any person whose interest may be affected by this Order may request a hearing with respect to this Order. Any such request shall not stay the immediate effectiveness of this Order.

A request for a hearing has been received from State Senator Tim McCormack of Ohio.

The Commission hereby directs that the Chairman of the Atomic Safety and Licensing Board Panel shall, pursuant to 10 CFR 2.105(3), select a board to

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determine whether the requester meets the requisite personal interest test and to conduct any hearing which may be required.*/

The subjects to be considered at the hearing shall include:

1. Whether the actions required by subparagraphs (a) through (g) of Section IV of the May 16, 1979 Order are necessary and sufficient and whether management competence and control are adequate to provide reasonable assurance that the facility will respond safely to feedwater transients, pending completion of the long-term modifications set forth in Section II. A contention challenging the correctness of the NRC Staff's conclusion that the actions described in subparagraphs (a) through (g) have been completed satisfactorily will be considered to be within the scope of the hearing. However, the filing of such a contention shall not of itself stay operation of the plant.

2. Whether the licensees should be required to accomplish, as promptly as practicable, the long-term modifications set forth in Section II of the Order.

3. Whether these long-term modifications are sufficient to provide reasonable assurance that the facility will respond safely to feedwater transients.

Resumed operation of the Davis-Besse facility on terms consistent with the Order of May 16, 1979 is not stayed by the pendency of these proceedings.

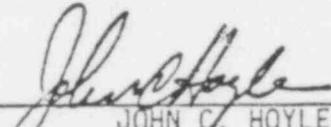
*/ Senator McCormack's original request was submitted prior to the issuance of the Commission's May 16 Order. By the time Senator McCormack had received a reply suggesting that he resubmit a request in accordance with the Order, the time in which to file had expired. In its filing of June 27, 1979, the Staff states that it "does not believe the request is inadequate for nontimeliness or for failure to be properly brought under the Order." We agree. Even if Senator McCormack's submission were untimely, which we have no need to decide, it would clearly meet the criteria of 10 CFR 2.714 for determining when an untimely filing is to be accepted.

Neither law nor the factual circumstances before us compel such a stay. In the event that a need for further enforcement action becomes apparent, either in the course of the hearing or at any other time, appropriate action can be taken at that time.

The NRC Staff has now determined that the actions set forth in subparagraphs (a) through (g) have been completed satisfactorily. It shall bring the matter before the Commission in a briefing as to the basis for its conclusions prior to permitting restart of the facility. That briefing will be open to the public. In the course of this briefing, the Commission will in no manner prejudice the merits of the adjudicatory hearing authorized by this Order. Any adjudicatory determination by the Commission that may arise from that hearing will be based solely on the record developed in that proceeding.*/

It is so ORDERED.

For the Commission



 JOHN C. HOYLE
 Acting Secretary of the Commission

Dated at Washington, D.C.
 this 5th day of July, 1979.

*/ The decision of the Licensing Board will be made on the basis of the record developed before it. Accordingly, pursuant to our rules, statements made by any person in the course of the Staff's briefing for the Commission may not be "pleaded, cited, or relied upon" in the adjudicatory proceedings before the Licensing Board, or in subsequent appellate proceedings before the Appeal Board. 10 CFR 9.103. If and when Commission review of that adjudication takes place, any party wishing to plead, cite, or rely upon the transcript of the briefing will be at liberty to do so. To that extent, owing to the unusual factual circumstances present here, we waive the prohibition contained in 10 CFR 9.103, in accordance with the provision of that rule authorizing such waiver by the Commission.

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