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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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Before the Atomic Safety and Licensing Appeal Board

In the matter of)
)
THE CLEVELAND ELECTRIC)
ILLUMINATING CO. ET AL.)
)
(Perry Nuclear Power Plant,)
Units 1 and 2))

Docket Nos. 50-440 OL
50-441 OL

MOTION FOR DIRECTED CERTIFICATION

I. INTRODUCTION

On February 11, 1985 Intervenor Ohio Citizens for Responsible Energy ("OCRE") moved the Licensing Board to appoint as a Board Witness on Issue #16 (on Transamerica Delaval diesel generator reliability) Mr. George Dennis Eley of Ocean Fleets Services. Mr. Eley testified on diesel generator reliability at the Shoreham proceeding. OCRE would sponsor Mr. Eley as OCRE's witness but for financial lack. Citing due process, the need for administrative proceedings to be decided on a full and complete record, and the NRC's policy in Consumers Power Co. (Midland Plant), ALAB-382, 5 NRC 603, 607 (1977), OCRE asked the Board to appoint Mr. Eley as its own witness.

Applicants and Staff responded to OCRE's Motion, and OCRE sought leave to reply to Applicants' response.

On March 13, 1985 the Licensing Board issued a confirmatory Order announcing its decisions with regard to this motion and

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motions for summary disposition of all the issues in this proceeding. No reasoning was given for any of the rulings; an explanation is to be filed "at a subsequent date." In the March 13 Order, the Licensing Board denied Applicants' motion for summary disposition of Issue #16 and also denied OCRE's February 11 motion seeking the appointment of Mr. Eley as a Board Witness on that issue.

Because this action violates OCRE's rights to due process by making meaningful participation in the hearing on Issue #16 impossible, OCRE hereby moves that the Appeal Board direct the Licensing Board, pursuant to 18 CFR 2.718(i):

1. to provide a written explanation of its decision denying OCRE's February 11 motion;
2. to certify to the Appeal Board for immediate appellate review the Licensing Board's decision (and explanation for same) denying OCRE's motion; and
3. to continue that part of the proceeding pertaining to Issue #16 pending the Appeal Board's disposition of the instant motion.

OCRE also respectfully requests that the Appeal Board reverse the Licensing Board's Order denying OCRE's February 11 Motion.

II. STANDARDS FOR DIRECTED CERTIFICATION

Directed certification is granted only when the Licensing Board's ruling either (1) threatens the party adversely affected with immediate and serious irreparable harm which, as a

practical matter, cannot be alleviated by a later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-635, 13 NRC 309 (1981); Public Service Electric and Gas (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977).

A party seeking directed certification under 10 CFR 2.718(i) must establish, at a minimum, that a referral under 10 CFR 2. (f) would have been proper; i.e., that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752 (1975).

All three standards are met herein. First, the Licensing Board's action threatens OCRE with irreparable harm that cannot be alleviated by a later appeal. As explained fully in OCRE's February 11 motion, appointment of Mr. Eley as a Board Witness on Issue #16 is necessary to provide OCRE with due process. Due process of law is guaranteed to every litigant by the Fifth Amendment to the Constitution. Note that "there can be no compromise [of the right to due process] on the footing of convenience of expediency, or a natural desire to be rid of harassing delay. . . ." Ohio Bell Telephone Co. v. Public

Utilities Commission, 301 U.S. 292, 304-5 (1937) (Cardozo, J.).

Due process requires that parties be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See also Zotos International v. Kennedy, 460 F.Supp 268, 274 (D.D.C. 1978) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it'" quoting Mathews v. Eldridge 424 U.S. 319, 324 (1976), and Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971) ("What counts is the reality of an opportunity to submit an effective presentation to assure that [the decisionmakers] will take a hard look at the problems.")

Without the relief requested in OCRE's February 11 Motion, meaningful participation in the hearing on Issue #16 will be impossible. Without the ability to submit an effective presentation which can affect the outcome of the decision, due process is lacking. Indeed, the denial of the right to present evidence and to summon witnesses of a party's choice constitutes denial of due process. Union Bag-Camp Paper Corp. v. FTC, 233 F.Supp 660, 666 (SDNY, 1964).

It must also be noted that OCRE relied heavily on the testimony of inter alia, Mr. Eley, in the Shoreham proceeding in opposing Applicants' motion for summary disposition of Issue #16. See "OCRE Response to Applicants' Motion for Summary Disposition of Issue 16", filed February 27, 1985, especially Exhibits 25, 29, 33, and 54. It is inherently unfair to deny

summary disposition of an issue and also to prevent the appearance at the hearing of the witness on which the intervenor's showing that genuine issues of fact exist relied.

The courts have held that denial of due process constitutes irreparable harm. See Heublein, Inc. v. FTC, 539 F.Supp 123, 128 (D. Conn, 1982); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir, 1972); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir 1962). This injury cannot be alleviated by a later appeal; the cases cited demonstrate that when fundamental constitutional rights are violated, a party is not required to wait for appellate review. Rather, irreparable injury is established when an egregious due process violation is documented. Compare Armstrong v. Manzo, which held that the ability to challenge an order after it has been issued is not a substitute for an opportunity to contest its entry.

Thus, the first showing, that of irreparable harm, has been met. The second, alternative showing is also met. The essence of the Licensing Board's decision is that it is not interested in hearing the facts on Issue #16, at least not any facts different from those proffered by Staff and Applicants. Since it is the Licensing Board's job to hear all the facts, and to decide the issues based on a full and complete record (see Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2nd Cir, 1965) and other cases cited in OCRE's February 11 Motion), an unwillingness of the Board to perform its job constitutes a pervasive and unusual alteration of the basic

structure of the proceeding.

Finally, the public interest will suffer if a hearing is held on Issue #16 without the testimony of Mr. Eley. It is the NRC's responsibility to protect the public interest, and in this proceeding, that responsibility has been delegated to the Licensing Board. See Scenic Hudson, supra, and the discussion at p. 8 of OCRE's February 11 Motion. The Licensing Board does not serve the public interest by proceeding with an unfair hearing and limiting the record to evidence favorable to Applicants.

Applicants will no doubt argue that they will be irreparably harmed and will suffer unusual delay and expense if the instant motion is granted. Such arguments must be ignored. The only "harm" they will suffer is that of litigation expense, which is not "irreparable harm." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977). Of course, any claims that hearing this matter will delay the Perry fuel load date and thus cause Applicants to incur additional costs are irrelevant. Power Reactor Development Corp. v. International Unions, 367 U.S. 396, 415 (1961) (holding that the Commission may not consider an applicant's financial investment in deciding cases.)

Compare Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 (1973) (delay in OL issuance due to unresolved safety problems demonstrates that the system is working properly, and delay is mandated

because the facility is not safe to operate.)

III. CONCLUSION

The Licensing Board's unexplained Order denying summary disposition of Issue #16 and also denying OCRE an opportunity to participate in the hearing on that issue in a meaningful manner, by denying OCRE's request that Mr. Eley be appointed as a Board Witness, constitutes a violation of OCRE's right to due process.

The Order is also illogical, unfair, contrary to the public interest, and antithetical to the Licensing Board's obligation to decide the issues on the basis of a full and complete record.

The standards for directed certification are thus met, and OCRE is entitled to the relief sought.

OCRE prays the Appeal Board is so moved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 16th day of MARCH, 1985 to those on the service list below.

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