



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

June 26, 1986

The Honorable John F. Seiberling  
United States House of Representatives  
Washington, D. C. 20515

Dear Congressman Seiberling:

This is in response to your letter of April 22, 1986 concerning the Commission's order of April 18, 1986.

The Commission intervened in the Perry proceeding in order to correct the Appeal Board's misinterpretation of Commission case law and precedent. In doing so, the Commission was exercising its authority to supervise the adjudication process and to assure that it was functioning properly.

Commission decisions hold that a person who seeks to reopen the record of an extensive adjudicatory proceeding once litigation has been completed bears a heavy burden. In the Perry proceeding, the Commission majority concluded that Ohio Citizens for Responsible Energy had not only failed to establish that the standards for reopening the record were met, but had explicitly conceded that the recent earthquake had no engineering significance for the Perry facility. Under these circumstances, the Commission majority found that there was no justification for additional litigation regarding the earthquake.

Our ruling does not mean that the issues occasioned by the January earthquake are not being considered by the NRC. On the contrary, as we noted in our testimony before the House Subcommittee on Energy and the Environment, Committee on Interior and Insular Affairs, the NRC staff has treated the earthquake as a high priority item. The staff has made two special post-earthquake inspections of Perry and concluded that although there was no evidence of specific plant damage caused by the earthquake, more confirmatory work is required before the plant will be permitted to operate at power levels above 5% of rated thermal power.

As the Commission stated in its order, prior to Commission approval of a full power license it will expect a detailed briefing regarding the staff's review of the seismic issues raised by the occurrence of the recent earthquake. The Commission's order explicitly stated that OCRE will be afforded an opportunity to make a presentation to the Commission regarding this matter at the same time. While the Commission recognizes that such a presentation is not the equivalent of an opportunity to litigate the matter, it is important to emphasize, as the Commission did in its recent order, that not every matter which must be considered prior to licensing must or

should be addressed in the adjudicatory context. (As noted earlier in this letter, the Commission ruled that the legal standards for further hearings were not met in the papers filed by OCRE in the Perry case.)

Please be assured that all matters having safety significance for the Perry facility will be carefully considered by the Commission prior to its vote on a full power license.

Commissioner Asselstine adds:

I do not believe the the Commission should have interposed itself into the Perry proceeding. The Appeal Board had developed an eminently sensible solution to a difficult problem. The Commission should simply have permitted the Board to proceed as it outlined in its orders. At a minimum, the Commission should have heard from the parties and should not have summarily disposed of the Appeal Board's "mini-hearing" and the intervenor's motion to reopen. The fact that the intervenor will be given an opportunity to speak for a few minutes at the Commission meeting, during which the Commission usually decides whether to issue a full power license, will not provide a meaningful opportunity for the intervenor to present its case and is not an adequate substitute for a close look at the issue by the Appeal Board.

The Commission argues that there was no justification for continued litigation in Perry because OCRE, the intervenor, had not met the standards for reopening the record and had conceded that the recent earthquake had no engineering significance for the Perry facility. Unfortunately, that does not tell the whole story. After reviewing the filings of all of the parties to the proceeding, the Appeal Board felt that it needed additional information in order to make a determination on one part of the test for reopening the record, i.e. whether the earthquake presented a safety significant issue. Instead of allowing the Board to obtain what it considered to be necessary information, the Commission invoked technical pleading requirements, overruled the Board, and dismissed the issue without ever hearing from any party or the Board. In other words, the Board did not feel comfortable ruling on the motion to reopen without additional information. Further, while OCRE did concede that "the high frequency exceedances of the SSE design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance," that is largely irrelevant. The intervenor did not abandon its claim that the earthquake raises concerns about the adequacy of the seismic design basis of the plant and of compliance with NRC regulations. These are the very subjects on which the Appeal Board wished to obtain additional information.

The Perry case is just another illustration of the Commission's distaste for the hearing process and for public participation in that process. The Commission has been all too eager in recent cases to interpose itself into proceedings to prevent the consideration of issues by hearing boards. Recent rulings by the Commission in a number of cases have made it harder and harder for the public to raise new issues and to participate meaningfully in the resolution of those issues. The Commission has argued in each case that its actions are appropriate because the issue will be considered by the NRC staff outside of the hearing process. That is hardly an adequate substitute for meaningful participation by the public and for an independent review of the issues by a licensing board.

The Commission's obvious dislike for the hearing process, as evidenced by its actions in Perry, does not bode well for the public's right to participate should Congress enact the NRC's licensing reform bill (H.R. 1447 and S. 836). In that bill, any opportunity for a hearing at the preoperation stage on issues such as emergency planning, quality assurance in construction, and operations and management qualifications is left totally within the discretion of the Commission. The bill provides no absolute right to a hearing as does Section 189 of the Atomic Energy Act. Given the Commission's performance in recent cases to limit public access to the hearing process and the fact that the Commission has only on the rarest of occasions granted a discretionary hearing, the Commission is not likely to find that "an issue consists of a substantial dispute of fact, necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except at a hearing..." (S. 836 and H.R. 1447 §101).

I would like to add the following comments:

I disagree with Commissioner Asselstine's characterization of the Commission's actions in the Perry proceeding and its attitude toward the hearing process and public participation. The maintenance of an effective administrative process requires that at some point, hearings must become final. Toward that objective, procedural requirements are established -- one of them, the requirement that once the record of a hearing is closed, a party wishing to reopen that record must make a high threshold showing. The petitioners in this case failed to make that showing, and for that reason, the majority of the Commission stepped in to correct a procedural error by its Appeal Board. In my view, this was in no sense a reflection of hostility to the hearing process generally, or to the rights of participants in it. I believe that the

approach taken by the Commission majority was consistent with its obligations both to the health and safety of the public and to the legal rules and precedents by which the Commission is bound.

Sincerely,

  
Nunzio J. Palladino

# Congress of the United States

House of Representatives

Washington, D.C. 20515

April 22, 1986

The Honorable Nunzio J. Palladino  
Chairman  
Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, D.C. 20555

Dear Mr. Chairman:

We are writing to express our grave concern with the Commission's April 18, 1986 action vacating the Atomic Safety and Licensing Appeal Board's order for an exploratory "mini-hearing" dealing with the effect of the January earthquake on the safe operation of the Perry nuclear power plant.

As you know, following the January earthquake that struck north-east Ohio, the Ohio Citizens for Responsible Energy (OCRE) filed a motion to reopen the hearing record for the Perry plant. The Appeals Board felt that it needed more information before it could rule on the safety significance of the OCRE motion. So the Appeals Board took an eminently sensible action, and decided to hold a one day "mini-hearing" to ensure that there had been an adequate examination of all the issues in the case. Thus the Board established a reasonable procedure to obtain more input from the public concerning this specific case, but without causing any delay in the efforts of the Cleveland Electric Illuminating (CEI) to obtain a full power license for the plant.

The Commission's rash decision in the Perry case leaves the Appeals Board unable to obtain answers to any questions that arise as a result of a motion to reopen the record. It also denies the public the right to be heard on any issues that arise after the initial decision of the Appeals Board. As Commissioner Asselstine stated in his dissenting views in this decision, "Thus, in the future, whether a Board can consider a safety issue in some detail before ruling on a motion to reopen will depend upon how adept a particular intervenor is in meeting these stringent pleading requirements on the first round of pleadings. If the intervenor does not make an open and shut case in his initial pleading, he will not get a second chance." Under these new procedures dictated by the Commission, severe safety problems such as those that plagued the Zimmer plant might never be discovered.

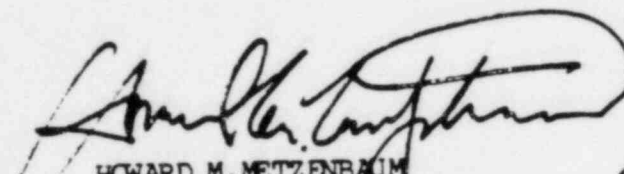
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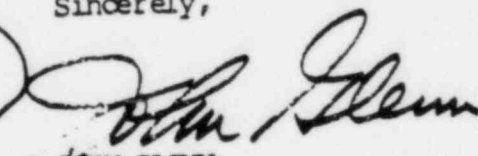
The Honorable Nunzio J. Palladino  
April 22, 1986  
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We feel that it was highly improper for the Commission to interject itself into the orderly proceedings of the Appeals Board in this case, with the result of summarily cutting off all public input into the decision making process. At the very least, the Commission should have heard from the parties to the case before issuing its order. The Commission's actions in this case demonstrate a total disregard for the necessity that the public be heard on issues affecting the safe operation of nuclear power plants.

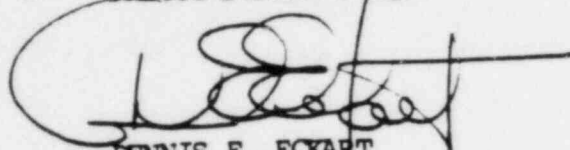
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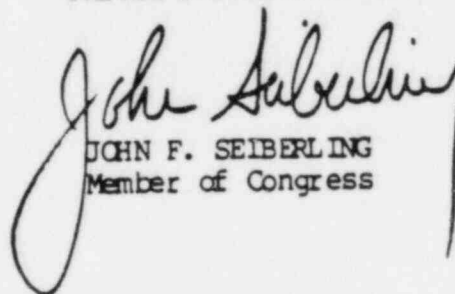
HOWARD M. METZENBAUM  
United States Senate



JOHN GLENN  
United States Senate



DENNIS E. ECKART  
Member of Congress



JOHN F. SEIBERLING  
Member of Congress



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

PDR

June 26, 1986

The Honorable Howard M. Metzenbaum  
United States Senate  
Washington, D. C. 20510

Dear Senator Metzenbaum:

This is in response to your letter of April 22, 1986 concerning the Commission's order of April 18, 1986.

The Commission intervened in the Perry proceeding in order to correct the Appeal Board's misinterpretation of Commission case law and precedent. In doing so, the Commission was exercising its authority to supervise the adjudication process and to assure that it was functioning properly.

Commission decisions hold that a person who seeks to reopen the record of an extensive adjudicatory proceeding once litigation has been completed bears a heavy burden. In the Perry proceeding, the Commission majority concluded that Ohio Citizens for Responsible Energy had not only failed to establish that the standards for reopening the record were met, but had explicitly conceded that the recent earthquake had no engineering significance for the Perry facility. Under these circumstances, the Commission majority found that there was no justification for additional litigation regarding the earthquake.

Our ruling does not mean that the issues occasioned by the January earthquake are not being considered by the NRC. On the contrary, as we noted in our testimony before the House Subcommittee on Energy and the Environment, Committee on Interior and Insular Affairs, the NRC staff has treated the earthquake as a high priority item. The staff has made two special post-earthquake inspections of Perry and concluded that although there was no evidence of specific plant damage caused by the earthquake, more confirmatory work is required before the plant will be permitted to operate at power levels above 5% of rated thermal power.

As the Commission stated in its order, prior to Commission approval of a full power license it will expect a detailed briefing regarding the staff's review of the seismic issues raised by the occurrence of the recent earthquake. The Commission's order explicitly stated that OCRE will be afforded an opportunity to make a presentation to the Commission regarding this matter at the same time. While the Commission recognizes that such a presentation is not the equivalent of an opportunity to litigate the matter, it is important to emphasize, as the Commission did in its recent order, that not every matter which must be considered prior to licensing must or



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CHAIRMAN

June 26, 1986

The Honorable John Glenn  
United States Senate  
Washington, D. C. 20510

Dear Senator Glenn:

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June 26, 1986

The Honorable Dennis E. Eckart  
United States House of Representatives  
Washington, D. C. 20515

Dear Congressman Eckart:

This is in response to your letter of April 22, 1986 concerning the Commission's order of April 18, 1986.

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