

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC	)	Docket Nos. 50-440 OL
ILLUMINATING CO. ET AL.	)	50-441 OL
	)	
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

MOTION FOR A CONTINUANCE

I. INTRODUCTION

The Commission has scheduled a meeting for September 5, 1986 at which it will consider issuance of a full power license for Unit 1 of the Perry Nuclear Power Plant. See 51 FR 29043 (August 13, 1986), Sunshine Act Meetings ("Friday, September 5, 10:00 AM, Discussion/Possible Vote on Full Power Operating License for Perry-1"). At this meeting the Commission will also consider the implications of the January 31, 1986 earthquake centered about 10 miles from the Perry facility. See CLI-86-07, slip op. at 4. Because issuance of the full power license will deprive Intervenor Ohio Citizens for Responsible Energy ("OCRE") of its rights and status as an intervenor, thereby prejudicing its case

on judicial review of CLI-86-07, OCRE hereby moves that the Commission continue its scheduled meeting and refrain from issuing a full power license for Perry Unit 1 pending the outcome of Ohio Citizens for Responsible Energy, Inc. v. NRC, Case No. 86-3355, before the Sixth Circuit Court of Appeals.

As this motion seeks a stay of a proposed Commission action, the four factors of 10 CFR 2.788(e) are addressed below and are found to weigh in OCRE's favor.

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EXHIBIT

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## II. GROUNDS FOR THE CONTINUANCE

### A. Likelihood of Prevailing on Appeal

As thoroughly discussed in the Petitioner's Brief, filed August 19, 1986 with the Court, the NRC in CLI-86-07 clearly violated the Atomic Energy Act and the Administrative Procedure Act. Surely such blatant disregard for statutory requirements as exhibited by the Commission's Order will not withstand judicial scrutiny.

In CLI-86-07 the Commission violated Section 189(a) of the Atomic Energy Act by summarily denying OCRE its right to a hearing guaranteed by that section. That the Commission persists in skirting the requirements of Section 189(a), despite judicial admonition in Union of Concerned Scientists v. NRC ("UCS"), 735 F.2d 1437 (D.C. Cir. 1984) and San Luis Obispo Mothers for Peace et al v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), does not bode well for the fate of CLI-86-07.

The Commission's action was furthermore an arbitrary and capricious abuse of discretion. CLI-86-07 is the culmination of a series of abuses never before combined in a Commission action.

Not content to sua sponte interfere with the orderly progress of the seismic issue before the Appeal Board, the proper tribunal for its consideration, the Commission, without benefit of advance public notice of its 5 PM April 17 affirmation meeting (as required by the Sunshine Act) and without giving any party to the Perry proceeding an opportunity to be heard, ruled

that the Appeal Board did not have the powers clearly accorded to it by the NRC's own regulations (e.g., 10 CFR 2.785). In a particularly peculiar inversion of logic, the Commission ruled that the Appeal Board did not have the authority to conduct an exploratory "mini-hearing" to aid its determination on a motion to reopen the record, a procedure the Appeal Board had used previously without Commission interference. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340 (1983). It is beyond comprehension why the Commission suddenly finds odious the very same procedure it previously accepted. Surely the Court will look upon CLI-86-07 with disfavor.

#### B. Irreparable Harm

Under Section 189(a) of the Atomic Energy Act, OCRE is entitled to an adjudicatory hearing on issues material to the ultimate licensing decision. UCS at 1442. The issue of the adequacy of the Perry seismic design in light of the January 31 earthquake is, by the Commission's regulations (and its own admission in CLI-86-07), material to the ultimate licensing decision. However, once the Commission issues a full power license for Perry (and necessarily disposes of the seismic issue) the "ultimate licensing decision" is made. The proceeding is terminated, and with it OCRE's rights under the Atomic Energy Act.

Thus, a full power licensing decision will render moot OCRE's case before the Court, as OCRE will no longer possess the

right to a hearing upon which it has staked a claim in its Petitioner's Brief. A continuance to preserve OCRE's rights and status is therefore necessitated.

#### C. Harm to Other Parties

The only party which could possibly be harmed by a continuance is Applicants. However, Applicants have not demonstrated that they are in fact ready to receive a full power license. Events such as the infamous charcoal fire in the offgas system (and others identified in the LERs) demonstrate that Applicants are plagued by continual human error apparently rooted in a persistent inability to follow procedures. Applicants therefore might benefit from more experience at low power during which they can rectify this deficiency.

The series of poor performance at Fermi-2 and River Bend are perhaps indicative of premature issuance of full power licenses, to the detriment of everyone. One of the lessons of the Three Mile Island accident and the June 1985 Davis-Besse incident is that, regardless of the offsite consequences, the utility is certainly a casualty. More time spent now correcting weaknesses could prevent costly shutdowns later.

#### D. Where the Public Interest Lies

There can be no doubt that the public interest demands a full and fair consideration of the earthquake issue with opportunity for meaningful participation by OCRE. Congress vested in the public, as well as the NRC staff, a role in

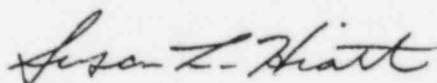
assuring safe operation of nuclear power plants." UCS at 1447. However, the scheduled Commission meeting, bearing little resemblance to an adjudicatory hearing held pursuant to the Administrative Procedure Act, can in no way fulfil the Congressional mandate. The public interest would clearly be served by a continuance to preserve OCRE's right to a hearing under the Atomic Energy Act.

The catastrophe at Chernobyl also demonstrates the weaknesses of a system which stifles public scrutiny. The victims of such a disaster are not limited to those who would have exercised hearing rights had they been available, but include the population at large. The Commission's mandate to safeguard the health and safety of the public dictates that a decision to license Perry, absent a full investigation into the safety threat posed by observed local seismicity, would be tantamount to an abrogation of statutory responsibility. The overriding need to protect the public requires that full power licensing for Perry be withheld.

### III. CONCLUSION

The four factors of 10 CFR 2.788(e) favor a continuance of the Commission's scheduled meeting pending the outcome of OCRE's case on judicial review of CLI-86-07. OCRE prays that the Commission is so moved.

Respectfully submitted,

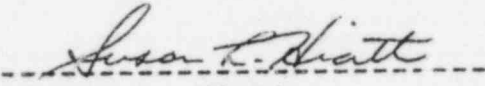


DATED: AUG. 26, 1986

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## 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 26<sup>th</sup> day of Aug, 1986 to those on the Service List below.

  
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