UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	:	
Ohio Edison Company (Perry Nuclear	:	
Power Plant, Unit 1) and Cleveland	:	Docket Nos. 50-440A
Electric Illuminating Company, et al.	:	and 50-346A (TAC
(Perry Nuclear Power Plant, Unit 1	:	Nos. 66288, 68373,
and Davis-Besse Nuclear Power	:	68880)
Station, Unit 1	:	

OPPOSITION OF THE CITY OF CLEVELAND, OHIO,
TO A HEARING WITH RESPECT TO THE DENIAL OF
APPLICATIONS TO SUSPEND ANTI-TRUST LICENSE
CONDITIONS AND PETITION TO INTERVENE IN
THE EVENT HEARING IS REQUESTED AND IS GRANTED

To the Honorable, the Commissioners of the
Nuclear Regulatory Commission:

The City of Cleveland, Ohio (Cleveland) responds to the Notice, published in the Federal Register on May 1, 1991 (Vol. 56, No. 84, p. 20057). That Notice concerns the Nuclear Regulatory Commission's (NRC or Commission) denial of the applications of Ohio Edison Company (OE) and of Cleveland Electric Illuminating Company (CEI) and Toledo Edison Company (TE) (collectively "Applicants"). Applicants sought suspension of the anti-trust conditions contained in the Perry Unit 1 and Davis-Besse Unit 1 construction permits and operating licenses "until such time as there may be a factual basis for imposing [the conditions]" (OE App. 80-81). For the reasons hereinafter stated Cleveland opposes any request for hearing by OE, CEI and/or TE respecting the Commission's denial of their applications or any request for hearing by any person whose interest may be affected. In the

hearing by any person whose interest may be affected. In the event, however, that a request for hearing is filed and is granted Cleveland, additionally, includes herein a request for intervention.

1. Cleveland is a municipal corporation, organized and existing under and by virtue of the Constitution and Laws of the State of Ohio and the charter adopted by its citizens.

2. Cleveland owns and operates Cleveland Public Power (CPP), an electric distribution system in Cleveland serving the requirements for electricity of certain portions of Cleveland.

3. CPP is in competition with CEI for the sale of electricity to residential, commercial and industrial customers in certain areas of the City of Cleveland, in many cases on a door-to-door basis.

Cleveland first shows that the Applicants are not entitled to a trial-type hearing. Cleveland shows also that no hearing is required by the Atomic Energy Act or the Administrative Procedure Act on Applicants' request or on the request for hearing by a person whose interest may be affected. Cleveland finally shows that if a hearing is requested and granted, Cleveland is entitled to intervention in the proceeding as a party-intervenor with full rights of participation as a party.

I. Applicants Are Not Entitled to Demand A Hearing Either By Reason of the Provisions of the Atomic Energy Act or the Administrative Procedure Act and No Hearing is Required Because There Are No Genuine, Material Issues of Fact, Only A Question of Law To Presented.

The Notice published in the Federal Register states that "the licensees [i.e., the Applicants], may demand a hearing with respect to the denial" of their applications for suspension of the anti-trust license conditions (material in brackets supplied). The Notice does not cite to any provision of the Atomic Energy Act (AEA) or, for that matter, to any other statute that gives the Applicants the right to "demand" a hearing. The Notice goes on to state that any "person whose interest may be affected by this proceeding may file a written petition for leave to intervene." The Notice utilizes the language of Section 189(a) of the AEA (42 USC §2239(a)). From this language, and having searched in vain the AEA and the Administrative Procedure Act for a provision that supports the Notice's statement that the Applicants may "demand" a hearing, it appears that the Commission could only have reference to Section 189(a).

A. Section 189(a) does not confer any hearing rights on the Applicants.

Section 189(a) refers to, and confers upon, persons other than Applicants "whose interest may be affected" by the proceeding for the "granting, suspending, revoking, or amending of any license or construction permit" the right to request a hearing and to be admitted as a party to the proceeding. The intent of Congress in enacting Section 189(a) was to provide for public participation when any one of the categories enumerated in that section is involved. Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, 735 F.2d 1437, 1446, citing Circuit Judge Skelly Wright's dissenting opinion in Bellotti v.

NRC, 725 F.2d 1380, 1389 (D.C. Cir. 1983). The court stated that in enacting Section 189(a), "we believe Congress vested in the public, as well as the NRC Staff, a role in assuming safe operation of nuclear power plants". (735 F.2d at 1447, emphasis supplied). Consequently, it is beyond dispute that Section 189(a) confers no rights whatsoever on the Applicants respecting hearings, and as Cleveland shows, infra, pp. 5-8, no such hearing rights are conferred either on Applicants, or persons whose interest may be affected, in the circumstances of this case where genuine issues of material fact are not raised by the requests. Cf. Union of Concerned Scientists, 735 F.2d at 1448, citing BPI v. AEA, 502 F.2d 424, 428 (D.C. Cir. 1974) and National Souvenir Center, Inc. v. Historic Figures, Inc., 728 F.2d 503, at 512-513 (D.C. Cir. 1984).

B. Assuming, arguendo, that Section 189(a) confers hearing rights on Applicants, the applications to suspend one of the license conditions is not one of the categories enumerated in that Section

The "right" to a hearing under Section 189(a) exists only if the proceeding is for one of the categories enumerated in that Section. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1312, 1314 (D.C. Cir. 1984). The applications for temporary suspension of a condition of the license, not for suspension of the license itself, is not one of the categories enumerated in Section 189(a). The applications are not for the grant of a construction permit or a license. They are not applications to suspend a license or construction permit. They are not applications to revoke a license or construction permit. They are not

applications for amendment of the licenses, notwithstanding CEI's and TE's effort to describe them as amendments. By no stretch of the meaning of "amendment" is the temporary suspension of the anti-trust conditions an "amendment". To "amend" is to improve, or to change for the better, or to correct an error, and an "amendment" is a change for the better, or a correction, or an improvement, involving no change in the substance or essence. Black's Law Dictionary, Revised Fourth Edition, p. 106. Applicants' proposal to eliminate the anti-trust license condition which would free them to resume their anti-trust conduct can hardly qualify as correcting an error, a change for the better or an improvement, and certainly it is not a change that does not change the substance or essence of the license. In fact, the elimination of these vital anti-trust license conditions would result in effectively issuing a new and very different license to Applicants. Moreover, because the applications do not fit any of the categories that confer on a person whose interest may be affected the right to request a hearing, such person is not entitled to a hearing under Section 189(a).

C. Assuming, arguendo, that Section 189(a) confers hearing rights on Applicants and that the temporary suspension of the anti-trust license conditions is one of the categories enumerated in Section 189(a), (1) neither a trial type of hearing nor any hearing is required either by Section 189(a) or the Administrative Procedure Act, and (2) in any case, Applicants have had a hearing

a. Neither a trial-type hearing nor any hearing is required

CEI and TE concede (Application, pp. 44-46) that

neither Section 5 of the Administrative Act nor Section 189(a) require a trial-type hearing on the record and that no hearing of any kind is required. CEI and TE stated (id):

> "Under Section 5 of the Administrative Procedure Act ("APA"), 5 U.S.C. §554 (Supp. 1988), the formal hearing procedures set forth in APA sections 7 and 8 are applicable only if the adjudication in question 'is required by statute to be determined on the record after opportunity for an agency hearing . . . .' Based on an exhaustive review of the legislative history of the Act, the Commission has held that Section 189 of the Act, discussed above, does not require a Section 554 hearing in every licensing or license amendment case. Kerr-McGee Corporation, 15 N.R.C. 232 (1982). Rather, the NRC found the legislative history to support the view that informal procedures may be better suited than trial-type evidentiary hearing to certain adjudications:
>
> > 'The emphasis, today, in the absence of a specific statutory directive as to the requisite form of a hearing, is on the requirements of a particular case, not on formalistic interpretations of statutory words . . . .'
>
> "Id. at 253 (quoting RCA Global Communications v. FCC, 599 F.2d 881, 886 (2d Cir. 1977)). Thus, the Commission concluded that the word "hearing" in section 189(a) does not trigger the formal hearing requirements of APA Section 5.
>
> "In this regard, the Commission has noted that a formal hearing is not required under Section 189 unless there are disputed adjudicative facts to be resolved before a license is amended. Kerr-McGee, 15 NRC at 255. In applying the same principle, the courts have gone even further: even where a statute imposes a requirement for an "on the record hearing" prior to agency action, thus triggering the hearing requirements of APA Section 5, federal courts have repeatedly held that a formal evidentiary hearing is required only where there are genuine issues of material fact to be resolved. See e.g., Vermont Department of Public Service v. FERC, 827 F.2d 127 (1987); Consolidated Oil & Gas Co. v. FERC, 806 F.2d 275 (D.C. Cir. 1986); Cerro Wire & Cable Co. v. FERC, 677 F.2d 124 (D.C. Cir. 1982). 'A hearing need not be commenced simply to resolve . . . legal or policy issues.' Kerr-McGee, 15 NRC at 255 (citing Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1220 (D.C. Cir. 1975)).
>
> "Consequently, neither the Atomic Energy Act nor the APA require that any formal hearing be held with respect to this license amendment application, even if one should be request-

ed by an interested party, where there are no genuine issues of material fact to be resolved."

CEI and TE could also have cited Cities Service Gas Co. v. FPC, 535 F.2d 1278, 1290 (D.C. Cir. 1976), McCulloch Interstate Gas Corp. v. FPC, 536 F.2d 910, 913 (CA 10, 1976); Otter Tail Power Co., v. FPC, 536 F.2d 240, 242 (CA 8, 1976); Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 501 (CA 4, 1973). There the court said that no formal evidentiary hearing is required "where there are no genuine, relevant, material, factual questions in dispute." In the present matter, there are no disputed adjudicative facts that need to be resolved. Only legal issues are involved.

b. Applicants Have Had Due Process; They Have Had a Hearing

In their applications and in supplementary pleadings, in response to pleadings filed by the Department of Justice, Cleveland and others, the matter of the applications has been thoroughly canvassed, the Commission's decision addressed the contentions of the Applicants and the Commission has set forth the reasons for its conclusion that the applications should be denied. As is well-recognized in Federal administrative law, no other hearing is required, assuming that there is a requirement for hearing. Citizens For Allegan County, Inc. v. FPC, 414 F.2d 1125, 1129 (D.C. Cir. 1969).

D. There is no occasion for a hearing because the Commission lacks the authority to grant the relief requested

For the sake of brevity, Cleveland incorporates by

reference its arguments on this point in its answers to the applications of OC, CEI and TE (E.g., Answer in Opposition to OE's Application, pp. 24-52). The Commission, having denied the applications, did not address Cleveland's arguments (Decision, p. 13, n. 18), but before the Commission orders and embarks upon a hearing on the basis of a request therefor by the Applicants or any one of them, or on the request of any person whose interests may be affected, the Commission must address Cleveland's arguments respecting the Commission's lack of authority to grant the relief requested. In that connection, the Commission must also address Cleveland's arguments that res judicata, collateral estoppel and laches bar the grant of the relief requested by the Applicants (Answer in Opposition to OE's Application, pp. 53-86). To proceed to a hearing where the Commission has no authority to grant the relief requested, would be a wasteful and useless undertaking.

II. In The Event That The Commission Orders That A Hearing Be Held, Cleveland Is Entitled To Intervention

Cleveland is already a party in Docket Nos. 50-440A and 50-346A. Cleveland was actively involved in the anti-trust review hearings that culminated in the inclusion of the anti-trust conditions, that the Applicants seek to obliterate, in the construction permit and subsequently in the operating license. It appears, therefore, that Cleveland is not required to petition to intervene in order to have intervenor status in any hearing that may be held. Since, however, the Notice appears to require

such a petition, out of an abundance of caution, Cleveland applies for intervention in the event a hearing is ordered. As should be evident, however, from Cleveland's opposition to a hearing set forth above, Cleveland, although an interested person whose interests are affected, is not requesting a hearing under Section 189(a).

Cleveland is a beneficiary of the anti-trust conditions which the Applicants seek to eliminate. Therefore, its interests would be affected, and affected adversely, if the anti-trust conditions were to be suspended. The anti-trust conditions mandated access to CEI's transmission facilities and gave Cleveland access to power from sources other than CEI with resulting substantial savings that has enabled Cleveland's municipal electric operations to survive and to continue as a viable competitor of CEI, bringing to the citizens of Cleveland the important benefits of reasonably priced electricity.

To suspend the anti-trust conditions, even temporarily, would be to remove the constraints on anti-trust conduct by Applicants. Applicants' suggestion that if they violate the anti-trust laws, Cleveland can bring a civil anti-trust action, is not worthy of address by Cleveland or consideration by the Commission.

WHEREFORE, Cleveland requests that the Commission deny any and all requests for hearing whether by the Applicants or by persons whose interest may be affected, for each and all of the reasons heretofore presented in this pleading. Applicants have

all of the above, if the Commission grants a hearing, Cleveland's petition to intervene be granted and that it be admitted to the proceeding with full rights of a party.

Respectfully submitted

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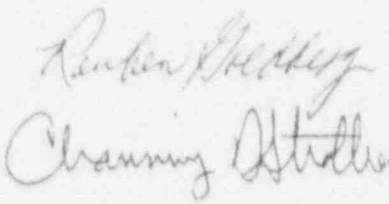

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May 31, 1991

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	:	
Ohio Edison Company (Perry Nuclear	:	
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(Perry Nuclear Power Plant, Unit 1	:	Nos. 66288, 68373,
and Davis-Besse Nuclear Power	:	68880)
Station, Unit 1)	:	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Opposition of the City of Cleveland, Ohio, to a Hearing With Respect to the Denial of Applications to Suspend Anti-Trust License Conditions and Petition to Intervene in the Event Hearing is Requested and is Granted" have been served upon the parties or their attorneys on the attached Service List, this 31st day of May, 1991, by deposit in Washington, D.C. in the United States Mail, first class, postage prepaid.

Reuben Goldberg
Attorney for City of Cleveland, Ohio

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Ohio Edison Company (Perry Nuclear	:	
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(Perry Nuclear Power Plant Unit 1	:	Nos. 66288, 68373,
and Davis-Besse Nuclear Power	:	68880)
Station, Unit 1)	:	

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[Docket Nos. 50-440A AND 50-346A]

Ohio Edison Co.; The Cleveland Electric Illuminating Co.; The Toledo Edison Co.; Notice of Denial of Applications for Amendments to Facility Operating Licenses and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) has denied requests by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (the licensees) for amendments to Facility Operating License Nos. NPF-58 and NPF-3, issued to the licensees for the operation of the Perry Nuclear Power Plant, Unit 1, and the Davis-Besse Nuclear Power Station, Unit 1, located in Lake County and Ottawa County, Ohio, respectively. The application of Ohio Edison, dated September 18, 1987, pertained solely to License No. NPF-58, while the joint application of Cleveland Electric Illuminating and Toledo Edison, dated May 2, 1988, related to both licenses. Notifications of receipt of these amendment requests were published in the Federal Register on December 22, 1987 (52 FR 48473) and on June 16, 1988 (53 FR 22589).

The purpose of the licensees' amendment requests were to suspend the antitrust conditions in the two operating license as they apply to these respective licensees. The NRC staff has advised the licensees that the proposed amendments are denied, based on the staff's evaluation of the arguments made in support of the applications, the extensive public comments received on the proposed amendments, and the views expressed by the Department of Justice in a June 13, 1990 letter to the NRC. The licensees were notified of the Commission's denial of the proposed amendments in a letter dated April 24, 1991.

By May 31, 1991, the licensees, may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date.

A copy of any petitions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC, 20555 and to Gerald Charnoff, Esq., Shaw, Pittman, Potts, and Trowbridge, 2300 N. Street, NW., Washington, DC 20037 (attorneys for Ohio Edison), and to Michael T. Mishkin, Esq., Squire, Sanders and Dempsey, 1201 Pennsylvania Avenue NW., P.O. Box 407, Washington, DC 20044 (attorneys for Cleveland Electric Illuminating and Toledo Edison).

For further details with respect to this action, see (1) the applications for amendment dated September 18, 1987 and May 2, 1988, (2) the Department of Justice letter to the NRC, dated June 13, 1990, and (3) the Commission's letter to the licensees, dated April 24, 1991.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.; at the Perry Public Library, 3753 Main Street, Perry, Ohio 44081; and at the University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606. A copy of item (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Document Control Desk.

Dated at Rockville, Maryland, this 24th day of April 1991.

John N. Hannon,

Director, Project Directorate III-3, Division of Rector Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 91-10287 Filed 4-30-91; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

National Advisory Committee on Semiconductors

The purpose of the National Advisory Committee on Semiconductors (NACS) is to devise and promulgate a national semiconductor strategy, including research and development. The implementation of this strategy will assure the continued leadership of the United States in semiconductor technology. The Committee will meet on Wednesday, May 15, 1991 at Science Applications International Corporation (SAIC), 1555 Wilson Boulevard, 7th Floor, Rosslyn, Virginia. The proposed agenda is:

1. Briefing of the Committee on its organization and administration.

2. Presentations to the Committee by OSTP personnel and personnel of other agencies on proposed and ongoing studies regarding semiconductors.

3. Discussion of Working Group actions.

A portion of the May 15th session will be closed to the public.

The briefing on some of the current activities of OSTP necessarily will involve discussion of material that is formally classified in the interest of national defense or for foreign reasons. This is also true for a portion of the briefing on panel studies. As well, a portion of both of those briefings will require discussion of internal personnel procedures of the Executive Office of the President and information which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requiring agency action. These portions of the meeting will be closed to the public pursuant to 5 U.S.C. 552b.(c)(1), (2), and (9)(B).

A portion of the discussion of panel composition will necessitate the disclosure of information of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Accordingly, this portion of the meeting will also be closed to the public, pursuant to 5 U.S.C. 552b.(c)(6).

Because of advance security arrangements, persons wishing to attend the open portion of the meeting should contact Ms. Kathleen Elim, at (703) 528-6090 prior to May 14, 1991. Ms. Elim is also available to provide specific information regarding time, place and agenda for the open session.

Dated: April 26, 1991.

Damar W. Hawkins,

Executive Assistant to D. Allan Bromley, Office of Science and Technology Policy.

[FR Doc. 91-10333 Filed 4-26-91; 4:52 pm]

BILLING CODE 3170-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-69A]

Japanese Government Procurement Policies Affecting Architectural, Engineering and Construction-Related Services

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of proposed determination pursuant to section 306 of the Trade Act of 1974 (the "Trade Act"), as amended, 19 U.S.C. 2416; and request for public comment on proposed U.S. action under section 301 of the Trade Act.