

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONDOCKETED  
USNRCBEFORE THE NUCLEAR REGULATORY COMMISSION '91 JUN 14 P3:22

In the Matter of )

OHIO EDISON COMPANY )

(Perry Nuclear Power Plant,  
Unit 1) )

Docket No. 50-440A

ANSWER OF OHIO EDISON COMPANY  
TO PETITION OF ALABAMA ELECTRIC COOPERATIVE, INC.,  
FOR LEAVE TO INTERVENE

On May 1, 1991, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Denial of Applications for Amendments to Facility Operating Licenses and Opportunity for Hearing. 56 Fed. Reg. 20057 (May 1, 1991). The Notice stated that the agency had denied an application by the Ohio Edison Company ("OE") to suspend the antitrust conditions appended to the operating license of the Perry nuclear power plant, as the conditions apply to Ohio Edison, and an application by the Cleveland Electric Illuminating Company ("CEI") and the Toledo Edison Company ("TE") to suspend the antitrust conditions appended to the operating license of the Perry and Davis-Besse nuclear power plants, as the conditions apply to CEI and TE.<sup>1/</sup> The Notice also stated that by May 31, 1991, the Licensees could demand a hearing with respect to the denial, and that by the same date "[a]ny

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<sup>1/</sup> OE, CEI, and TE collectively are referred to herein as the "Licensees."

person whose interest may be affected by this proceeding may file a written petition for leave to intervene." Id.

On May 30, 1991, Alabama Electric Cooperative, Inc. ("AEC") filed a petition for leave to intervene in any hearing demanded by the Licensees. On May 31, 1991, applicant OE and joint applicants CEI and TE filed timely requests for a hearing.<sup>2/</sup> This Answer is Ohio Edison's response to AEC's petition for leave to intervene. See 10 C.F.R. § 2.714(c) (1991).

The NRC's Rules of Practice provide, in pertinent part, that:

(c) Any party to a proceeding may file an answer to a petition for leave to intervene . . . with particular attention to the factors set forth in paragraph (d)(1) of this section. . . .

(d) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on petitions to intervene . . . shall, in ruling on --

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<sup>2/</sup> See Ohio Edison Company's Request for a Hearing with Respect to the Denial of the Application to Amend the Perry Operating License to Suspend the Antitrust Conditions Insofar as They Apply to Ohio Edison Company (May 31, 1991) (hereinafter "OE Request for Hearing"); Cleveland Electric Illuminating Company's and Toledo Edison Company's Request for a Hearing with Respect to the Denial of the Application to Amend the Perry and Davis-Besse Operating Licenses to Suspend the Antitrust Conditions Insofar as They Apply to Cleveland Electric Illuminating Company and Toledo Edison Company (May 31, 1991) (hereinafter "CEI/TE Request for Hearing").

(1) A petition for leave to intervene . . . , consider the following factors, among other things:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

10 C.F.R. §§ 2.714(c) and (d). As shown below, each of these factors militates against allowing AEC to intervene as a party in the instant proceeding.

The NRC applies judicial concepts of standing in determining whether a petitioner has made the requisite showing of interest required by Section 189a of the Atomic Energy Act and 10 C.F.R. § 2.714. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 N.R.C. 325, 329 (1989) (citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610, 614 (1976)); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 N.R.C. 327, 332 (1983). These judicial standards require that the challenged action could cause (1) "injury-in-fact" to the potential intervenor, and (2) that such injury is arguably within the zone of interests protected by the Atomic Energy Act. See Warth v. Seldin, 422 U.S. 490, 500-01 (1975);

Sierra Club v. Morton, 405 U.S. 727, 734-37 (1972); Three Mile Island, 18 N.R.C. at 332.

It is clear from its request that AEC will not suffer an "injury-in-fact" as a result of the suspension of the antitrust conditions at issue in this proceeding. AEC has no relationship, whatsoever with any of the Licensees or their facilities: it does not assert that it is a competitor of Ohio Edison, Cleveland Electric Illuminating, or Toledo Edison, or that it is a beneficiary of the antitrust conditions on the Perry and Davis-Besse plants in Ohio. Rather, according to AEC, it is a beneficiary of the antitrust conditions imposed on the Alabama Power Company's Joseph M. Farley plant, located in southern Alabama. AEC nevertheless asserts that it has a cognizable interest in the proceeding because an NRC decision suspending the Perry and Davis-Besse antitrust conditions "might be used as arguable precedent" in some future proceeding "to attempt to alter or vitiate the Alabama Power conditions." AEC Petition at 2. AEC argues that its "direct and substantial interest in protecting itself from any such contingency" justifies its intervention in the present proceeding. Id.

AEC is in error. Potential future litigants in one proceeding have no right to intervene in another earlier proceeding in order to preclude the development of possibly harmful precedent. There must be a connection between the threatened injury to a

petitioner and the particular proceeding in which the petitioner wishes to intervene. Allied-General Nuclear Services, (Barnwell Fuel Receiving and Storage Station), LBP-76-12, 3 N.R.C. 277, aff'd, ALAB-328, 3 N.R.C. 420 (1976). In short, the petitioner must have some "direct stake" in the outcome of the proceeding. Allied-General Nuclear Services, (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 N.R.C. 420, 422 (1976) (citing Sierra Club v. Morton, 405 U.S. at 439-40). However, standing cannot be based upon "abstract concerns" in the matter which are not accompanied by some real impact on the petitioner. Transnuclear, Inc. (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 N.R.C. 525, 531 (1977). Rather, to justify intervention, an "injury-in-fact" must be "distinct and palpable," Warth v. Seldin, 422 U.S. at 501, not "abstract," "conjectural" or "hypothetical." Allen v. Wright, 468 U.S. 737, 751 (1983) (citing Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

AEC's asserted interest is far too attenuated from the current proceeding to support standing: AEC will not be harmed by any decision in the present proceeding. Before AEC would even be in a position to be harmed, Alabama Power Company would have to initiate its own license amendment proceeding wholly independent from this action. This remote and hypothetical event is insufficient to support standing. "A plaintiff must allege that he has



been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." Allied-General, 3 N.R.C. at 285 n. 11 (citing United States v. SCRAP, 412 U.S. 669 (1973)).

Furthermore, AEC's asserted interest represents a generic concern affecting all present beneficiaries of antitrust license conditions on nuclear power plants. Such a "generalized grievance shared by a large number of citizens in a substantially equal measure" will not support standing. Warth v. Seldin, 422 U.S. at 499; Three Mile Island, 18 N.R.C. at 333 (citing Transnuclear, 6 N.R.C. at 531).

In short, AEC's petition for leave to intervene fails to satisfy any of the three criteria for intervention under 10 C.F.R. § 2.714(d). Since AEC will have no "injury-in-fact," it does not have standing under Section 189a of the Atomic Energy Act to support intervention as of right. See § 2.714(d)(i). And because AEC will have no "injury-in-fact," it has no direct stake or interest in the proceeding, see § 2.714(d)(ii), nor will any order that may be entered in the proceeding adversely affect AEC's interest, see § 2.714(d)(iii). In sum, AEC is not entitled to intervene on the basis of its conjectural assertions.

Nor do the circumstances weigh in favor of allowing AEC to be admitted as a party to the proceeding as a matter of

discretionary intervention. See Pebble Springs, 4 N.R.C. at 616; Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 N.R.C. 616, 623 (1981). A determination whether to allow discretionary intervention is based upon an assessment of the circumstances of the particular case, and a consideration of the following factors:

(a) Weighing in favor of allowing intervention --

- (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention --

- (4) The availability of other means whereby petitioner's interest will be protected.
- (5) The extent to which the petitioner's interest will be represented by existing parties.
- (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceedings.

Pebble Springs, 4 N.R.C. at 616. The Petitioner bears the burden of persuading the Licensing Board that discretionary intervention is appropriate. Nuclear Engineering Co. (Sheffield Low Level

Radioactive Waste Disposal Site), ALAB-473, 7 N.R.C. 737, 745 (1978).

As to these factors, AEC's Petition presented no Pebble Springs analysis. It can fairly be read, however, to contend that AEC is concerned with the possible effect of an order in the instant proceeding on AEC's interest. (Factors (a)(2) and (a)(3) above.) These factors, which are the same as those in § 2.714(d)(ii) and (iii), addressed above, militate against allowing AEC to intervene as a matter of discretion. The facts are that the present amendment requests are based upon the unfavorable economics of the Perry and Davis-Besse nuclear units -- not those of Farley. AEC has nothing to contribute to a consideration of those economics, even if there is, as Ohio Edison anticipates, no dispute among the other parties as to those economics. Moreover, AEC's position on the legal issues involved in this case will be represented by another Petitioner -- the City of Cleveland -- which does have standing to intervene, and apparently also by the NRC and the DOJ staffs.<sup>3/</sup> Patently, AEC has no property, financial or other interest in the proceeding. It is not a beneficiary of the Perry or Davis-Besse license conditions; it does not buy or distribute electric power in Ohio. Finally, AEC has alternative means to protect its interests:

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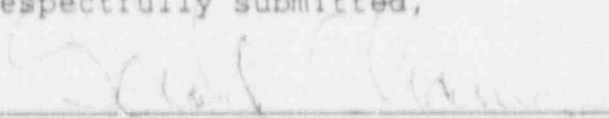
<sup>3/</sup> OE has urged, however, that the Licensing Board give no weight to the recommendations of these parties because of the taint associated with them. See OE Request for Hearing, Issues (4) and (5).



participation as a party in any future proceeding seeking to suspend the Farley antitrust license conditions, in the event the Farley license holders request any such amendment. Therefore, under a Pebble Springs analysis, there is no reason to grant discretionary intervention to AEC.

For all of these reasons, Ohio Edison respectfully submits that AEC has not shown that it should be permitted to intervene in this proceeding. Accordingly, its petition for leave to intervene should be denied.

Respectfully submitted,



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Gerald Charnoff  
Deborah B. Charnoff  
Margaret S. Spencer

SHAW, PITTMAN, POTTS & TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000

Counsel for Ohio Edison Company

Dated: June 14, 1991

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DUCKETT  
USNRC

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OFFICE OF SECRETARY  
DUCKETT & SERVICE  
BRANCH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this fourteenth day of June, 1991,  
a copy of the foregoing Answer of Ohio Edison Company to Petition  
of Alabama Electric Cooperative, Inc., for Leave to Intervene was  
hand-delivered to each of the following:

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland

B. Paul Cotter, Jr.  
Chief Administrative Judge  
Atomic Safety and Licensing Board Panel  
West Towers Building  
4350 East West Highway  
Fourth Floor  
Bethesda, Maryland

and that a copy of the foregoing Answer of Ohio Edison Company to  
Petition of Alabama Electric Cooperative, Inc., for Leave to  
Intervene was mailed first class, postage prepaid, to each of the  
following:

Joseph Rutberg, Esquire  
Sherwin E. Turk, Esquire  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mark C. Schechter  
Chief  
Transportation, Energy and  
Agriculture Section  
Antitrust Division  
Department of Justice  
Judiciary Center Building  
555 Fourth Street, N.W.  
Washington, D.C. 20001

James P. Murphy, Esquire  
Squire, Sanders & Dempsey  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20044

D. Biard MacGuineas, Esquire  
Volpe, Boskey and Lyons  
918 Sixteenth Street, N.W.  
Washington, D.C. 20006

Craig S. Miller,  
Director of Law  
June W. Weiner,  
Chief Assistant Director of Law  
William M. Ondrey Gruber,  
Assistant Director of Law  
City Hall, Room 106  
601 Lakeside Avenue  
Cleveland, Ohio 44115

Reuben Goldberg, Esquire  
Channing D. Strother, Jr.  
Goldberg, Fieldman & Letham, P.C.  
1100 Fifteenth Street, N.W.  
Washington, D.C. 20005

*Margaret S. Spencer*

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Margaret S. Spencer  
SHAW, PITTMAN, POTTS & TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000