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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION 91 JUN 14 P4:26

BEFORE THE NUCLEAR REGULATORY COMMISSION
OFFICE OF SECRETARY
AND SERVICE
BRANCH

In the Matter of)
OHIO EDISON COMPANY)
(Perry Nuclear Power Plant,)
Unit 1) and THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY, et al.)
(Perry Nuclear Power Plant,)
Unit 1 and Davis-Besse Nuclear)
Power Station, Unit 1))

Docket Nos. 50-440A
and 50-345A (TAC Nos.
66288, 68313 and
68880)

ANSWER OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
AND THE TOLEDO 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 ("Notice"). See 56 Fed. Reg. 20057 (May 1, 1991). Specifically, the Notice announced the Commission's denial of applications by the Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, the "Licensees" or "Applicants") for suspension of the antitrust conditions appended to the operating licenses of the Perry and Davis-Besse nuclear power facilities. The Notice further stated that the Licensees could demand a hearing with respect to the Commission's denial by May 31, 1991, and that by that same date "[a]ny person whose

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

On May 30, 1991, Alabama Electric Cooperative, Inc. ("AEC"), filed its petition for leave to intervene in any hearing demanded by the Licensees. See Petition of Alabama Electric Cooperative, Inc., for Leave to Intervene ("AEC's Petition") (May 30, 1991). The following day, Licensees filed their timely requests for a hearing regarding the Commission's denial.^{1/} In this Answer, CEI and TE request that the Commission deny AEC's Petition on the basis of the following arguments. See 10 C.F.R. § 2.714(c) (1991).

I. AEC IS NOT ENTITLED TO INTERVENTION AS OF RIGHT.

An evaluation of AEC's Petition in light of the relevant regulatory guidelines, as well as the common law standing requirements governing intervention as of right, illustrates that the Commission should deny AEC's Petition. Specifically, the NRC's Rules of Practice provide that the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated

^{1/} See The Cleveland Electric Illuminating Company's and The 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 The Cleveland Electric Illuminating Company and The Toledo Edison Company (May 31, 1991) ("CEI/TE Request for Hearing"); 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) ("OE Request for Hearing").

to rule on petitions to intervene should consider, among other things, the following factors in its analysis of such petitions:

(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) (1991).

In addition to a favorable showing under these three regulatory factors, a potential intervenor must also fulfill the "judicial concepts of standing" to qualify for intervention as of right. Florida Power and Light Co. (St. Lucie, Units 1 and 2), CLI-89-21, 30 N.R.C. 325, 329 (1989) (Commission consistently applies "contemporaneous judicial concepts of standing" to determine whether petitioner has sufficient interest to intervene as of right); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610, 613-14 (1976) ("contemporaneous judicial concepts of standing" should be applied in considering whether petitioner has alleged an "interest [which] may be affected by the proceeding," within the meaning of § 189a of the Atomic Energy Act, as amended, 42 U.S.C. § 2239(a) and 10 C.F.R. § 2.714). Accord Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 N.R.C. 327, 332 (1983). That is, the petitioner must show that the

challenged action could cause it "injury-in-fact," and that such injury is arguably within the "zone of interest" protected by the Atomic Energy Act. St. Lucie, 30 N.R.C. at 329 (citing Three Mile Island, 18 N.R.C. at 332).

The petitioner who alleges merely "abstract concerns" in the matter which are not accompanied by some real impact on the petitioner will not qualify for intervention. See Transnuclear, Inc. (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 N.R.C. 525, 531 (1977). Cf. Warth v. Seldin, 422 U.S. 490, 501 (1974) (injury-in-fact must be "distinct and palpable"); Allen v. Wright, 468 U.S. 737, 751 (1984) ("abstract," "conjectural" or "hypothetical" injury is not injury-in-fact); 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. 727, 739-40 (1972) (petitioner must allege a "direct stake in the outcome" of the proceeding to warrant intervention)).

A review of AEC's arguments for intervention reveals that the indirect, contingent, and speculative nature of its alleged "interest" in this proceeding precludes it from fulfilling either the regulatory or common law standards governing intervention as of right. Essentially, AEC argues that because it is a beneficiary of the antitrust conditions imposed on the Alabama Power Company's Joseph M. Farley plant, an NRC decision suspending the antitrust conditions appended to the Perry and

Davis-Besse operating licenses "might be used as arguable precedent" in some future action to attempt to "alter or vitiate" the Farley antitrust conditions. See AEC Petition at 2 (emphasis added). AEC asserts that its interest in protecting itself from any such "contingency" is sufficient to warrant its intervention in this proceeding.

First, the tenuous nature of AEC's "property, financial or other interest" related to the Perry and Davis-Besse antitrust conditions is insufficient to warrant AEC's intervention. See 10 C.F.R. § 2.714(d)(i) and (ii). AEC is not a competitor of TE, CEI or OE, nor is AEC a beneficiary of the antitrust conditions appended to the Perry or Davis-Besse operating licenses. Accordingly, any order suspending those antitrust conditions could have no impact on AEC's financial or other interests. See 10 C.F.R. § 2.714(d)(iii). Thus, AEC fails to allege an interest sufficient to warrant its intervention as of right under the relevant regulatory factors. See 10 C.F.R. § 2.714(d).

Under similar reasoning, AEC cannot allege an "injury-in-fact" necessary to fulfill the common law standing requirements. See St. Lucie, 30 N.R.C. at 329; Pebble Springs, 4 N.R.C. at 614; Three Mile Island, 18 N.R.C. at 332. AEC's allegation of injury resulting from future use of detrimental precedent hinges on the occurrence of a "hypothetical" proceeding. Allen, 468 U.S. at 751. Such an allegation is insufficient as "[a] plaintiff must allege that he has been or will in fact be perceptibly

harm 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 (quoting United States v. SCRAP, 412 U.S. 669, 688-89 (1973)).

At best, AEC's asserted interest represents a concern uniformly affecting all beneficiaries of antitrust license conditions on nuclear power plants. Such a generalized grievance "shared in substantially equal measure by all or a large class of citizens" will not support intervention. Three Mile Island, 18 N.R.C. at 333 (citing Transnuclear, 6 N.R.C. at 531.) See also Warth, 422 U.S. at 499.

In summary, AEC's interest is too remote and speculative to satisfy the three requirements of § 2.714(d). Additionally, AEC will not suffer an injury-in-fact: the potential future use of detrimental precedent fails to fulfill the common law standing requirements. As such, AEC cannot intervene as of right.

II. AEC'S ALLEGED INTEREST IN THIS PROCEEDING IS INSUFFICIENT TO WARRANT DISCRETIONARY INTERVENTION.

AEC's alleged concern is also insufficient to warrant AEC's admission as a party to the proceeding through exercise of the Commission's discretionary powers. See Pebble Springs, 4 N.R.C. at 614-17; Three Mile Island, 18 N.R.C. at 333. See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 N.R.C. 616, 623 (1981). In determining whether to

exercise its discretion in allowing intervention, the Commission should consider, among others, 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 --
 - (1) The availability of other means whereby petitioner's interest will be protected.
 - (2) The extent to which the petitioner's interest will be represented by existing parties.
 - (3) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Pebble Springs, 4 N.R.C. at 616.

While not presenting a complete Pebble Springs analysis regarding discretionary intervention, AEC's Petition did address factors (a)(2) and (3) of that test in describing the possible effect of an order from the instant proceeding on AEC's interest. These Pebble Spring factors, however, are the same as those

expressed in § 2.714(d)(ii) and (iii) which, for the reasons discussed above, weigh against AEC's intervention.

Additionally, the Licensees base their amendment requests in this action on the unfavorable economics of the Perry and Davis-Besse nuclear facilities rather than those associated with Farley. As such, AEC could not contribute in any meaningful way to an evaluation of the currently undisputed economic conclusions regarding the Perry and Davis-Besse facilities.

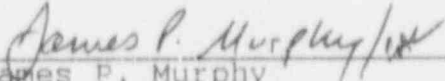
Moreover, AEC may protect any valid interest it possesses by opposing any future request brought by Alabama Power to suspend the Farley antitrust license conditions. Additionally, the Department of Justice, the NRC Staff, and the City of Cleveland, a CEI competitor as well as the direct beneficiary of antitrust conditions at issue in this proceeding, can adequately represent AEC's position on the disputed legal issues.^{2/} Thus, the Pebble Springs factors weigh against the discretionary admission of AEC as a party to this proceeding.

In summary, AEC has not met its burden of satisfying the regulatory and common law requirements for intervention. See 10

^{2/} See Opposition of the City of Cleveland, Ohio, to a Hearing with Respect to the Denial of Application to Suspend Anti-Trust License Conditions and Petition to Intervene in the Event Hearing is Requested and is Granted (May 31, 1991). The Licensees do not contest the City of Cleveland's right to intervene in this proceeding.

C.F.R. §2.732 (1991). Accordingly, CEI and TE respectfully request that the Commission deny AEC's Petition for Leave to Intervene.

Respectfully submitted,


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Date: June 14, 1991

Counsel for The Cleveland
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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'91 JUN 14 P4:51

BEFORE THE NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
SHANLEY

In the Matter of)
OHIO EDISON COMPANY)
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(Perry Nuclear Power Plant, Unit 1)
1 and Davis-Besse Nuclear)
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and 68880)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer of
The Cleveland Electric Illuminating Company and The Toledo Edison
Company to Petition of Alabama Electric Cooperative, Inc. for
Leave to Intervene is served this 14th day of June, 1991, to each
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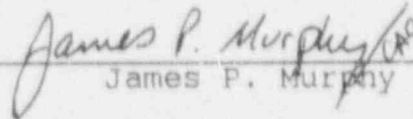
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