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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
OHIO EDISON COMPANY	)	Docket No. 50-440A/346-A
	)	
(Perry Nuclear Power Plant, Unit 1)	)	

ANSWER OF OHIO EDISON COMPANY
TO OPPOSITION OF THE CITY OF CLEVELAND, OHIO,
TO A HEARING WITH RESPECT TO THE DENIAL OF
APPLICATIONS TO SUSPEND ANTITRUST LICENSE
CONDITIONS AND PETITION TO INTERVENE IN
THE EVENT HEARING IS REQUESTED AND IS GRANTED

On May 31, 1991, the City of Cleveland, Ohio ("The City") filed in this proceeding a document entitled "Opposition of the City of Cleveland, Ohio, to a Hearing with Respect to the Denial of Applications to Suspend Antitrust License Conditions and Petition to Intervene in the Event Hearing is Requested and is Granted" (hereinafter "The City's Petition"). This Answer is Ohio Edison Company's ("OE") response to The City's Petition.[1/] See 10 C.F.R. § 2.714(c) (1991).

1/ OE incorporates by reference into this Answer pages 8-28 of its Response to Comments on Its Antitrust License Amendment Application (filed in this proceeding on July 5, 1988), in which OE responded at length to The City's argument that the NRC lacks the authority to adjudicate OE's license amendment application. See The City's Petition at 7-8.

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Ohio Edison Company believes that The City has standing to intervene in this proceeding on the basis of its status as a beneficiary of Cleveland Electric Illuminating Company's ("CEI") antitrust conditions (see The City's Petition at 9), notwithstanding the fact that The City has no interest whatsoever with regard to OE.

Contrary to The City's argument, OE is entitled to a hearing under Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), which provides, in pertinent part, that:

> [i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to such proceeding. . . . .

OE is clearly a "person" under the Atomic Energy Act's all-encompassing definition of the term, see 42 U.S.C. §2014(s), and its interests will clearly be "affected by the proceeding." The NRC staff acknowledged OE's right to a hearing by stating in the Notice of Denial that it may "demand" a hearing. See 56 Fed. Reg. 20057. The City is thus incorrect in asserting that Section 189(a) refers to only to "persons other than Applicants." See The City's Petition at 3.

The City's sole rationale for ignoring both the literal language of the Atomic Energy Act and the Commission's interpretation of its governing statute is that "[t]he 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." The City's Petition at 3, citing Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) (citing the dissent in Bellotti v. NRC, 725 F.2d 1380, 1389 (D.C. Cir. 1983)). However, neither Union of Concerned Scientists nor Bellotti is on point, inasmuch as both cases were concerned with the hearing rights of potential intervenors, not the hearing rights of licensees. Moreover, the cited authority does not specify that there was a sole purpose underlying Section 189(a), but provides that "[t]he Commission is entitled to great freedom in its efforts to structure its proceedings so as to maintain their integrity while assuring meaningful public participation, but one of its goals must be to assure that there is meaningful public participation." Union of Concerned Scientists, 735 F.2d at 1446, quoting Bellotti v. NRC, 725 F.2d at 1389 (Wright, J., dissenting).

The City also argues, most creatively, that the requested changes would not constitute license amendments, and therefore Section 189(a) does not apply.[2/] See The City's Petition at 4-5.

2/ In so arguing, The City ignores the facts that OE's application was submitted pursuant to 10 C.F.R. § 50.90, which governs applications to amend operating licenses, and that the NRC staff has consistently considered the request to be a license amendment application. See "Notice of Denial of Applications for Amendments to Facility Operating Licenses,"

Footnote continued on next page.

The D.C. Circuit has defined a license amendment as something which "grant[s] the licensee authority to do something that it otherwise could not have done under the existing license authority. Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980), vacated on other grounds, 459 U.S. 1194 (1983). The City admits that "the elimination of these vital antitrust conditions would result in effectively issuing a new and very different license to Applicants." The City's Petition at 5. Such changes clearly constitute license amendments.[3/]

Contending that no hearing should be provided, The City states that "there are no disputed adjudicative facts that need to be resolved." The City's Petition at 7. While OE agrees that there are no adjudicative facts in dispute, OE is nonetheless entitled to a hearing before the Licensing Board to resolve disputed issues of law. See 10 C.F.R. § 2.749 (providing for

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Footnote continued from previous page.

56 Fed. Reg. 20057 (May 1, 1991) (emphasis added); Letter from T. Murley to M. Lyster and D. Shelton (April 24, 1991) at 1 (referring to "license amendment applications"); NRC Staff Evaluation (undated; appended to April 24, 1991 letter) at 1 (referring to "amendment applications").

3/ The City -- presumably with its tongue stuck firmly in its cheek -- presses this point by arguing that the changes Applicants seek are not "amendments" because, according to Black's Law Dictionary, a change is an "amendment" only if it is "a change for the better, or a correction, or an improvement, involving no change in the substance or essence." The City's Petition at 5. This argument -- according to which no disputed change would ever constitute an "amendment" -- is patently absurd.

summary disposition on the pleadings if there are no genuine issues of material fact).[4/]

The City is mistaken in arguing that the "hearing" before the NRC staff was sufficient to satisfy OE's right to a hearing. OE is entitled to a hearing before an impartial adjudicatory officer or panel. The NRC staff, of course, plans to participate as a party advocating the denial of OE's application. See 10 C.F.R. § 2.781 (separation of functions between NRC investigative and litigation employees and NRC adjudicatory employees).[5/]

Finally, even if OE were not entitled to a Section 189(a) hearing as a matter of right, the May 1, 1991, Notice of Denial

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4/ The City quotes the CEI/TE application at length to illustrate that a formal trial-type evidentiary hearing is not necessarily required where there are no disputed factual issues. See The City's Petition at 6-7. However, that application did not, as The City states, concede "that no hearing of any kind is required." See The City's Petition at 6 (emphasis added).

5/ Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1129 (D.C. Cir. 1969), which The City cites as the sole support for its argument that OE is entitled only to a "hearing" by the NRC staff (see The City's Petition at 7), is distinguishable on the grounds that the agency determination in that case was made by the Federal Power Commissioners themselves, not by the FPC staff.

and Opportunity for a Hearing constitutes a valid exercise of the NRC's discretion to conduct a hearing where it finds that "a hearing is required in the public interest." 10 C.F.R. § 2.104.

Respectfully submitted,

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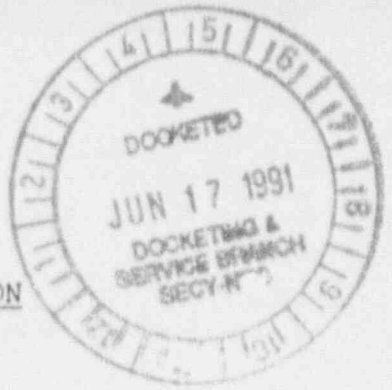
Dated: June 17, 1991



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this seventeenth day of June, 1991, a copy of the foregoing ANSWER OF OHIO EDISON COMPANY TO OPPOSITION OF THE CITY OF CLEVELAND, OHIO, TO A HEARING WITH RESPECT TO THE DENIAL OF APPLICATIONS TO SUSPEND ANTITRUST LICENSE CONDITIONS AND PETITION TO INTERVENE IN THE EVENT HEARING IS REQUESTED AND IS GRANTED was hand-delivered to:

Secretary of the Commission
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11555 Rockville Pike
Rockville, Maryland

and that a copy of the foregoing ANSWER OF OHIO EDISON COMPANY TO OPPOSITION OF THE CITY OF CLEVELAND, OHIO, TO A HEARING WITH RESPECT TO THE DENIAL OF APPLICATIONS TO SUSPEND ANTITRUST LICENSE CONDITIONS AND PETITION TO INTERVENE IN THE EVENT HEARING

IS REQUESTED AND IS GRANTED was mailed first class, postage pre-paid, to each of the following:

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