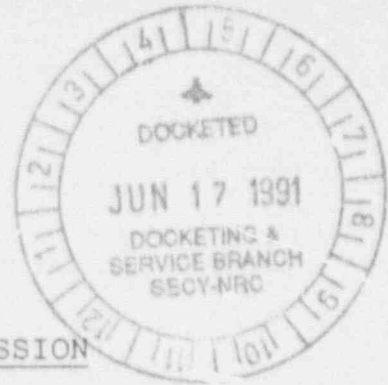


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION



In the Matter of)	
OHIO EDISON COMPANY)	
(Perry Nuclear Power Plant,)	
Unit 1) and THE CLEVELAND ELECTRIC)	Docket Nos. 50-440A
ILLUMINATING COMPANY, et al.)	and 50-346A (TAC Nos.
(Perry Nuclear Power Plant,)	66288, 68313 and
Unit 1 and Davis-Besse Nuclear)	68880)
Power Station, Unit 1))	

ANSWER OF THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON COMPANY TO THE
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 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). The Notice stated that the Commission had denied the applications by The Cleveland Electric Illuminating Company ("CEI"), The Toledo Edison Company ("TE"), and the Ohio Edison Company ("OE"), (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.^{1/} The Notice also stated that "[b]y 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." 56 Fed. Reg. 20057 (emphasis added).

On May 31, 1991, joint applicants CEI and TE, and applicant OE filed timely requests for a hearing.^{2/} On that same date, the City of Cleveland, Ohio ("City"), filed its opposition to those requests for a hearing and, in the alternative, a petition to intervene.^{3/} This Answer represents CEI's and TE's

^{1/} See The Cleveland Electric Illuminating Company's and The Toledo Edison Company's Application to Amend the Perry and Davis-Besse Operating Licenses to Suspend the Antitrust Conditions (May 2, 1988) ("CEI/TE Application to Amend"); Ohio Edison Company's Application to Amend the Perry Operating License to Suspend the Antitrust Conditions Insofar as They Apply to Ohio Edison Company (Sept. 18, 1987) ("OE Application to Amend").

^{2/} 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").

^{3/} See 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 (May 31, 1991) ("City's Opposition"). CEI and TE do not challenge Cleveland's petition to intervene in the requested hearing.

response to the City's Opposition pursuant to
10 C.F.R. § 2.714(c) (1991).

I. CEI AND TE ARE ENTITLED TO A HEARING REGARDING THE
DENIAL OF THEIR APPLICATION FOR AMENDMENT.

A. Licensees Qualify as "Person[s] Whose
Interest May Be Affected by the Proceeding."

CEI and TE, as Licensees subject to the antitrust conditions at issue in this proceeding, clearly have a right to a hearing upon demand regarding the Commission's denial of the CEI/TE Application to Amend. See Atomic Energy Act § 189(a), 42 U.S.C § 2239(a) (1991). Specifically, Congress authorizes a hearing upon request under the following circumstances:

In any proceeding under this chapter, for the granting, suspending, revoking or amending of any license . . . 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.

Id. (emphasis added). Just as Licensees clearly qualify as "person[s]" within § 189(a), so do they possess an interest which will clearly "be affected" by this proceeding.^{4/} Particularly

^{4/} The Atomic Energy Act defines "person" so broadly as to include nearly every conceivable entity:

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any

(Footnote 4 continued on next page)

within this proceeding involving the denial of the requested suspension of the antitrust conditions appended to their operating licenses, the Licensees are perhaps the persons with the strongest interest in this proceeding.

The City's attempts to bolster its argument through a review of the Congressional goals underlying § 189(a) is unconvincing. See City's Opposition at 3. Closer scrutiny of the quote upon which the City bases this argument indicates that public participation was only one of the goals associated with § 189(a)'s enactment. See Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) (" . . . one of [the Commission's goals in applying § 189(a)] must be to assure that there is meaningful public participation") (quoting Bellotti v. NRC, 725 F.2d 1380, 1389 (Wright, J., dissenting)) (emphasis in original). Additionally, neither Bellotti nor UCS control here as both focused on the hearing rights of potential intervenors rather than licensees. Thus, although the statutory language and legislative history indicate that the provision clearly applies to potential intervenors, such sources do not reflect, as City asserts, an

(Footnote 4 continued from previous page)
such government or nation, or other entity;
and (2) any legal successor, representative,
agent, or agency of the foregoing.

42 U.S.C. § 2014(s) (1991).

intent to exclude § 189(a)'s application to the parties with the greatest interest, the licensees themselves.

B. An Action Seeking a Suspension of Antitrust Conditions Qualifies as One of the Enumerated Proceedings under § 189(a).

Generally, courts have indicated that an action which alters the original terms of a license qualifies as a license amendment requiring some form of hearing under § 189(a). San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984) (extension of license term constitutes § 189(a) amendment), vacated in part on other grounds, 760 F.2d 1320 (D.C. Cir. 1985). Cf. Sholly v. NRC, 651 F.2d 780, 791 (1980) (action which "grant[s] the licensee authority to do something that it otherwise could not have done under the existing license authority . . . [is] a license amendment within the scope of § 189(a)"), vacated as moot, 459 U.S. 1194 (1983).

The Commission imposed the antitrust conditions upon the CEI and TE operating licenses at the time of, and in fact as a condition of, the original issuance of their operating licenses. See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC 265 (1979). Thus, any removal or suspension of such conditions clearly alters the original operating license. San Luis Obispo, 751 F.2d at 1314; Sholly, 651 F.2d at 791. As such, the request for suspension of the

antitrust conditions constitutes a request for an amendment to the operating license for purposes of § 189(a) hearing rights.

C. The Absence of a Disputed Material Fact Does Not Eliminate CEI's and TE's Right to a Hearing.

Although the City and the Licensees agree that "there are no disputed adjudicative facts that need to be resolved" (see City Opposition at 7), CEI and TE nevertheless are entitled to a hearing before the Licensing Board to resolve the remaining disputed issues of law.^{5/} That is, even if, as City concedes, there are no disputed material facts, and all parties agree as to the unfavorable economics concerning the Perry and Davis-Besse facilities, § 189(a) as well as 10 C.F.R. §§ 2.714(b) and 2.749 provide CEI and TE with the right to a hearing on the remaining disputed issues of law.

Specifically, CEI and TE have the right to submit contentions consisting of a specific statement of the issue of law or fact to be raised or controverted along with concise

^{5/} Contrary to the City's representations, CEI and TE have not represented that they lack a right to all types of hearings. See City's Opposition at 6-7 (citing CEI/TE Application to Amend at 44-46). Rather, CEI and TE asserted in their Application to Amend, and continue to assert now, that in these proceedings, no formal hearing is required before issuance of the requested amendment. Thus, CEI and TE's request for less than a full evidentiary hearing after the Commission's original denial of their application is consistent with their previous arguments. For the sake of brevity, CEI and TE incorporate by reference their arguments regarding their hearing rights contained in their Application to Amend at 44-46.

statements supporting those contentions. Cf. 10 C.F.R. § 2.714(b). Upon the filing of these contentions, CEI and TE are entitled to file for a summary disposition on the pleadings in accordance with the procedures described in 10 C.F.R. § 2.749. Additionally, the presiding officer may allow oral argument on these issues even in the absence of a disputed material fact. See 10 C.F.R. § 2.755 (presiding officer may allow oral argument when time permits and the nature of the proceeding and public interest warrant). Such a hearing would efficiently fulfill the Licensees' rights under § 189(a).

Contrary to the City's assertion, a "hearing" before the NRC Staff fails to satisfy CEI's and TE's right to a hearing under § 189(a). The Licensees are entitled to a hearing before an impartial adjudicatory officer or panel. As the NRC Staff surely will participate as a party advocating the denial of the CEI/TE Application for Amendment in any future hearing on the matter, the hearing before the Staff fails to qualify as an "impartial" proceeding. See 10 C.F.R. § 2.781 (discussing separation of functions between NRC investigative and litigation employees and NRC adjudicatory employees).^{6/}

^{6/} In fact, the City's only cited source in its assertion that the NRC Staff "hearing" fulfills the § 189(a) requirements is distinguishable as the agency determination involved in that case was made by the Federal Power Commissioners themselves rather than the Federal Power Commission Staff. See City's Opposition at 7 (citing Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1129 (D.C. Cir. 1969), cert. denied, 422 U.S. 1026 (1975)).

Finally, even if the Licensees were not vested with § 189(a) hearing rights, the Commission's May 1, 1991 Notice of Denial and Opportunity for a Hearing constitutes a valid exercise of the Commission's discretion to grant a hearing where the "hearing is required in the public interest." See 10 C.F.R. § 2.104.

II. THE COMMISSION MAINTAINS JURISDICTION TO REVIEW THE REQUEST FOR SUSPENSION OF THE ANTITRUST CONDITIONS.

The City's allegation that the Commission lacks jurisdiction to suspend the antitrust conditions appended to the Perry and Davis-Besse operating licenses is completely without merit.^{7/} Clearly, if the Commission has the authority to impose such conditions, the Commission retains the power to remove them. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 N.R.C. 325, 330 n.2 (1989).

In St. Lucie, the licensee asserted that the Commission lacked the authority to revoke an exemption from one of the Commission's regulations. The Commission dismissed this attack on its jurisdiction, stating: "[w]e emphatically reject the Licensee's suggestion that the commission cannot revoke an exemption. If the Commission has authority to grant an

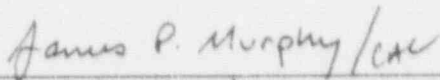
^{7/} For the sake of brevity, TE and CEI incorporate by reference their arguments addressing the Commission's authority to suspend the antitrust conditions contained at pp. 10-40 of CEI/TE Application to Amend.

exemption, it certainly has the authority to revoke that exemption." Id. (citation omitted).

The same reasoning controls in this proceeding. Implicit in the power to impose antitrust conditions upon the Applicants' operating licenses is the power to remove such conditions when their presence is no longer warranted. Thus, the City's attempts at limiting the Commission's jurisdiction are misplaced.

In summary, § 189(a) clearly provides CEI and TE with the right to a hearing to resolve any disputed issues pertaining to the suspension of the antitrust conditions appended to the Perry and Davis-Besse operating licenses. Accordingly, CEI and TE respectfully request the Commission to recognize those rights and grant their Request for Hearing.

Respectfully Submitted,


James P. Murphy

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Date: June 17, 1991

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

91 JUN 17 P452

BEFORE THE NUCLEAR REGULATORY COMMISSION

OF SECRETARY
DOCKETING & 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 50-346A (TAC
Nos. 66288, 68313
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 the 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 is served this 17th day of June, 1991, to each of the following persons in the manner indicated below:

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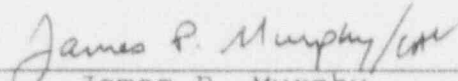
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