UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket Nos. 50-440-A
	)	50-346-A
OHIO EDISON COMPANY	)	
(Perry Nuclear Power Plant,	)	
Unit 1, Facility Operating	)	
License No. NPF-58)	)	
	)	
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY	)	
THE TOLEDO EDISON COMPANY	)	
(Perry Nuclear Power Plant,	)	ASLBP No. 91-644-01-A
Unit 1, Facility Operating	)	
License No. NPF-58)	)	
(Davis-Besse Nuclear Power	)	
Station, Unit 1, Facility	)	
Operating License No. NPF-3)	)	

BRIEF OF CITY OF CLEVELAND, OHIO IN SUPPORT OF NOTICE OF APPEAL OF PREHEARING CONFERENCE ORDER GRANTING REQUEST FOR HEARING

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IN SUPPORT OF NOTICE OF APPEAL OF PREHEARING
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To the Honorable, the Commissioners of
the Nuclear Regulatory Commission:

Pursuant to 10 C.F.R. §2.714a, Intervenor City of Cleveland, Ohio ("Cleveland") submits its brief in support of its Notice of Appeal of the Atomic Safety and Licensing Board's ("Board") October 7, 1991 Prehearing Conference Order ("PHC Order") (LBP-91-38) and the October 8, 1991 Notice of

Hearing (56 Fed. Reg. 51939). The October 7 order and October 8 notice grant the requests of Ohio Edison Company ("Ohio Edison"), Cleveland Electric Illuminating Company ("CEI"), and Toledo Edison Company ("TE") (collectively "applicants") for a hearing concerning their applications for "suspension" as to them of certain antitrust licensing conditions imposed in the licenses for the Perry and Davis-Besse nuclear generating plants. The October 7 order rejects Cleveland's opposition to applicants' requests for a hearing and Cleveland's challenge to the Commission's jurisdiction to consider applicants' applications on the ground that the Commission has no authority to conduct the requested antitrust review sought by applicants.[1/] These rulings are the subject of Cleveland's Notice of Appeal and of this brief. Cleveland opposes the grant of a hearing.

DESCRIPTION OF CLEVELAND

Cleveland is an Ohio municipal corporation which owns and operates Cleveland Public Power ("CPP"), an

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1/ The Board's order refers to the proceeding as "antitrust related" (PHC Order at 1). It is not simply "antitrust related." It is an antitrust review under Section 105c. The applicants filed their respective applications under Section 2.101 of the Commission's Regulations that implement Section 105c of the Atomic Energy Act ("AEA or Act"). In an action filed in the District of Columbia District Court to disqualify the Commission from adjudicating the issue raised in its application herein and to have that function performed by the court, Ohio Edison in its Complaint stated that it "seeks a determination by this Court of an antitrust issue."

electric distribution system serving the electric requirements of the citizens of Cleveland within certain portions of the city limits. CPP is in competition with CEI for the sale of electricity to residential, commercial and industrial customers in certain areas of Cleveland, in many cases on a door-to-door basis.

Cleveland was actively involved as an intervenor-party[2/] in the antitrust review hearings in the herein dockets that culminated in the imposition of the antitrust conditions, which the applicants now seek to eliminate.

Cleveland is a direct and intended beneficiary of the antitrust conditions. These conditions mandated access to CEI's transmission facilities, which electrically surround Cleveland, and those of the co-licensees. These conditions provided Cleveland with access to power from sources other than CEI with resulting substantial savings that have enabled Cleveland's municipal electric operations to survive and to continue as a viable competitor of CEI, bringing to Cleveland's citizens the important benefits of reasonably priced electricity.

Removal of the conditions will have a direct, adverse effect upon Cleveland and its citizens. See PHC Order

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2/ Cleveland's May 31, 1991 conditional petition to intervene, pp. 8-9, stated that it was filed out of an abundance of caution inasmuch as Cleveland was already a party to the dockets in which applicants filed their applications and has actively opposed the applications heretofore in the herein dockets.

at 22-23. The importance of these antitrust license conditions to Cleveland and its reliance on the antitrust license conditions at issue in this proceeding are further described in this brief, infra pp. 33-36.

PROCEDURAL BACKGROUND

On or about September 18, 1987, Ohio Edison filed an application for "suspension" of the antitrust conditions of the Perry Nuclear Power Plant operating license "insofar as they apply to Ohio Edison Company" and "until such time as there may be a factual basis for imposing [the conditions]." Application at 1 and 80-81. Ohio Edison invoked 10 C.F.R. §§50.90 and 2.101 as authority for its application and expressly requested that "the Director of Nuclear Reactor Regulation amend the Perry Operating License by suspending the antitrust licensing conditions insofar as they apply to OE." (Emphasis added.) Ohio Edison's application discusses Section 105c of the AEA, 42 U.S.C. §2135(c) at some length. However, Section 189a, 42 U.S.C. §2239, of that Act upon which the Board relies for the Commission's and the Board's authority to conduct a post operating license antitrust review, is not mentioned much less relied upon. Neither Ohio Edison nor CEI and TE relied on Section 189a as supporting this application or the Commission's jurisdiction. The Board has relied on Section 189a as supporting Commission jurisdiction to conduct an antitrust review. Cleveland in this brief

shows that the Board's position has been unequivocally rejected by the Commission in previous decisions. Infra, pp. 12-25.

Notice of the application appeared at 52 Fed. Reg. 48473 (December 22, 1987). In February and April 1988, Cleveland and other interested entities filed answers in opposition to Ohio Edison's application. On July 5, 1988, Ohio Edison replied to these answers.

On or about May 2, 1988, CEI and TE filed an application to suspend the antitrust conditions of the Perry and Davis-Besse operating licenses as to them. CEI and TE, like Ohio Edison, expressly relied on 10 C.F.R. §§50.90 and 2.101 and expressly requested that the Director of Nuclear Reactor Regulation ("Director") amend the operating licenses by suspending the antitrust conditions. While Section 105c of the AEA was discussed in their application, Section 189a is not even mentioned. Cleveland and others filed comments in opposition to the application in September 1988.

On June 13, 1990, pursuant to the Director's request, the Department of Justice ("DOJ") provided advice respecting the applications. Among other things, DOJ concluded that the applications were "based upon a novel reading of the Atomic Energy Act and a misreading of the earlier license proceedings" in these dockets. June 13 letter at 1. The letter stated that: "It is the conclusion of the Department of Justice that the legal interpretations advanced by

Petitioners do not support the relief requested." Id.

DOJ noted, p. 3, note 6, that:

> Because the NRC can deny the amendment requests solely on legal grounds . . . a long and resource intensive hearing on the costs and benefits of the subject nuclear plants is unnecessary.

DOJ concluded, p. 4 and note 8, that the applications are "without merit" and recommended their dismissal without any evidentiary hearing.

On May 1, 1991 (56 Fed. Reg. 20057) a notice was published stating that the Commission had denied the application based upon the Staff's decision, arguments made in support of the applications, public comments and the views expressed by DOJ in its June 13, 1990 letter.[3/]

The Director's April 24, 1991 letter to applicants,

3/ Applicants expressly sought suspension of the antitrust license conditions by the Director, who has been delegated significant authority to make licensing decisions in antitrust reviews (see Ohio Edison application at 3). Under the Commission's regulations invoked by the applicants, which were improperly invoked inasmuch as the operating licenses have already been issued, Staff's determination became the decision of the Director and, absent sua sponte review by the Commission, became the Commission's decision, subject only to timely court review. 10 C.F.R. §2.101(e)(3). Thus, the notice properly referred to the decision as the Commission's decision. Moreover, there was no basis for advising the applicants that they could demand a hearing and reference to a Board to determine whether a hearing is appropriate and the nature of that hearing. A Commission decision is not properly reviewable by the Board. The Board apparently regards the decision as only a Staff decision which the Board is free to disregard although Staff counsel stated at the prehearing conference that the Staff acted on behalf of the Commission pursuant to delegated authority (Tr. 181).

referenced in the Federal Register notice, advised applicants of the denial of the application, enclosing the decision which explained the basis for the denial of the applications. The decision expressly did not reach or address Cleveland's "argument that the Commission lacks the authority to grant the relief requested by the Licensees", p. 13, note 18, but rejected as a matter of law applicants' argument that the Commission's jurisdiction to impose antitrust licensing conditions exists only if the cost of power from a nuclear plant provides the licensee with a competitive advantage over other sources of power.

As a policy matter, the decision concluded, p. 12, that:

> Finally, there is little to commend the Licensees' proposed suspension of their antitrust license conditions "until such time as there may be a factual basis for imposing them" (OE Application at 81). Such an approach to antitrust enforcement would require constant scrutiny of the competitive environment for these and other facilities, to determine whether previously imposed antitrust license conditions should be suspended or reimposed. The past two decades have demonstrated that reliability factors and energy costs for power plants using any source of fuel can vary greatly from year to year, as a result of such factors as supply disruptions and the need to comply with evolving statutory or regulatory developments. The Licensees' approach would result in unending litigation over perceived or real short-term developments which are asserted to affect the appropriateness of retaining previously imposed antitrust license conditions -- the need for which was fully litigated many years before, based largely upon anticompetitive conduct of a

licensee's own making.17/ Thus, wholly apart from the lack of merit in Licensees' legal arguments, their suggested approach to antitrust surveillance and enforcement is substantially lacking.

17/ In addition, this approach would cause unacceptable disruptions in the sale and supply of electricity -- a circumstance which would hardly be alleviated by the alternative suggested by CEI/TECO, whereby their competitors would be left to seek judicial relief, under the Sherman and Clayton Acts, from the Licensees' renewed anticompetitive practices (CEI/TECO Application at 15-16).

The May 1 Federal Register notice, oddly, without citation to any authority, stated that applicants "may demand a hearing with respect to the denial".4/ Applicants filed requests for hearing on May 31, 1991, which included terse lists of issues for which hearing was requested and which, by implication, dropped some issues and matters raised in the applications. On that same date, Cleveland filed an opposition to any hearing, challenging the Commission's jurisdiction to consider the applications, and, in the event a hearing was to be held, for intervention. Others, but not the applicants, filed petitions to intervene as described in the PHC Order, pp. 22-39. DOJ filed its "Notice of Intent to Participate" as a matter of right pursuant to AEA Section

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4/ The notice also appeared to set the same time for petitions for leave to intervene by "any person whose interest may be affected by this proceeding" as was fixed for applicants to submit any request for a hearing. Thus, interventions had to be drafted and filed before interested persons knew whether or not there would be further proceedings.

105c(5), 42 U.S.C. §2135(c)(5).

The Secretary of the Commission referred the requests for hearing and petitions for intervention to the Chief Administrative Judge on June 7, 1991. On June 13, 1991 (56 Fed. Reg. 28426), the Chief Judge established an Atomic Safety and Licensing Board to determine whether a hearing is appropriate and, if a hearing is to be held, its nature, and to preside over the proceeding in the event that a hearing is ordered." (Emphasis added.)

On June 19, 1991 by notice published in 56 Fed. Reg. 29292, the Board scheduled a prehearing conference (later rescheduled) at which, it stated, "the Board will consider the various requests for a hearing . . . , discovery (in the event a hearing is authorized) and other matters . . . ."

Various other filings, including Cleveland's July 10, 1991, supplement to its conditional petition to intervene, submitted pursuant 10 C.F.R. §2.714(b)(1), were made at various times by various entities prior to the prehearing conference which was held on the record on September 19, 1991. At that conference certain rulings were made and certain further procedures established and are reflected in the Board's Prehearing Conference Order.

The Board's Order (PHC Order at 56) granted intervention to Cleveland, American Municipal Power-Ohio, Inc. and Alabama Electric Cooperative; denied City of Brooks Park's petition to intervene; and rejected all of Cleveland's con-

tentions in opposition to the hearing with the exception of Cleveland's contentions that res judicata, collateral estoppel and laches barred the relief sought. The Board ruled these grounds as non-jurisdictional which should be submitted as part of Cleveland's motion for summary disposition (PHC Order at 21, note 43).

The Board ordered the parties to file a joint statement of the "bedrock" legal issue (or issues) upon which they seek a ruling within 30 days from the date of service (October 8) of the order and fixed a schedule for the submission of motions for summary disposition for all parties (PHC Order at 54-55).

ARGUMENT

I. THE BOARD ERRED IN RULING THAT THE COMMISSION HAS JURISDICTION TO CONDUCT AN ANTITRUST REVIEW SUBSEQUENT TO THE ISSUANCE OF AN OPERATING LICENSE

In its Prehearing Conference Order of October 7, 1991,[5/] the Board confronted Cleveland's position that the Commission (and consequently the Board) has no jurisdiction under the AEA to consider applicants' applications for suspension of the antitrust license conditions of the Perry and Davis-Besse operating licenses. Cleveland contends that antitrust reviews are authorized by Section 105c of that Act only in connection with an application for a Construction

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5/ Served October 8, 1991.

Permit ("CP") and in connection with the application for an Operating License ("OL"). The latter review may take place only when a "significant change" has occurred since the issuance of the CP in the circumstances relied on for the imposition of the antitrust license conditions.[6/]

For this position Cleveland relies, principally, on South Texas (Houston Lighting & Power Co., et al. (South Texas Project, Units 1 and 2)), CLI-77-13, 5 NRC 1303 (1977) and Florida Power & Light Company (St. Lucie Plant, Unit Nos. 1, 3, 4), ALAB-428, 6 NRC 221 (1977). These are the seminal and binding Commission decisions on the subject.

Although the Board concedes (PHC Order at 17) that "nothing in the language of section 105 explicitly directs the Commission to exercise antitrust review authority to undertake" the suspension or removal of previously imposed antitrust conditions, the Board ruled that the Commission nevertheless may conduct an antitrust review in this case after the issuance of the OL. The Board contends that the limitations of Section 105c on antitrust reviews do not apply because the licensees, by requesting the antitrust review, thereby voluntarily waived the statutory limits on antitrust review (PHC Order at 19). The Board further contends that "the narrow supervisory antitrust jurisdiction accorded the

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6/ The purpose of the OL review is not to delete antitrust license conditions but rather to determine whether additional antitrust license conditions should be added. See South Texas, infra.

Commission under Section 105c cannot be considered to circumscribe the Commission's more general authority, as reflected in AEA Section 189a and 10 C.F.R. §50.90 to amend a facility license at the request of the licensee." Id.

Cleveland shows, infra, that the Board's efforts to avoid and distinguish South Texas and the Board's reliance on Section 189a and Section 50.90 of the Commission's regulations are of no avail.

A. Under the Commission's Decisions In South Texas And Florida Power The Board's Ruling Is Fatally Defective

1. The South Texas Case

The South Texas case stemmed from an application for construction permits jointly filed by Houston Lighting & Power Company ("Houston"), Central Power and Light Company ("Central") and the Cities of San Antonio and Austin, Texas. The Attorney General reviewed the application for the permit and advised that an antitrust hearing was unnecessary. 5 NRC at 1305. No person submitted a petition to intervene or a request for a hearing on the antitrust aspects of the proposed project. Hence, no antitrust hearing was conducted. The construction permits were issued in late 1975.

In 1976, Central established for the first time an interconnection between its distribution facilities and those of certain out-of-state utilities. Houston responded by breaking off interconnections between its distribution system

and the systems of certain other utilities, including Central. These actions led to a flurry of judicial and administrative actions in which both Central and Houston challenged the actions of the other in various judicial and administrative forums.

Pertinent here is Central's filing before the Commission of a petition seeking intervention and an antitrust hearing. Central argued that Houston's termination of interconnection was a supervening development which warranted the imposition of antitrust conditions. The petition was addressed, in turn, by the Licensing Board, the Appeal Board and the Commission. By that point, all parties agreed that an antitrust hearing should be held at the earliest opportunity but differed as to the appropriate procedure for conducting the hearing.[7/]

The Commission began its analysis by noting that this ostensibly procedural dispute raised "significant issues" concerning the Commission antitrust review authority:

> resolution of this dispute requires a definition of the scope of our responsibility in enforcing the antitrust laws and the policies underlying them in relation to the enforcement responsibilities of other agencies, particularly the Department of Justice. Some of the parties' arguments would assign to us a broad and ongoing antitrust enforcement role; they envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating li-

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7/ The position of each of the parties and the NRC staff is described in the decision. 5 NRC at 1307-08.

> censes. As we shall show, we believe that the Congress envisioned a narrower role for this agency, with the responsibility for initiating antitrust review focused at the two-step licensing process. 5 NRC at 1309.

The Commission first examined the legislative history of the 1970 amendments to the Act which established pre-licensing antitrust review pursuant to Section 105. The Commission found that Congress deliberately limited antitrust review to the construction permit proceeding and, in a more narrow fashion, to the operating license proceeding. The Commission noted that "[c]oncern with the competitive aspects of licensing in the nuclear area . . . goes back to the original legislation enacted in 1946." Id. at 1313. The 1946 Act provided for anticipatory, antitrust review in the licensing context coupled with referrals to the Attorney General. The Act was rewritten in 1954 and a two-stage licensing process for privately owned reactors was set up. But antitrust review applied only upon a demonstration of the "practical value" of the facilities for industrial or commercial use. The Commission never made a "practical value" finding. In the 1970 amendments, Congress responded by finding that nuclear power has commercial value, thereby eliminating the need for a Commission finding of "practical value".

The Commission noted that the legislative history of the 1970 amendments indicated that antitrust review was to take place only in limited circumstances. The Commission

quoted a statement by the Chairman of the Joint Committee on Atomic Energy in which he noted that the Committee "sees no sense" in plenary antitrust review as part of both the construction permit and operating license proceedings. Id. at 1316. The Chairman noted that plenary antitrust review would be inequitable to a utility which had invested immense sums in a nuclear facility on the basis of the construction permit. Hence, he stated, limiting antitrust review to the prelicensing stage was necessary to encourage investment in nuclear facilities. Id.

The Joint Committee also noted that prelicensing antitrust review was advantageous because the utility would have "a time-related incentive to expedite the entire process and to comply with reasonable antitrust safeguards before any competition is damaged."8/

The Commission noted that there is a much narrower antitrust review in connection with an application for an operating license for a commercial facility. Section 105c(2) of the Act, 42 U.S.C. §2135(c)(2), states that the antitrust review procedures applicable to an operating license application apply only if:

> the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous

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8/ Id. at 1314, quoting statement of Charles A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Cooperative Association.

> review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

"Significant changes" are changes which "(1) have occurred since the previous antitrust review of the licensee, (2) are reasonably attributable to the licensee, and (3) have antitrust implications that would likely warrant some NRC remedy".[9/]

The Commission found that Congress, by setting up this two-step review process, intended to limit antitrust review to this process, id. at 1312:

> We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance. The Act links Commission antitrust review with the licensing process, demanding a thorough antitrust review at the stage of application for the construction permit and allowing a narrower second review at the operating license stage, if such a review is deemed advisable on the basis that significant changes have occurred in the licensees activities. The clear implication of the "significant change" language is that the holder of a construction permit is not subject to a second antitrust review at the operating license stage unless "significant changes" in the proposed project with antitrust implications have occurred in the interim. (Footnote omitted.)

The Commission went on to note, id. at 1314:

9/ South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 824 (1980). Note that the purpose of the antitrust review at the operating license stage is to add -- not delete -- antitrust conditions.

> But even among those who argued in favor of prelicense review, no evidence emerges that anything more than license connected review was considered. There is no hint in the legislative history that anyone -- advocate or foe of prelicensing review -- anticipated anything more. Indeed, the reasons underlying support for the bill as enacted indicate the importance of anticipatory review to its advocates. (Emphasis in original.)

The Commission summarized its findings, id. at 1317:

> In summary then, we conclude that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review. Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused so directly on "prelicensing" review.

The Commission also observed that the limits on the Commission's authority in the one instance in which post-licensing review of antitrust matters is permitted also reflected the desire by Congress to proscribe such review in all other circumstances. Section 105a of the AEA permits the Commission to modify antitrust conditions if a court finds that the licensee has violated any of the federal antitrust laws "in the conduct of the licensed activity."[10/] Referring to this language, the Commission noted, id.:

> if a broad, ongoing police power in the anti-

10/ Here, again, observe that the Commission action contemplated is the addition, not deletion, of conditions consistent with the court's findings.

> trust area had been assumed, the language in 105(a) authorizing the Commission to act with respect to licenses already issued, in light of the antitrust findings of courts would have been, if not superfluous, certainly redundant.

The Commission also rejected the argument that sections of the AEA other than Section 105 could give the Commission "general antitrust police powers in the nuclear industry" which would justify reopening licensing proceedings. Id. Again, the Commission noted that the carefully circumscribed and detailed antitrust review process set forth in Section 105 alone was intended to govern the antitrust review process. Hence, other sections of the AEA which deal in a general way with the Commission's authority -- such as Section 161, 42 U.S.C. §2201, and Section 186, 42 U.S.C. §2236 -- do not govern this process. Id.

The Commission found that in the special circumstances at issue in South Texas, antitrust review prior to the filing of the operating license application would not conflict with the policies underlying Section 105 of the Act. The Commission noted that all of the parties favored an antitrust review. The NRC then stated, id. at 1318:

> if antitrust review is found necessary in the period between issuance of a construction permit and application for an operating license, we can fashion remedies to expedite the review. This necessary flexibility can allow us to resolve antitrust allegations in a timely fashion, without unduly delaying the licensing process.

The Commission recognized that, due to the special

circumstances in the proceeding, it did not need to address whether antitrust review would be warranted in certain other circumstances, id.:

> Thus, we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment which would result in a "new or substantially different facility," or where an application for transfer of control of a license has been made, or where "significant changes" occur after an operating license is issued. We note, however, that the report of the Joint Committee explicitly refers to our authority to conduct a review of the first situation, H.R. Rep. No. 91-1470, 91st Cong. 2d Sess., 3 U.S. Code Cong. and Adm. News, 4981, 5010 (1970). Authority in the second situation, not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b). The third situation presents the issues pending in the Florida Power and Light proceeding, n. 1 supra, which we do not have before us and need not resolve to decide this case. We go no further than to conclude that Section 186 can have at best limited application, in light of the "significant changes" restriction of Section 105(c)(2) and its relation to the overall scheme of Section 105.

As shown below, the Florida Power case reinforces the finding in South Texas that antitrust review can only occur in the context of a construction permit or operating license proceeding. Moreover, Florida Power clarifies that this statutory bar on antitrust review applies even if there are significant changes in circumstances subsequent to the license proceedings.

2. The Florida Power Case

The Florida Power proceeding involved the St. Lucie

Plant, Units 1 and 2 and Turkey Point Plant, Units 3 and 4 in Docket No. 50-335A, et al. In that proceeding, numerous municipal electric power utilities ("cities") sought to intervene 31 months late in a proceeding and petitioned for an antitrust hearing. The Commission had already issued operating licenses in the proceeding for three of the four plants at issue pursuant to Section 104(b) of the AEA: St. Lucie Plant, Unit 1 and Turkey Point Plant, Units 3 and 4. For ease of reference, these are referred to as the Turkey Point plants. No requests for an antitrust hearing had been filed during the construction permit proceeding.

The cities pointed to an array of allegedly anticompetitive practices of the applicants subsequent to the issuance of the operating licenses. LBP-77-23, 5 NRC at 798. These activities included refusal to (1) enter into an integrated power pool, (2) sell wholesale power, and (3) wheel power.[11/] Among the sections cited by the cities as a basis for their request for relief were Section 105 of the AEA and Section 2.206 of the NRC's regulations.[12/]

The Licensing Board rejected the petition. LBP-77-23, 5 NRC 789 (1977). The Board pointed to the Appeal

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11/ See "Joint Petition Of Florida Cities For Leave To Intervene Out Of Time; Petition To Intervene; And Request For Hearing", pp. 49-85 (Aug. 6, 1976).

12/ See "Notice of Appeal and Appellate brief of Florida Cities", pp. 11-12 (April 29, 1977).

Board's decision in South Texas (then pending before the Commission) in which it found that neither the Licensing nor the Appeal Board has the "authority to reopen a terminated construction permit proceeding by ordering a hearing on a supervening antitrust question." 5 NRC at 731. The Board noted that this finding applied with full force to the cities' joint petition despite the allegations of anticompetitive activities subsequent to the issuance of the operating license. Id. "Therefore," stated the Board, "the Joint Petition must be and is dismissed." Id.

The Licensing Board found that this same reasoning indicated that there was no jurisdictional bar to establishment of an antitrust hearing in connection with the remaining plant: St. Lucie Plant, unit No. 2. The Board noted that the construction permit proceeding regarding that plant was still pending before the Licensing Board. The Board went on to find that the cities had satisfied the standards governing interventions in Section 2.714 of the Commission's regulations by showing that (1) they had a sufficient interest in the proceeding due to concerns about alleged anticompetitive conduct by the applicants, and (2) they had good cause to file late because (1) the cities and applicants had agreed to allow the construction permit to issue subject to certain conditions insuring that the cities had access to, or at least the opportunity to purchase access to, the nuclear capacity, (ii) the applicants had failed to meet these com-

mitments, and (iii) the fossil fuel shortage which began in 1973 exacerbated the impact of the applicants' monopoly of nuclear power.

The Appeal Board affirmed the Licensing Board's decision regarding the Turkey Point plants, on one hand, and the St. Lucie Plant No. 2, on the other, in two separate decisions. Florida Power and Light Company, 6 NRC 8 (1977) (St. Lucie No. 2); Florida Power and Light Company, 6 NRC 221 (1977) (Turkey Point). Most significant here is the Appeal Board's decision affirming the denial of the petition seeking post-operating license antitrust review of Turkey Point. The Appeal Board noted that the Commission had decided not to review the Board's finding in South Texas that it could not order an antitrust hearing "'in the absence of a pending construction permit or operating license proceeding.'" Id. at 223.[13/] Hence, the Appeal Board agreed with the Licensing Board that South Texas was fully applicable and precluded the Licensing Board from directing a hearing on antitrust issues despite the allegations of anticompetitive acts by the licensee subsequent to the issuance of the operating licenses.

However, the Appeal Board noted that the Commission had, subsequent to the Licensing Board, directed the Appeal Board to consider a related issue: whether the Commission

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13/ The Commission decision was issued on March 31, 1977 and was not reported. Id. at 223.

Director could address the antitrust issues raised by the petitioners. The Appeal Board first noted that the Turkey Point units received construction permits prior to the 1970 amendments to the Act requiring prelicensing antitrust review. Id. at 224. The Board observed that Congress, in enacting the 1970 amendments, decided to exclude from antitrust review under Section 105c plants, such as Turkey Point, which had received construction permits under Section 104(b) before 1970. Id. at 224-225.

Directly pertinent here is the alternative justification given by the Appeal Board for its decision. The Board pointed to the Commission's finding in South Texas, 5 NRC 1303, that post-operating license antitrust review is precluded by the AEA and found that this reasoning applied even where significant changes had occurred[14/]:

> In its own South Texas decision, the Commission recently considered at length the extent of its authority to hold antitrust hearings. The precise issue in that case involved when an antitrust proceeding under Section 105(c) may be ordered after a construction permit has been issued but before the necessary additional license to commence operations has been granted. The Commission did not confine its South Texas opinion to that relatively narrow question; instead it chose to address the broad spectrum of NRC antitrust responsibilities. In so doing, it manifested the judgment in no uncertain terms that the NRC's supervisory antitrust jurisdiction over a nuclear reactor license does not extend over the full 40-year

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14/ 6 NRC at 226.

> term of the operating license but ends at its inception.12/ (Emphasis supplied.)
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>
> 12/ Except perhaps as necessary to enforce the terms of a license or to revoke one fraudulently obtained, or in circumstances where a plant is sold or so significantly modified as to require a new license. See CLI-77-13, supra, 5 NRC at 1318.

The Commission declined to review the Appeal Board's decision. The cities submitted a petition for review in the D.C. Circuit. The court affirmed the Commission's decision. Ft. Pierce Utilities Authority v. NRC, 636 F.2d 986 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979).

These decisions of the Commission completely undermine the Board's effort in the instant case to find authority for post OL antitrust review in what the Board describes as the "more general authority, as reflected in Section 189a and 10 C.F.R. §50.90,15/ to amend a facility license at the

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15/ We are baffled by the Board's reliance on Section 50.90 of the Commission's regulations as authority to conduct post OL issuance antitrust review. To begin with a regulation does not generate statutory authority. Only the Congress can create statutory authority for the Commission. West Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n., 701 F.2d 632, 641 (7th Cir. 1983)("Our inquiry cannot end with a finding that the NRC acts in conformance with its regulations, for we must determine whether those regulations as interpreted violate the governing statue.") A regulation that is valid implements existing statutory authority. Section 50.90 of the regulations does no more than advise that a holder of a license or construction permit who desires to seek an amendment must describe the changes desired in the form prescribed for original applications and must be submitted in the manner specified in Section 50.4 of the regulations. There is nothing in the regulation that remotely provides substantive authority such as appears in Section 105c of the AEA.

request of the licensee" (PHC Order at 17). As the Commission stated in South Texas, Section 105 alone was intended to govern the antitrust review process. The Commission held that other sections of the AEA which deal in a general way with the Commission's authority such as Section 161, 42 U.S.C. §2201,[16/] and Section 186, 42 U.S.C. §2236, do not govern the process (5 NRC at 1317). So, here, the Board's reliance on the general authority of Section 189a is effectively and flatly rejected by the Commission's decision in South Texas, and, indeed, in Florida Power.

B. The Commission's Authority To Enforce Antitrust License Conditions Pursuant To Section 105 Does Not Include The Authority To Delete Or Modify Existing Antitrust License Conditions

The Board's suggestion that the Commission authority to police the antitrust license conditions under Section 105c "provides a basis for our jurisdiction here" (PHC Order at 21, note 42), was also rejected in South Texas, supra, pp. 17-18 and Florida Power, p. 23-24. Obviously the Commission

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16/ Section 161c confers authority on the Commission to "hold such . . . hearings as the Commission may deem necessary or proper [to] assist it in exercising any authority provided in this Act, or in the administration of this Act, or any regulations or orders issued thereunder" (emphasis supplied). General authority to hold hearings does not confer subject matter authority, such as the right to impose antitrust conditions. The section confers no more than procedural authority. The authority to hold a hearing on a particular subject matter must be found in a section of the AEA that submits that subject matter to the Commission's jurisdiction. This is true also as to Section 186.

has authority to enforce compliance with the antitrust conditions it has imposed and to make such modifications of the conditions as are necessary to force compliance.

In fact, that very situation was presented with respect to antitrust conditions the applicants would eliminate. On January 24, 1978, Cleveland asked the Commission to take enforcement action pursuant to Section 2.201, et al. of its regulations against CEI for violations of antitrust License Condition No. 3, which required CEI and its co-licensees to provide wheeling for entities in the service areas of the co-licensees. The Acting Director of the Commission's Office of Nuclear Reactor Regulation responded by issuing a Notice of Violation to CEI pursuant to Section 2.201 of the Commission's regulations. In the Notice, the Director reviewed CEI's January 27 transmission schedule filed with the Federal Energy Regulatory Commission ("FERC") and CEI's response to a Staff questionnaire concerning Cleveland's motion and stated that "it appears that CEI has not complied with antitrust license Condition No. 3 of the subject license and construction permits . . . ."[17/]

Cleveland, CEI and the NRC Staff met in an unsuccessful attempt to address the concerns raised by Cleveland's filing. On June 25, 1979, the Director found that CEI had

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17/ The Notice is reproduced in Appendix A of the June 25 "Order Modifying Antitrust License Condition No. 3 of Davis-Besse Unit 1, License No. NPF-3 and Perry Units 1 and 2, CPPR-148, CPPR-149" (unreported).

not complied with license Condition No. 3 (mimeo at 6):

> CEI has approached its responsibility to file a wheeling schedule for the City as if it had not been required as a condition of its operating license and two construction permits to comply with Antitrust License Condition No. 3.

The Director noted that an April 27, 1979 initial decision by a FERC administrative law judge ("ALJ") addressing CEI's transmissio[illegible]dule "deals effectively with most items [illegible] by the NRC Staff to be in violation of Antitrust License Condition No. 3" (mimeo. at 4). With respect to the matters not resolved by FERC, the Director ordered CEI to file an amendment to its transmission tariff to ensure compliance with the antitrust license condition. Consistent with these findings, the Director exercised his authority pursuant to Section 2.204 of the NRC's regulations and modified license Condition No. 3 to add language requiring CEI to file a revised t[illegible]smission schedule reflecting the changes ordered by the NRC and FERC.

The Board's effort to find support for authority to conduct post OL antitrust reviews in the Appeal Board's decision in Davis-Besse, ALAB-560, 10 NRC at 294-295, has no merit. The Board contends that the Appeal Board suggested that a licensee may seek relief from an antitrust condition in its license by filing a petition pursuant to 10 C.F.R. §2.206 requesting the Commission's Staff to institute an enforcement type "show cause" hearing (PHC Order at 20, note 41, 2nd Paragraph).

Nowhere in the license conditions approved by the Licensing and Appeal Boards in Davis-Besse is there any mention that the conditions can be modified in the event circumstances change. The Appeal Board simply says that the NRC Director has the "authority [pursuant to Section 2.200, et seq. of the NRC's regulations] to modify license conditions where necessary." Those sections of the Regulations authorize the Director "to modify, suspend or revoke a license or to take other action for alleged violation of any provision of the Act or this chapter or the conditions of the license" (emphasis supplied). Thus, the Board's citation to the Director's enforcement order of June 25, 1979 merely reflects the Board's recognition that a license condition can be modified to ensure that it is not circumvented by the Applicants. It is clear that the Appeal Board was not suggesting that the antitrust conditions could be suspended in the circumstances here.

C. The Licensees Cannot Confer Jurisdiction On The Commission

The Board agrees that Section 105c does not provide for post-OL antitrust review (PHC Order at 17). The Board alleges that the purpose of limiting antitrust review to prelicensing proceedings was to free utilities from the continuing uncertainty of having to undergo antitrust review. Thus, Congress limited NRC antitrust jurisdiction to the CP and OL stages. The Board then rationalizes that if the utility is

willing to voluntarily submit to continuing supervisory antitrust jurisdiction, the jurisdictional limits created by Congress should not be applied (PHC Order at 19). This is plainly erroneous. Where the Congress has limited the Commission's ancitrust jurisdiction, the parties cannot by their own acts enlarge it. The Commission's antitrust jurisdiction can only be created by Congress not by the licensees.

The Board is not clear as to what new antitrust supervisory jurisdiction applicants have conferred on the Commission. Does the Commission now, courtesy of the applicants, have authority in a subsequent proceeding under Section 189a invoked by another interested party to impose new more stringent license conditions? Or is the jurisdiction limited to the relief requested by applicants? Can the license conditions only be ratcheted down or can they be ratcheted up as well? Is the jurisdiction purportedly created by the applicants good for this day and train only or does it extend for the life of the underlying license? Presumably, it must extend for the entire 40 year life of the operating license, inasmuch as applicants' proposed relief is that the antitrust license conditions be suspended until such time as it is determined that the cost of nuclear power has become competitively advantageous.

Of necessity, the sort of jurisdiction purportedly created by applicants requires the Commission to undertake an ongoing supervisory role. No one can predict when the cost

advantage of nuclear generation vis-a-vis other forms of generation will swing one way or the other. Much of the necessary cost data will be in the unique possession of the applicants. Without periodic reporting requirements no one, aside from applicants, will know when the cost advantage has shifted. Of necessity, the Commission will become embroiled in the arcane intricacies of utility cost allocation in quasi-ratemaking proceedings. If the antitrust conditions are suspended and then a nuclear power cost advantage occurs, are the original license conditions reinstated, or, as a part of the Commission's newly found antitrust supervisory powers, is a full proceeding held to determine which conditions if any should be reinstated?

The Board tries to buttress its finding that applicants can confer jurisdiction by saying that the Commission "is in the best position to make a judgment about whether the requirements it dictated now should be suspended or otherwise altered" (PHC Order at 19). It may be true that if the Commission cannot change the license conditions, no one can. But that does not make the Commission the most effective post-license antitrust arbiter. The reason the Commission was given the limited antitrust jurisdiction it possesses was that it is uniquely situated to prevent probable anticompetitive effects in their incipiency.

The Commission may desire jurisdiction to amend the license conditions. And, as Staff counsel observed at the

prehearing conference, as a matter of policy the Commission might believe it to be desirable to be vested with continuing antitrust supervisory powers.[18/] But, in fact, it does

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18/ Turning to jurisdictional issues raised by Cleveland, Staff counsel candidly stated that: "Staff until now ducked entirely the jurisdictional issue." (Tr. 175). His comments on jurisdiction, he said, "are of a preliminary nature." (Tr. 176). He acknowledged that Section 105 "provides a very limited jurisdiction for the Commission to look at antitrust issues." (Tr. 176). He conceded that Section 105 contemplates a look at antitrust issues in the first instance when the license application is first presented as it was 14 years ago and subsequently at the OL licensing state. (Tr. 176). He conceded the present posture is different from either of these two situations. (Tr. 176). He stated: "I have to say in my personal opinion, I don't see that the Act specifically affords the Commission jurisdiction to look at antitrust issues at this time." (Tr. 176) (Emphasis supplied). "However," he went on to say, "there seems to be a problem with that conclusion, because as a matter of policy, the Commission should be entitled to review conditions embodied in its own licenses at any time. I don't have statutory authority for that, but it seems the right outcome as a matter of policy, and I would submit that the authority to do that would come from Section 189 of the Act whereby the Commission has authority to commence a proceeding for the amendment or suspension or revocation of a license or any part thereof (Tr. 176-177) (emphasis supplied). Staff counsel goes on to acknowledge that South Texas and "Statesville" cases "suggest the antitrust review really should be more limited" and that the reference to "policing" in South Texas, relied on by Judge Bechhoefer, refers to enforcement of existing license conditions (Tr. 177). He stated there is "a bit of an anomaly if we say the Commission has the right to decrease the application of previously imposed conditions but not to expand the scope of those previously imposed. It's not a perfect outcome, and I'm not satisfied with the outcome." (Tr. 178). Cleveland observes that there is much authority that regulatory commission would desire to have "as a matter of policy", but if the statute does not provide it, as this one does not provide it, the regulatory body's recourse is to the legislature. Section 189a is of no help to the Commission. Section

(continued...)

not have such authority. As the Appeals Board observed in Consumers Power Company (Midland Plant Units 1 and 2) ALAB-452, 6 NRC 892, 912 (1977): "Like Section 5 of the FTC Act, Section 105(c) was also designed by Congress to 'nip in the bud any incipient antitrust situation,' albeit via the NRC prelicensing review process." (Citation oritted.) Moreover, any findings are to be based on "reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws". Id., citing Joint Committee Report 14-15. Clearly, in enacting Section 105c, which was predicated on incipiency and probabilities, Congress understood that an anticompetitive situation that was probable or incipient might not in fact come to fruition. Nonetheless, Congress did not provide for continuing Commission antitrust supervision to provide relief to licensees if those probabilities did not in fact occur. Had Congress intended to provide for such continuing antitrust supervision it could have done so in Section 105c.

Moreover, the Board ignores the other side of the coin, the impact on the beneficiaries of the antitrust license conditions. The policy concerns underlying the deci-

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18/(...continued)
189a cannot be construed without taking into account other provisions of the AEA. The other provisions, as Staff counsel admits, are a bar to antitrust reviews subsequent to issuance of the OL. The limitation was sought by the utilities for their protection, but the limitation works both ways.

sion by Congress in the 1970 amendments to limit antitrust review to the CP and OL proceedings are directly applicable here. As noted, above, the Commission in reviewing the legislative history of the 1970 amendments in South Texas observed that Congress recognized that strict limits on the frequency of antitrust reviews were needed to ensure that utilities could rely on Commission licensing decisions. 5 NRC at 1314-16. The Commission cited statements by the Chairman of the Joint Committee on Atomic Energy and others during the Congressional hearings opposing an unlimited reopening of antitrust review in the operating license proceeding. Id.

These same concerns apply with equal force to protect the competitive positions of beneficiaries of the license conditions. In the situation here, the relief sought by the applicants -- elimination of the license condition restraints as to them -- would have the sort of disruptive impact which Congress acted to prevent by limiting antitrust review to the construction permit and operating license proceeding. Prior to the imposition of the antitrust license conditions, Cleveland's Municipal Power System ("CPP") faced extinction due to the anticompetitive activities of CEI, in particular, and its sister members of Central Area Power Coordination Group ("CAPCO"). See Toledo Edison Company, et al. 5 NRC 133, 165-76 (1977). CPP was dependent entirely on power purchased from CEI for its continued existence. CPP

had a single interconnection with CEI, and the ability to purchase only firm and emergency power from CEI.

Imposition of the license conditions provided CPP access to transmission and coordination services and a variety of wholesale purchase power sources. Because of the license conditions, CPP has been able to add a second and third interconnection and plans to add a fourth. CPP has also been able to diversify its power supply, and take advantage of the variety of surplus power available as short-term, limited term, energy and even "dump" power. These arrangements provides CPP and, in turn, its customers with substantial reductions in costs from what would have been paid to CEI without such competition.

CPP's first firm power purchase from an alternative supplier began in 1980 as a direct result of the license conditions and involved a purchase from Power Authority of the State of New York ("PASNY") of inexpensive hydroelectric power. CPP had applied for and received an allocation of PASNY energy in the late 1970's, but CPP could not take advantage of this cheap power source until CEI was forced by the license conditions to transmit the power to CPP.

As the PASNY Power Bargaining Agent for the State of Ohio, CPP has represented the entire State and has fulfilled its responsibility to facilitate making PASNY Niagara Power available for transmission to municipally-owned electric systems throughout the State. CPP could not have obtained

low cost Niagara Preference Power for the 75 municipal electric systems in Ohio receiving the power without the ability to have the power actually transmitted from New York to each municipal system through the transmission facilities of Ohio Edison and CEI. Indeed, all but two of the 75 recipient municipal systems receive the power by having it transmitted at some point over the systems of Ohio Edison and CEI.

The license conditions have permitted CPP to diversify its supply sources to procure the cheapest power available. For example, during CPP's peak months of July and August, 1987, when it provided its customers approximately 70 million kwh of energy, CPP purchased power from ten different sources: Dayton Power and Light Company, PASNY, Ohio Power, Big Rivers, CEI, American Electric Power Company ("AEP"), TE, Duquesne, Michigan Electric Coordinated Systems and PENELEC. CPP also purchased power from Ohio Edison, Ontario Hydro and Buckeye during the past eight years.

Moreover, even if the license conditions were suspended and later reimposed, CPP and other utilities in the service areas of the co-licensees would still not be able to rely on the services available pursuant to the license conditions in planning its power supply.[19/] CPP could not assume that the service available pursuant to the antitrust

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19/ As noted, Ohio Edison argues that antitrust conditions can be suspended and reimposed by the Commission at any time.

license conditions would continue to be available. Therefore, CPP's ability to make advantageous purchase power arrangements with other power suppliers, and thus its ability to compete with CEI, would be impaired. As noted, Congress, in enacting the 1970 amendments, intended to prevent that sort of continuing uncertainty regarding the conditions governing a nuclear facility.

II. THE BOARD ERRED IN RELYING ON SECTION 189A OF THE AEA FOR AUTHORITY TO CONDUCT THE ANTITRUST REVIEW SOUGHT BY APPLICANTS

A. Section 189a Is Procedural And Does Not Grant A Substantive Right To Amend The Operating License

The right to a hearing under Section 189a(1) 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). Section 189a provides hearing rights "in any proceeding under this AEA, for the granting, suspending, revoking, or amending" an operating license. However, this section does not prescribe the circumstances under which a license may be granted, suspended, revoked, or amended. Unless there exists substantive authority outside Section 189a for the requested amendment, Section 189a is not applicable. That Section 189a does not create substantive jurisdiction has been recognized by the Commission in 10 C.F.R. Part 2 App. A III(a)(1) in which it is said "the granting of a petition for leave to intervene

does not operate to enlarge the issues . . . with respect to matters beyond the jurisdiction of the Commission." If Section 189a itself provided substantive jurisdiction, there would be no need for the foregoing language.

Thus, it is plain on the face of Section 189a(1) that it confers no substantive authority on the Commission in lieu of or in addition to the substantive authority of Section 105c. It cannot be disputed that the applicants are seeking antitrust review. It is equally clear that the Board intends to undertake antitrust review, in some fashion, under the perceived authority of Section 189a. (PHC Order at 19). Since Section 189a(1) provides no substantive right to an amendment, and such an amendment is barred by Section 105c, the Board lacks jurisdiction to determine the applications.

B. Section 189a(1) Confers Hearing Rights On The Public But Confers No Hearing Rights On The Applicants

Section 189a(1), 42 U.S.C. §2239(a)(1), provides, in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award of royalties under sections 153, 157, 186c, or 188, 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. (Emphasis supplied.)

The Board has ruled that Section 189a(1) confers on the applicants the right to demand a hearing (PHC Order 7-8). The Board's ruling rests on two reasons. One, that an applicant/licensee "is a person" within the meaning of the AEA and has an "interest" that "may be affected" within the meaning of section 189a. (PHC Order at 7-8). Two, the Board asserts that "as a long standing matter of statutory construction, the Commission considers an applicant/licensee to be an 'interested person' within the meaning of section 189a in instances in which its request for licensing action is denied." (PHC Order at 7).

In concentrating on "person" and "interest" that may be affected, the Board has ignored the crucial provision, that "any such person shall be admitted as a party to the proceeding." Clearly, a proceeding is already in existence for a person to have the opportunity to request a hearing. Such proceeding is in existence as the result of an application filed by the applicant/licensee. The applicant/licensee is already a party to the proceeding by reason of that application. Indeed, the applicant/licensee under the Commission's regulations is not required to file a petition to intervene nor to specify its interest. But to become a party to the proceeding any other person whose interest may be affected must file a petition to intervene under 10 C.F.R. §2.714 of the Commission's regulations to attain party status. The petition must set forth with particularity the

interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene, with particular reference to the factors enumerated in paragraph (d)(1) of Section 2.714. There is also a requirement for submitting a list of contentions prior to the holding of a preliminary conference that are accepted by the Board as issues in the proceeding.

In brief, Congress in Section 189a(1) provided public participation for the public's protection as the majority and dissenting opinions agreed in Bellotti v. United States Nuclear Regulatory Comm'n., 725 F.2d 1380, 1383, 1386 (D.C. Cir. 1983). See also, Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n., 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985); Cholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980) (per curiam), vacated and remanded, 459 U.S. 1194, 103 S.Ct. 1171, 75 L.Ed.2d 423 (1983).

The Board, for the reasons given by the applicants/licensees, finds the Union of Concerned Scientists case inapposite (PHC Order at 8, note 16). The reason the applicants/licensees gave was that the case did not involve applicant/licensees but involved the public seeking participation. In fact, none of the judicial cases found involving Section 189a involved an applicant/licensee. Each case involved the public seeking participation. This fact reinforces, rather

than detracts from, Cleveland's interpretation of Section 189a(1).

With respect to the Board's second reason -- that Cleveland's interpretation is contradicted by a long standing Commission construction -- Cleveland has examined the notices published in the Federal Register for each of the Commission's regulations cited by the Board (PHC Order at 7, note 14) -- 10 C.F.R. §§ 2.103(b), 2.105(d), 2.108(b) and 2.1205. Only one of the orders is their express reference to Section 189a(1) as authority for the regulation. In that one, the notice states that Section 189(a)(1) includes applicants. None of the notices adopting the regulations state that the Commission was confronted with the interpretation Cleveland presents. Nor is there any case found in which the Commission faced the challenge Cleveland presents.

Even if the Board's statement that the Commission has long regarded Section 189a(1) as referring to applicants as well as the public is accepted, Cleveland submits respectfully that the Commission's interpretation is in error and should be re-visited. Does it make sense that a section that assures applicants for a construction permit that the application therefor will not be disposed of without a hearing also requires the applicants for a construction permit to request a hearing? Cleveland submits that that does not make sense. But what does make sense is that Congress was concerned that the public whose interest may be affected have a

right to a hearing and have a role in the process. The Board afforded the applicants an opportunity to bootstrap a right to hearing by characterizing the applicants as persons whose interest may be affected by the very proceeding that the applicants themselves had initiated. This reading of Section 189a is not supportable.

CONCLUSION

WHEREFORE, for each and every one of the reasons submitted in this brief in support of the Notice of Appeal, Cleveland's appeal should be granted, the reference to the

Board should be revoked and the applications should be dismissed.

Respectfully submitted,

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October 23, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket Nos. 50-440-A
	)	50-346-A
OHIO EDISON COMPANY	)	
(Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
THE TOLEDO EDISON COMPANY	)	
(Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58	)	ASLBP No. 91-644-01-A
(Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NOTICE OF APPEAL" and "BRIEF OF CITY OF CLEVELAND IN SUPPORT OF NOTICE OF APPEAL OF PREHEARING CONFERENCE ORDER GRANTING REQUEST FOR HEARING" have been served upon the parties or their attorneys on the attached Service List, this 23rd day of October, 1991, by deposit in Washington, D.C. in the United States Mail, first class, postage prepaid.

Channing D. Strother, Jr.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'91 OCT 24 P4:25

In the Matter of	)	Docket Nos. 50-440-A 50-346-A
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY THE TOLEDO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58 (Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	)	ASLBP No. 91-644-01-A

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