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USNRC

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|------------------------------------|---|-----------------------|
| In the Matter of |) | |
| OHIO EDISON COMPANY |) | Docket No. 50-440-A |
| (Perry Nuclear Power Plant, Unit 1 |) | Docket No. 50-346-A |
| Facility Operating License |) | (Suspension of |
| No. NPF-58) |) | Antitrust Conditions) |
| THE CLEVELAND ELECTRIC |) | |
| ILLUMINATING COMPANY |) | ASLBP No. 91-664-01-A |
| 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) |) | |

AMENDED PETITION OF THE CITY OF BROOK PARK, OHIO,
FOR LEAVE TO INTERVENE OUT OF TIME

Pursuant to Section 2.714(a) of the Commission's Rules of Practice (10 C.F.R. § 2.714(a)), the City of Brook Park, Ohio, ("Brook Park") hereby submits its amended petition for leave to intervene in these proceedings. Brook Park's initial petition to intervene was denied in the Board's order of October 7, 1991 (LBP-91-38, at pp. 36-39), as amended by the Board's order of November 5, 1991. The persons designated to receive service of pleadings, orders and other documents in connection with this proceeding on behalf of Brook Park are:

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For the reasons set forth below, Brook Park is entitled to intervene out of time in this proceeding as of right, because its establishment of a municipal electric system by adoption of Ordinance No. 7711-1992, which became effective on May 22, 1992, has eliminated the "hypothetical" nature of the injury-in-fact that Brook Park would sustain as the result of a favorable ruling on the Licensees' application in this proceeding, and thereby eliminated the principal ground for the Board's denial of Brook Park's initial motion for leave to intervene. In addition, Brook Park's creation of a municipal electric system places it squarely within the "zone of interests" intended to be protected by the antitrust conditions at issue in this proceeding.

Alternatively, Brook Park is entitled to both intervention as of right and discretionary intervention in these proceedings because: (1) its formation of a municipal electric system within the service territory of the Cleveland

Electric Illuminating Company gives it a direct and immediate interest in the continuation of the antitrust conditions at issue in this proceeding which cannot be represented adequately by other parties to this proceeding; (2) Brook Park's perspective, as a nascent municipal electric system within the service territory of one of the applicants in this proceeding, will substantially contribute to the development of a sound record in this proceeding; (3) Brook Park's counsel bring significant expertise to this proceeding, based on their prior experience in the formation of municipal electric utilities in the State of Ohio, their participation in the administrative review process before the Staff in this proceeding and their experience in the application of antitrust principles in the electric utility industry; and (4) Brook Park's participation will not inappropriately broaden or delay this proceeding.

I. BROOK PARK IS ENTITLED TO INTERVENTION
OUT OF TIME AS OF RIGHT UNDER
THE COMMISSION'S RULES OF PRACTICE

As set forth in the Board's order of October 7, 1991 (LBP-91-38 at pp. 2-3), the Commission's notice of May 1, 1991 (56 Fed. Reg. 20,057) established May 31, 1991, as the date for filing petitions for intervention and requests for hearing in this proceeding. Brook Park filed its initial petition to intervene on August 8, 1991, and supplemented its petition at

the Board's direction on September 4, 1991. As stated above, the Board denied Brook Park's initial petition to intervene by its order of October 7, 1991 (LBP-91-38, at pp. 36-39), as amended by the Board's order of November 5, 1991.

Brook Park's present, amended petition to intervene is "untimely" within the meaning of Section 2.714(a)(1) of the Commission's Rules of Practice. Brook Park is nonetheless entitled to intervention as of right in this proceeding under the requirements of Section 2.714(a) and (d) of the Commission's Rules of Practice (10 C.F.R. § 2.714(a) and (d)), for the reasons set forth below. In particular, Brook Park has satisfied the "cause" requirement of the cited provisions of the Commission's Rules of Practice because its ability to satisfy the "standing" requirements articulated by the Board in LBP-91-38 was fully and finally resolved on the May 22, 1992, effective date of its ordinance creating its municipal electric system.

The requirements for untimely intervention under the Commission's Rules of Practice are as follows:

10 C.F.R. § 2.714(a)(1)

. . . Untimely filings will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition . . . that the petition . . . should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden or delay the proceeding.

10 C.F.R. § 2.714(d)(1):

. . . [S]uch ruling body or officer shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

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

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

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

In demonstrating Brook Park's compliance with the foregoing requirements, it is first necessary to review the process of Brook Park's establishment of its municipal electric system under Article XVIII of the Constitution of the State of Ohio. We then show: (1) that Brook Park unquestionably established the "standing" necessary to support its intervention in this proceeding on the effective date of its ordinance creating a municipal electric system, and

therefore has the requisite "cause" for its untimely intervention; (2) that Brook Park's interests are not otherwise represented in this proceeding, and that its participation will contribute significantly to the development of a sound record herein; and (3) that Brook Park's participation in this proceeding will not inappropriately broaden or delay this proceeding.

A. The Creation of Brook Park's
Municipal Electric System Under
Article XVIII of the Ohio Constitution

The central objective of the antitrust conditions at issue in this proceeding is the protection of competition and the elimination of the "situation inconsistent with the antitrust laws . . ." (42 U.S.C. § 2135(c)(5)) that the Commission found applicants The Toledo Edison Company ("TECo") and The Cleveland Electric Illuminating Company ("CEI") to have created. Toledo Edison Co. (Davis-Besse Nuclear Power Plant, Units 1, 2, and 3), ALAB-560, 10 NRC 265 (1979). As the Commission found in the underlying licensing proceedings, the significant source of competition in the product and geographic markets relevant to its inquiries was not other investor-owned utilities (with which TECo and CEI were found to have acted in a collusive and anticompetitive manner), but rather the small, consumer-owned, municipal and cooperative electric systems operating within those markets. Id. at 274-

275. It is therefore essential, in deciding this motion and in deciding this case, that the Board have an appreciation for the process and the dynamics of the creation and operation of municipal electric systems under the Constitution of the State of Ohio, through which Brook Park's municipal electric system has lately come into being.

1. Article XVIII of the Ohio Constitution

Ohio's Constitutional Convention of 1912 added Article XVIII to the Ohio Constitution. Known generally as the "home rule amendment," Article XVIII confers upon Ohio municipalities extensive powers of self-governance, including the power to acquire, own and operate a municipal utility. Thus, Article XVIII, Section 4 of the Ohio Constitution provides:

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service.

Recognizing the significant commitment of a municipality's capital and other resources required for the establishment and operation of a municipal utility, Article XVIII of the Ohio Constitution requires that the process of formation of a municipal utility proceed with deliberation and an appropriate opportunity for the citizens of the

municipality to participate in the decision to form such a utility. Thus, Article XVIII, Section 5 of the Ohio Constitution provides:

Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage.

Finally, Article XVIII, Section 6 of the Ohio Constitution limits the ability of a municipal utility to engage in off-system sales to not more than fifty percent of the amount of power consumed within the corporate limits of the municipality.

2. Brook Park's Creation of
Its Municipal Electric System

Brook Park is a municipality located in Cuyahoga County, Ohio, covering a land area of 8.8 square miles adjacent to the southwest corner of the boundary of the City of Cleveland. Brook Park has approximately 26,000 inhabitants, and its residents and businesses presently receive electric service from CEI, one of the applicants in this proceeding. Present annual electric energy consumption within Brook Park is approximately 760,000,000 kWh per year, and peak demand within Brook Park is approximately 135 MW.

As stated in its initial petition for leave to intervene in this proceeding, filed August 8, 1991, Brook Park

began to study the feasibility of establishing its municipal electric system during the late Spring and early Summer of 1991. Following the submission by its consultants of a preliminary feasibility study of the feasibility of Brook Park's establishment of a municipal electric system, Brook Park's City Council placed on the ballot for its November 1991 elections a referendum for the amendment of its Charter to establish a Division of Utilities within its municipal government in order to establish a municipal electric system. On November 6, 1991, the citizens of Brook Park voted 77 percent in favor of the referendum establishing the City's Division of Utilities.

On April 21, 1992, following further review and analysis of the establishment of a municipal electric utility, Brook Park's City Council unanimously passed Ordinance No. 7711-1992 (a copy of which is attached hereto as Exhibit A), establishing a municipal utility in accordance with the requirements of Article XVIII, Sections 4 and 5 of the Ohio Constitution. Pursuant to Article XVIII, Section 5 of the Ohio Constitution, Ordinance No. 7711-1992 became effective on May 22, 1992.

Brook Park thus became only the second city in the State of Ohio to establish a new municipal utility in the past fifty years.^{1/}

B. Brook Park Has Standing
To Intervene In This Proceeding
As An "Entity" Entitled to the
Benefit of the Antitrust Conditions;
The Need to Establish Standing Also
Constitutes Cause for Late Intervention

1. Brook Park Is Within The "Zone of Interests"
Sought to Be Protected By The Antitrust Conditions
And Will Suffer Specific and Concrete
Injury-In-Fact Should The Licensees' Application
Herein Receive A Favorable Ruling

In its order of October 7, 1991 (LBP-91-38, at p. 38 [as amended by its order of November 5, 1991]), the Board observed (footnotes omitted):

. . . [I]t is apparent that any injury Brook Park [purportedly] might suffer as a consequence of this proceeding is entirely hypothetical until it reaches its decision actually to [institute] a municipal electrical system. As counsel for Brook Park advised us during the prehearing conference, such a determination will not come, at the earliest, until November of this year. At that time, Brook Park citizens will vote on whether to amend the municipality's charter to establish an electrical system. If they do so, Brook Park's stake in this proceeding will then cease to be provisional and it will become subject to the same concrete injury-in-fact that could accrue to Cleveland or AMP-Ohio as a result of a determination in this proceeding in

^{1/} The only other Ohio city to establish a municipal electric system within the last fifty years is the City of Clyde, Ohio, which is surrounded by the service territory of applicant TECo. Clyde established its municipal system in July, 1987, and began to provide electric service to its first customer on April 16, 1989.

favor of the licensees. At present, however, the abstract, hypothetical nature of the injury to Brook Park is insufficient to establish its standing to intervene in this proceeding.

The facts set forth in Part A. above plainly establish that the Board's concerns over Brook Park's "standing" to intervene in this proceeding have been fully satisfied by Brook Park's establishment of a municipal electric utility through the adoption of Ordinance No. 7711-1992. In the most basic possible terms, Brook Park's establishment of a municipal electric utility through the adoption of Ordinance No. 7711-1992 made Brook Park an "entity" within the meaning of the antitrust conditions in this proceeding -- i.e., "any electric generation and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions" (Toledo Edison Co., supra, 10 NRC at 405 n.480) -- which is entitled to invoke those conditions. Brook Park is located within the geographic market found to be relevant in the underlying licensing proceedings (the "Combined CAPCO Company Territories" or "CCCT," which encompasses the service territory of CEI, within which Brook Park is located). Brook Park will compete with CEI in at least one product market found relevant in the underlying proceedings (the retail service market), and will be both a consumer and a competitor

in the other two product markets (regional power exchange transactions and coordination services).

In developing sources of power supply for its newly created municipal electric system, Brook will need to invoke one or more of the following antitrust conditions at issue in this proceeding: Condition 1 (forbidding the licensees to impose specified conditions on their sale or exchange of wholesale power or coordination services with requesting entities); Condition 2 (requiring licensees to make available interconnections with requesting entities on reasonable terms and conditions); Condition 3 (requiring licensees to engage in wheeling for requesting entities); Conditions 5, 6 and 7 (requiring licensees to make available to requesting entities, respectively, maintenance power, emergency power and economy energy, on terms and conditions no less favorable than those between or among the licensees themselves or other entities outside of the Central Area Power Coordination ("CAPCO") Pool); and Condition 10 (requiring licensees to sell wholesale power to requesting entities on either a full requirements or partial requirements basis, at the requesting entity's option). See Toledo Edison Co., supra 10 NRC at 296-299.

In view of the foregoing, it is clear, both from the Board's own prior decision concerning Brook Park's initial petition for leave to intervene and from the relevant

precedent, that Brook Park has now satisfied the requirements of the "contemporaneous judicial concepts" of standing governing the Board's disposition of petitions for leave to intervene under Section 2.714(a) of the Commission's Rules of Practice. Florida Power & Light Co. (St. Lucie Nuclear Power Plant), CLI-89-21, 30 NRC 325, 329 (1989); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 332-333 (1983). The foregoing discussion also makes plain that Brook Park is a "person whose interest may be affected" by this proceeding, within the meaning of Section 189a of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2239(a)(1)), and is therefore entitled to be admitted as a party to this proceeding.

2. Brook Park Has Shown
Good Cause For Untimely Intervention

The Board's disposition of Brook Park's initial petition for leave to intervene in LBP-91-38 (at p. 38) makes it self-evident that Brook Park has good cause for untimely intervention. Simply put, Brook Park attempted to intervene earlier in this proceeding, and was met with a decision of this Board holding that it lacked standing and needed to fulfill the legal requisites for establishment of a municipal electric system before it could demonstrate standing. Brook Park fulfilled the legal requisites for establishment of a municipal electric system under the Constitution and laws of

the State of Ohio beyond peradventure when Ordinance No. 7711-1992 became effective on May 22, 1992. As the Board's disposition of Brook Park's initial petition in LBP-91-38 makes abundantly clear, this Board was not prepared to find that Brook Park had established standing prior to that time. Accordingly, Brook Park has shown good cause for its "untimely" submission of its amended petition for leave to intervene.

C. Brook Park's Interests Are Not
Otherwise Represented In This Proceeding;
Brook Park's Participation Will Contribute
Significantly To The Development Of A Sound Record

The Board's order of October 7, 1991 (LBP-91-38 at pp. 38-39) also questioned Brook Park's showings with respect to the third (and, implicitly, the fourth) factor governing disposition of untimely petitions to intervene under Section 2.714(a) of the Commission's Rules of Practice. As the Board indicated would be appropriate in LBP-91-38, Brook Park takes this opportunity to amplify these aspects of its showing in support of its petition.

1. Brook Park's Interests Are Not
Otherwise Represented In This Proceeding

Fundamentally, Brook Park's interest in this proceeding is unique. As observed above, Brook Park is only the second municipal electric system to be formed in the State of Ohio in the last fifty years. Brook Park's emergence as a

municipal electric utility, and the challenges it confronts in the process of implementing Ordinance No. 7711-1992, should reasonably be expected to provide "live" proof of the continuing need for, and the efficacy of, the antitrust conditions which the licensees seek to have eviscerated in this proceeding.

The Board will recall that the gravamen of the Commission's findings in initially imposing the conditions at issue in this proceeding was that TECo, CEI and Ohio Edison had engaged in a lengthy course of anticompetitive conduct designed to suppress and eliminate their municipal competitors. See Toledo Edison Co., supra, 10 NRC at 278-282. The initial application of TECo and CEI in this proceeding for "suspension" of the antitrust conditions in their licenses argues in part (TECo/CEI Application at 29-33, and particularly at 31) -- in what Brook Park finds to be a particularly chilling economic solipsism -- that "the conditions threaten to exacerbate the erosion of CEI's and TE's municipal markets."^{2/}

^{2/} The notion that a market participant "owns" a market -- as suggested by CEI's and TECo's use of the possessive in the above-cited portions of their application -- is one that Brook Park finds novel in antitrust theory, and a notion that Brook Park sincerely hopes does not lose its novelty by obtaining acceptance in this or any other proceeding.

Fairly read, then, both the decision imposing the conditions and the licensees' instant applications to "suspend" those conditions put in issue in this proceeding whether the barriers to market entry found in the underlying proceedings to have been anticompetitively erected and maintained by the applicants have been sufficiently attenuated (as applicants contend, by the "high cost" of nuclear power generation) to warrant giving the applicants a "second bite" at their municipal competitors, freed from the restraint of the conditions. The question of the impact of barriers to entry on the ability of a market participant to maintain supracompetitive pricing, or otherwise to engage in anticompetitive conduct, is well recognized in the antitrust laws that the Commission is bound by Section 105c of the Act (42 U.S.C. § 2135(c)) to uphold. Cf. United States v. Falstaff Brewing Co., 410 U.S. 526, 532-533 (1973). No party in this proceeding is in a better position than Brook Park to bear witness to the effect of the conditions on such barriers than Brook Park, as it struggles to overcome them as a new market entrant.

Brook Park's interests are plainly not represented by American Municipal Power-Ohio, Inc. ("AMP-Ohio"). AMP-Ohio is a wholesale power supplier, which does not compete in the retail electric market with any applicant, as Brook Park will.

Moreover, Brook Park is not a member of AMP-Ohio, and AMP-Ohio is therefore not obligated to represent its interests in this proceeding, even if (as is not necessarily the case) those interests were otherwise aligned.

Brook Park's interests in this proceeding are also not represented by the City of Cleveland. Cleveland is a large and well established municipal system with a long history of confronting the competitive (and anticompetitive) challenges posed by CEI. In contrast, Brook Park is an emerging municipal system, engaged in the process of exploring and acquiring power supply and relying, in a very real sense, on the continued existence of the antitrust license conditions at issue in this proceeding for its very survival as a municipal utility. Moreover, Brook Park believes that the limitation on off-system sales contained in Article XVIII, Section 6 of the Ohio Constitution would preclude Cleveland from providing Brook Park with wholesale full requirements service, although Brook Park does regard Cleveland as at least a potential competitor for the supply of a portion of Brook Park's power and energy requirements. It is thus clear that the respective interests of Brook Park and Cleveland in this proceeding are not coterminous.

The Board's description of the interest of Alabama Electric Cooperative ("AEC") in this proceeding ought to

suffice as an explanation why AEC cannot represent Brook Park's interests. AEC is not a competitor in the product and geographic markets found relevant by the Commission in the underlying proceedings.

Finally, neither the NRC Staff nor the Department of Justice ("DOJ") can properly represent the direct and unique interests of Brook Park in these proceedings. Both Staff and DOJ are charged with the representation of the broadest public interest in these proceedings. Thus, although Brook Park is confident in the efforts of Staff and DOJ to advance and defend the important questions of public policy at issue in applicants' efforts to escape the restraints of their license antitrust conditions, the broad public interest responsibilities of both Staff and DOJ will likely preclude them from adequately representing Brook Park's direct and unique interest in this proceeding.

2. Brook Park's Participation Will
Bring Substantial Legal and
Technical Expertise To This Proceeding

In addition to the unique and crucial perspective that Brook Park's interest in the protection and continuation of the antitrust conditions will bring to this proceeding, Brook Park's counsel have significant experience and expertise in a number of matters involved in this proceeding. Thus, Brook Park's counsel served as counsel to the City of Clyde,

Ohio, in its efforts to create the first successful municipal electric system in the State of Ohio in the last fifty years. They are thus thoroughly -- indeed, uniquely -- familiar with the broad range of legal issues involved in the creation and development of municipal electric systems in Ohio, and in particular with the crucial role that the antitrust conditions at issue in this proceeding play in that process.

In addition, as counsel for the City of Clyde, Ohio, Brook Park's counsel participated in the administrative review process before the Staff on the applications involved in these proceedings, filing comments on behalf of the City of Clyde with respect to the Ohio Edison application on February 5, 1988, and filing comments on behalf of the City of Clyde with respect to the TECo/CEI application on July 15, 1988. Brook Park's counsel have thus been actively involved in, and have carefully followed the course of, this proceeding, from its outset. Their "familiarity with the OE and CEI/TE applications thus . . ." demonstrably does "match that of AMP-Ohio, which [like Brook Park's counsel] participated in the administrative review process before the Staff." (LBP-91-38 at p. 39).

Finally, Brook Park's counsel both have extensive experience in the application of antitrust principles to the utility industry, through inter alia their representation of

major and active intervenors in the following utility merger proceedings before the Federal Energy Regulatory Commission under Section 203 of the Federal Power Act (16 U.S.C. § 824b), each of which involved application of the principles of the Sherman and Clayton Acts to the utility mergers at issue:

Utah Power & Light Co. and PacifiCorp. (FERC Docket No. EC88-2-000 and related dockets);

Southern California Edison Co. and San Diego Gas & Electric Co. (FERC Docket No. EC89-5-000);

Northeast Utilities Service Co. (Re Public Service Co. of New Hampshire) (FERC Docket No. EC90-10-000 and related dockets);

Kansas City Power & Light Co. and Kansas Gas & Electric Co. (FERC Docket No. EC90-16-000); and

Kansas Power & Light Co. and Kansas Gas & Electric Co. (FERC Docket No. EC91-2-000)

Based on the foregoing, it is clear that Brook Park's counsel would bring to this proceeding a unique combination of experience in the creation and development of municipal electric systems in the State of Ohio (within the service territories of two of the three applicants -- TECo (Clyde) and CEI (Brook Park)) -- and thorough familiarity with the legal and technical issues involved in the application of antitrust principles to the utility industry. Brook Park's counsel also have thorough familiarity with the applications at issue here, and with the record of this proceeding from its outset.

D. Brook Park's Participation
Will Not Inappropriately Broaden
Or Delay This Proceeding

Brook Park recognizes that, as a consequence of the Board's order on its initial petition for leave to intervene, it must take the record in this proceeding as it exists at such time as it may be permitted to intervene. In particular, Brook Park recognizes that briefing and argument on summary disposition of this proceeding have already occurred. In that regard, Brook Park generally supports Staff's April 1991 administrative determination to deny the amendment requests herein (the positions of Cleveland, AMP-Ohio, AEC and DOJ already found sufficient by the Board (LBP-91-38 at p. 54, note 99) to satisfy the pleading requirements of Section 2.714(b) of the Commission's Rules of Practice), and generally supports the arguments advanced by Cleveland, AMP-Ohio, AEC and DOJ in connection with the motions for summary disposition. If granted leave to intervene, Brook Park would propose to submit a formal statement, after detailed consideration of the pleadings, with respect to which specific portions of the arguments advanced by those parties it wishes to adopt. Brook Park will not seek individually to brief or argue summary disposition to the Board, but does wish to preserve its appeal rights with respect to whatever order the Board might issue on summary disposition.

Should the Board determine to proceed with a factual inquiry on the applications, Brook Park will accept the "bedrock legal issue" already stipulated by the parties. Although Brook Park does not believe that any factual inquiry is appropriate on these applications, and has therefore not thoroughly analyzed the nature of whatever evidentiary presentation (if any) it might wish to make to the Board, Brook Park believes that any evidentiary presentation it might wish to make would not encompass the testimony of more than two or three witnesses relating to Brook Park's particular interest in the proceeding, as described above.

Finally, Brook Park will accept whatever limitations of time and scope are already in place with respect to discovery in this proceeding.

Brook Park believes that the foregoing limitations on its participation are sufficient to ensure that such participation will not inappropriately broaden or delay this proceeding. However, Brook Park is also amenable to addressing on a reasonable basis whatever other legitimate concerns other participants might raise in this regard with respect to Brook Park's intervention.

II. AT A MINIMUM, BROOK PARK HAS
SATISFIED THE COMMISSION'S REQUIREMENTS
FOR DISCRETIONARY INTERVENTION

The Commission's seminal decision on discretionary intervention, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976), establishes that the Board is to consider essentially the same criteria set forth in Section 2.714(a) and (d) with respect to intervention of right in deciding whether to grant discretionary intervention. The principle difference between the treatment of intervention of right and the treatment of discretionary intervention is that discretionary intervention does not adhere to the Commission's strict standing requirements.

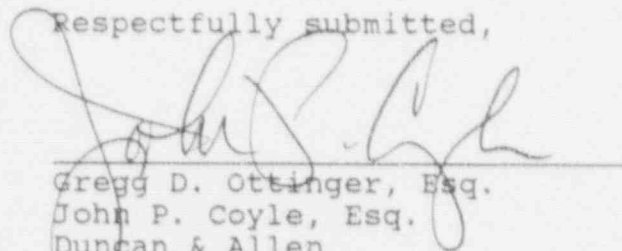
Brook Park believes that it has more than adequately established that it has standing, and has otherwise satisfied the Commission's requirements for granting untimely intervention as of right under the relevant provisions of the Rules of Practice. In any event, through the showing made above, Brook Park has clearly satisfied the Commission's requirements for discretionary intervention. In particular, Brook Park has shown significant ability to contribute on issues of law or fact which will not otherwise be properly raised or presented; has set forth those matters with appropriate specificity to allow evaluation; and has

demonstrated the importance and immediacy of those issues, justifying the time necessary to consider them. The policies underlying the Commission's decision in Pebble Springs, 4 NRC at 617, are thus fully satisfied and Brook Park should, at a minimum, be granted discretionary intervention in this proceeding.

III. CONCLUSION

For the foregoing reasons, Brook Park's amended petition for leave to intervene out of time should be granted as a matter of right. Alternatively, Brook Park should be granted discretionary intervention.

Respectfully submitted,



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Counsel for the
City of Brook Park, Ohio

Dated at Washington, D.C.
this 15th day of June, 1992.

EXHIBIT A
TO AMENDED PETITION OF CITY OF BROOK PARK, OHIO
FOR LEAVE TO INTERVENE

CITY OF BROOK PARK ORDINANCE NO. 7711-1992
(ADOPTED APRIL 21, 1992; EFFECTIVE MAY 22, 1992)

P/C _____
1st R Council Hall
2nd R _____
3rd R _____
V/C Austin Miller

CITY OF BROOK PARK OHIO

ORDINANCE NO: 7711-1992

INTRODUCED BY: Mayor Coyne

AN ORDINANCE
DECLARING IT NECESSARY TO ESTABLISH, ACQUIRE,
AND OPERATE A MUNICIPAL ELECTRIC SYSTEM

WHEREAS, this Council has an interest in keeping rates for electric service to the citizens of, and businesses in, the City of Brook Park as low as possible; and

WHEREAS, Article XVIII, Section 4 of the Ohio Constitution provides in part that "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service;" and

WHEREAS, Article XVIII, Section 5 of the Ohio Constitution provides in part that "Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage;" and

WHEREAS, this Council has received, reviewed and discussed feasibility studies prepared by expert utility consultants, regarding the feasibility, costs, and benefits of establishing a municipal electric utility to serve the City and its inhabitants; and

WHEREAS, based on the feasibility studies referenced above, this Council has determined that it is in the public interest to establish a municipal electric utility owned and operated by the City of Brook Park in order to reduce electrical costs to the City, businesses and inhabitants of Brook Park;

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Brook Park, State of Ohio, that:

SECTION 1: That the City of Brook Park shall proceed to acquire, construct, own, lease and operate within or without its corporate limits, a public electric utility the product or service of which shall be supplied to the City and its inhabitants, and may contract with others for any such product or service.

SECTION 2: That the municipal electric system within the Division of Utilities shall be named "Brook Park Public Power." The Mayor shall have supervision over Brook Park Public Power.

SECTION 3: That the City shall have and may exercise any and all legal powers and duties necessary to implement Section 1 of this Ordinance, to provide reliable electric service to the City, businesses and inhabitants of Brook Park, and may exercise all of the powers granted to municipal electric utility systems by the Constitution and laws of Ohio and the Charter of the City of Brook Park. The Mayor is authorized and directed to oversee the implementation of such powers and duties to the extent allowed by law, and to perform the activities necessary to do so, including, but not limited to, the following:

- A. Develop plans for, and enter into negotiations with third parties in connection with all aspects of the establishment of Brook Park Public Power and its program for the purchase, production, transmission, distribution and sale of electric power and energy (its "power program").
- B. Supervise the work of all consultants engaged by the Brook Park City Council in connection with the establishment of Brook Park Public Power and its power program.
- C. Review all proposed contracts or other engagements relating to the establishment and operation of Brook Park Public Power and its power program and make recommendations to the City Council concerning proposed contracts or engagements.
- D. Have responsibility for the development of plans and procedures for the operation and maintenance of Brook Park Public Power and its power program and supervise the implementation thereof.
- E. Have the responsibility to recommend to the City Council rates for the use of electric service provided by Brook Park Public Power.

SECTION 4: It is the intention of Council that funding for acquisition, construction and improvement of Brook Park Public Power shall be obtained by the issuance, from time to time as funds are required, of obligations by the City. It is the intention of this Council that, to the maximum extent possible, such obligations shall be self-supporting obligations, the principal and interest and premium, if any, on which shall be paid from the revenues of the City's electric utility. Such obligations may consist of revenue obligations authorized and issued by the City pursuant to Article XVIII, Section 12 of the Ohio Constitution, other revenue obligations issued under authority of Article XVIII, Section 3 of the Ohio Constitution or general obligations of the City issued in accordance with Ohio law. To the extent that this Council determines it to be in the best interest of the City to do so, this Council may authorize the issuance of notes in anticipation of the issuance of long-term obligations to provide financing for Brook Park Public Power.

SECTION 5: Prior to the issuance of any obligations, the City may use moneys in its general fund or other available funds to pay architectural, engineering, survey, consulting and legal costs in connection with the planning, organization and development of Brook Park Public Power, and to pay any costs of acquiring, constructing, equipping and operating Brook Park Public Power. To the extent that any such expenditures may be properly financed with the proceeds of general obligations or revenue obligations of the City under Ohio law, the City intends to reimburse itself for such expenditures with a portion of the proceeds of notes, bonds or other tax-exempt obligations of the City. This Council intends that this Ordinance shall constitute the declaration of official intent of the City under Treas. Reg. Section 1.103-18, promulgated pursuant to the Internal Revenue Code of 1986, as amended.

SECTION 6: If any of the provisions of this Ordinance are held invalid for any reason, the remaining provisions shall remain in full force and effect to the extent they are not dependent on and inseparable from the invalid provision.

SECTION 7: It is found that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 8: The Clerk of this Council is hereby authorized and directed to mail a copy of this Ordinance to the current supplier of electric service to the City, The Cleveland Electric Illuminating Company, by certified mail.

SECTION 5: That this Ordinance shall take effect and be in force from and after its passage at the earliest period allowed by law, provided that, pursuant to Article XVIII, Section 5 of the Ohio Constitution, if within thirty days from passage of this Ordinance, a petition signed by ten per centum of the electors of the City of Brook Park shall be filed with the executive authority of the City demanding a referendum on this Ordinance, it shall not take effect until submitted to the electors and approved by a majority of those voting thereon in accordance with Article XVIII of the Ohio Constitution.

PASSED: April 22, 1982

[Signature]
PRESIDENT OF COUNCIL

ATTEST: [Signature]
CLERK OF COUNCIL

APPROVED: [Signature]
MAYOR

4/22/82
DATE

THIS ORDINANCE IS FILED WITH THE
CLERK OF COUNCIL AND COMMUNITIES.

RECEIVED
DIRECTOR OF LAW

RECEIVED
President & Board of Directors of The City of Brook Park, Ohio, do hereby certify that the foregoing is a true and correct copy of Ordinance No. 18-1982.

I, Patricia J. Lohrman, Clerk of the City of Brook Park, State of Ohio, do hereby certify that there is no knowledge of person or persons of the Municipality and that publication of the foregoing ordinance/resolutions was made by posting two copies of it at the most public places in that Municipality in accordance with ordinance 18-1982 passed on August 12, 1979, at Brook Park, Ohio. I certify that the Mayor, Patricia Lohrman, 17401 Highway Road #1, Fox Station, 44040 Brook Park, Ohio 44130, and the Clerk, Patricia Lohrman, 17401 Highway Road #1, Fox Station, 44040 Brook Park, Ohio 44130, have read the ordinance and it is a part of the record of the City of Brook Park.

[Signature]
Clerk of Council

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'92 JUN 15 P1:13

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

| | | |
|------------------------------------|---|-----------------------|
| In the Matter of |) | |
| OHIO EDISON COMPANY |) | |
| (Perry Nuclear Power Plant, Unit 1 |) | Docket No. 50-440-A |
| Facility Operating License |) | Docket No. 50-346-A |
| No. NPF-58) |) | (Suspension of |
| |) | Antitrust Conditions) |
| THE CLEVELAND ELECTRIC |) | |
| ILLUMINATING COMPANY |) | ASLBP No. 91-664-01-A |
| 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) |) | |

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy each of the foregoing Amended Petition of the City of Brook Park, Ohio, for Leave to Intervene and Notice of Appearance on Behalf of the City of Brook Park, Ohio has this day been served upon the following persons by first class United States mail, postage prepaid, except as otherwise noted, in accordance with the requirements of Section 2.712 of the Commission's Rules of Practice (10 CFR § 2.712):

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Administrative Judge
G. Paul Bollwerk, III
Atomic Safety & Licensing Bd.
U.S. Nuclear Reg. Commission
Mail Stop EW 439
Washington, D.C. 20555

Sherwin L. Turk, Esq.
Office of the General Counsel
U.S. Nuclear Reg. Commission
Mail Stop OWFN 15B18
Washington, D.C. 20555

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Washington, D.C. 20037

Deborah Charnoff, Esq.
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Squire, Sanders & Dempsey
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Washington, D.C. 20044

Reuben Goldberg, Esq.
Goldberg, Fieldman & Letham, P.C.
1100 15th Street, N.W.
Washington, D.C. 20005

Administrative Judge
Charles Bechhoefer
Atomic Safety & Lic. Bd.
Nuclear Regulatory Commn.
Mail Stop EW 439
Washington, D.C. 20555

Administrative Judge
Marshall E. Miller,
Chairman ASLBP
1920 South Creek Blvd.
Spruce Creek Fly-In
Daytona Beach, FL 32124
(via Federal Express)

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Washington, D.C. 20005

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Chief Asst. Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114

Philip N. Overholt
Office of Nuclear Plant
Performance
Office of Nuclear Energy
U.S. Dept of Energy, NE-44
Washington, D.C. 20585

Janet R. Urban, Esq.
Antitrust Division
Department of Justice
555 4th Street, N.W.
Washington, D.C. 20001

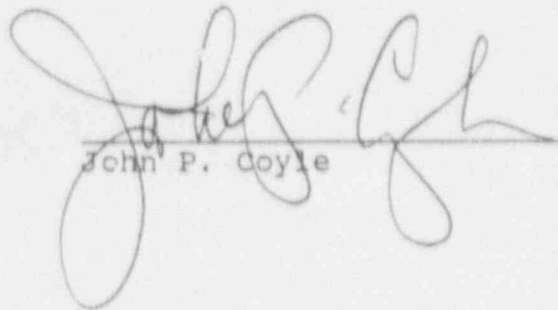
D. Biard MacGuineas, Esq.
Volpe, Boskey and Lyons
918 16th Street, N.W.
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Washington, D.C. 20006

Kenneth L. Hegeman, P.E.
President
American Municipal Power-Ohio, Inc.
601 Dempsey Road, P.O. Box 549
Westerville, OH 43081

Justin T. Rogers
President
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308

B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel
West Tower Building
4350 East West Highway
Bethesda, Maryland 20814

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



John P. Coyle

Dated at Washington, D.C.
this 15th day of June, 1992.