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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

EXEMPTED
USNRC

COMMISSIONERS:

'92 MAR -5 P4:22

- Ivan Selin, Chairman
- Kenneth C. Rogers
- James R. Curtiss
- Forrest J. Remick
- E. Gail de Planque

OFFICE OF SECRETARY
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SERVED MAR - 5 1992

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

Docket Nos. 50-440-A
50-346-A

(Suspension of
Antitrust Conditions)

ORDER

CLI-92-06

In CLI-91-15, 34 NRC 269 (1991), the Commission directed the Atomic Safety and Licensing Board to suspend consideration of all matters, except the so-called bedrock legal issue (or issues), in this proceeding involving applications for amendments to the operating licenses for the Perry and Davis-Besse nuclear plants. Ohio Edison Company (OE), Cleveland Electric Illuminating Company and Toledo Edison Company (Applicants) have sought amendments to suspend certain antitrust conditions from the operating licenses. OE has filed a motion for reconsideration of CLI-91-15, requesting

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that the Commission vacate its order and allow the proceedings to continue as they were prior to the suspension. The NRC staff opposes the motion.¹ For the reasons stated in this order, OE's motion is denied.

In its order memorializing its rulings during a prehearing conference, the Licensing Board ruled that it had jurisdiction to conduct the proceeding,² admitted OE's contention regarding decisional bias, and provided an opportunity for the parties' joint submission of a "bedrock" legal issue (or issues) that would be the subject of potentially dispositive motions for summary disposition. LBP-91-41, 34 NRC 229 (1991). In light of the potential for the bedrock legal issue to be dispositive of this proceeding, a point emphasized by OE, the Commission exercised its inherent supervisory power over adjudicatory proceedings and issued CLI-91-15, which directed the Licensing Board to suspend its consideration of all matters in the proceeding with the exception of the "bedrock" issue. By its terms, the suspension included OE's decisional bias issue.

¹ No other answers were received, although the City of Cleveland noted its opposition to OE's motion in its separate Motion for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission Decision, at 4-6 (Dec. 27, 1991).

² The City of Cleveland's appeal of the Licensing Board's jurisdictional ruling is pending before the Commission. Our ruling today is without prejudice to our consideration of that appeal and Cleveland's separate motion (referenced in the preceding footnote) to remove the conduct of all proceedings from the Licensing Board to the Commission.

OE objects to the suspension and asks that we reconsider our earlier order because, OE argues, this proceeding cannot be resolved fairly without reaching the decisional bias issue, even as to the bedrock legal issue. OE also objects to the suspension of other issues that may require consideration in the proceeding, such as the actual cost of Perry and Davis-Besse power. Additionally, OE suggests that we have misunderstood the "bedrock issue."³

As its primary basis for reconsideration, OE argues that the decisional bias issue must be decided in conjunction with or prior to the bedrock legal issue. This is so, OE maintains, because the decision on bias will affect the weight to be given the NRC staff's position throughout the proceedings and will thus be relevant to the decision on the bedrock issue. We do not agree.

In general, the NRC staff is only one party to a Commission adjudicatory proceeding. The staff does not occupy a favored position and its presentations are subject to the same scrutiny as those of other parties. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating

³ OE notes that our corrected order, CLI-91-15, 34 NRC at 271 n.3, lumped the two issues that the parties agreed would be subject to motions for summary disposition under the general rubric "bedrock issue." Motion for Reconsideration at 4 n.4. Our intention was to ensure that the parties understood that they could proceed, as they had agreed, with the litigation of both those potentially dispositive issues before the Licensing Board. Our characterization of the issues solely for the purpose of the order did not change the meaning or the treatment being given to those two issues for any other purpose.

Station, Units 2 & 3), ALAB-268, 1 NRC 383, 399 (1975). We think it significant here that, as all parties agree, the bedrock issue is a legal question. In this context, we have specifically observed that "[o]n some questions, such as interpretation of statutes or judicial decisions, the staff's submissions are to be given no more weight than those of any other party." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451, 462 (1976).⁴ OE has not explained why either the Licensing Board, or the Commission, on review, is incapable of rendering an independent decision regarding a question of law, even accepting arguendo some bias on the part of the staff due to the alleged Congressional interference.⁵ Importantly, OE can seek review from an appropriate United States Court of Appeals, if it should be dissatisfied with the outcome of the proceeding. When a case turns on a question of law, "Judicial review is fully capable of correcting bias...." Gulf Oil Corp. v. FPC, 563 F.2d 588, 612 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978). Thus, at least with respect to the legal issues being addressed by the

⁴ In unusual situations (not the case here) where staff is directed by the Commission to conduct a study and are subject to ongoing Commission review during the study, the staff's views may be afforded more weight. CLI-76-17, 4 NRC at 462. In this case, the Licensing Board has assured OE that it considers all lawyers to be on equal footing. Prehearing Conference Transcript at 78-79.

⁵ In fact, counsel for OE assured the Licensing Board that OE was not "suggesting that this tribunal was adversely affected or is now somehow adversely influenced by threats from members of Congress." Prehearing Conference Transcript at 74. Moreover, OE has not alleged that the Commissioners are incapable of rendering a fair decision because they will be adversely affected by supposed threats from Congress.

parties at this time, we do not see a compelling reason to proceed with consideration of the decisional bias issue.⁶

Contrary to OE's suggestion, our order in CLI-91-15 is not inconsistent with representations made by the NRC in prior judicial proceedings. Although the NRC represented in prior judicial proceedings that the claim of decisional bias must be raised at the agency level, the NRC did not promise a decision on the merits of that issue. At most, the representations indicate that the issue must be raised before the Commission and that a final Commission decision on OE's amendment request, subject to judicial review, will be provided.⁷ Suspending the bias issue from consideration

⁶ We recognize that bias or predisposition may bear on the credibility of a party's witnesses or evidence, although it is far from clear that bias is appropriate as a principal issue for litigation in NRC proceedings. However, as we decided in CLI-91-15, we need not reach that question or provide guidance on the further litigation of such questions pending resolution of the potentially dispositive legal issues proposed by the parties.

⁷ Ohio Edison Company's Motion for Reconsideration of CLI-91-15 at 5-9. Specifically, OE claims support for its position in the following NRC statements before the district court (see id. at 6):

If the NRC staff determines initially to deny the requested amendment, plaintiff will have an opportunity for an adjudicatory hearing before an Atomic Safety and Licensing Board. That Board's on the record decision will in turn be reviewable by the Atomic Safety and Licensing Appeal Board and the Commission. It is through this agency process that Ohio Edison must first present its claims of improper congressional interference in the administrative process.

NRC Memorandum of Points and Authorities in Support of Motion to Dismiss at 4 (Aug. 22, 1988); and

Subject matter jurisdiction over this claim rests with the NRC in the first instance, and, on appeal, exclusively in the Court of Appeals. Plaintiff will have
(continued...)

while the parties address the bedrock legal issue is not contrary to these representations. Even if the issue of decisional bias were to be dismissed altogether, without a review of its merits, a final Commission decision on the amendment application would provide OE, if it were dissatisfied with the outcome, the opportunity for judicial review. In its order dismissing OE's petition for writ of mandamus, the District of Columbia Circuit Court of Appeals noted that OE did not show that it would be prevented from raising the issue of decisional bias on judicial review after the administrative process had been concluded. In re Ohio Edison Co., No. 89-1014, slip op. at 4 (D.C. Cir. Apr. 27, 1983) (unpublished per curiam order). The Court did not state that an opportunity to litigate the issue of decisional bias would be provided by the NRC. Therefore, neither prior judicial proceedings nor NRC representations before the courts require us to allow OE to proceed with its decisional bias claims at this time.

Although OE focuses mainly on the Commission's suspension of the decisional bias issue, OE also complains of the suspension of consideration of other matters that might be germane if the applicants were to prevail on the bedrock issue. OE suggests that the suspension implies that the Commission believes the only outcome will be that OE will lose the bedrock issue. As stated in

⁷(...continued)
ample opportunity to raise a charge of improper influence or bias in that forum.

CLI-91-15, by suspending consideration of these matters, the Commission intimates no opinion on the bedrock legal issue or any other matter. The Commission's order has suspended, but not precluded, consideration of other relevant matters as warranted upon resolution of the bedrock legal issue. If an evidentiary hearing is appropriate, in the event that applicants win the bedrock issue, the Commission will provide appropriate instructions and guidance for the conduct of further proceedings.

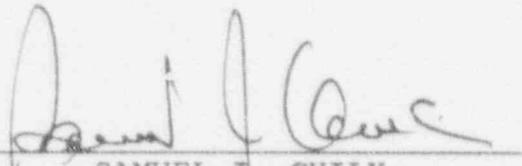
For the reasons stated in this order, OE's motion for reconsideration is denied.

Commissioner Curtiss disapproved this order; his dissenting views are attached. Commissioner de Planque did not participate in this matter.

IT IS SO ORDERED.



For the Commission⁸,


 SAMUEL J. CHILK
 Secretary of the Commission

Dated at Rockville, Maryland,
 this ^{7th} day of March 1992.

⁸ Commissioner Remick was not present for the affirmation of this order; if he had been present he would have approved it.

Dissenting Views of Commissioner Curtiss

I respectfully disagree with the Commission's decision to deny Ohio Edison's motion for reconsideration of CLI-91-15 and to continue the suspension of the consideration of the staff "bias/predisposition" contention in this formal adjudicatory proceeding.

Instead, I believe that the Commission should take up the question of the admissibility of the bias/predisposition issue now, rather than defer consideration of that question until the Licensing Board decides the so-called "bedrock issues" in this proceeding.

The fact of the matter is that the applicants' bias/predisposition contention raises a question about whether "the Licensing Board and the Nuclear Regulatory Commissioners [should] give no weight to the recommendations of the NRC staff" on the substantive issues in this case. Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 257 at n.92 (emphasis added). The NRC staff has made, and will be making, recommendations to the Licensing Board on the "bedrock issues" and to the Commission on the City of Cleveland's appeal on jurisdictional issues. In such a case, it seems evident that the challenge to the staff's impartiality must be resolved prior to, not at the conclusion of, any proceedings on the substantive merits of the antitrust issue. For that reason, I believe the Commission should resolve the question of whether such a contention is admissible now.² To

¹ Although the "bedrock issues" are primarily legal in nature, it is not clear that the parties' positions will be confined strictly to legal arguments (where bias/predisposition on the part of an individual party may be of lesser concern). In this regard, the Licensing Board itself acknowledged that --

[a]t this juncture . . . we are unable to parse the various controversies between the parties into the neat categories this analysis requires with the degree of certainty sufficient to convince us that threshold dismissal of these allegations [about staff bias] is appropriate.

LBP-91-38, 34 NRC at 256.

² On the question of whether a contention alleging staff bias/predisposition should be admitted as a litigable issue, I have substantial doubts about allowing such contentions in our proceedings. While the credibility of a witness who presents evidence is always a consideration, I am not aware of any NRC proceeding in which a party's bias/predisposition per se was made a principal issue for litigation on the merits. Nor does the

ignore the concerns that have been raised at this stage of the proceeding will, unfortunately, leave in place the cloud that has been cast on the staff's impartiality and, as a consequence, on the arguments, evidence, and recommendations that the staff will be advancing on the basic substantive issues that must be decided in this proceeding.

For the foregoing reasons, I respectfully dissent.

staff's role in the agency's proceedings suggest a different conclusion. Indeed, in a formal adjudicatory proceeding, the staff does not occupy a favored position; it is just another party to the proceeding. When a Board comes to decide contested issues, it must evaluate the staff's evidence and arguments in light of the same principles which apply to the presentations of the other parties. The staff's views cannot be accepted without passing under the same scrutiny as those of the other parties. Consolidated Edison Co. of New York (Indian Point Nuclear Generating Station, Units 2 & 3), ALAB-304, 3 NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 399 (1975); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973). In general in these proceedings, the application is in issue, not the adequacy of the staff's review of the application. A party may raise contentions challenging the particular action that is the subject of the proceeding, but it may not proceed on the basis of allegations that the staff has somehow failed in its performance. To the extent that a party seeks to litigate the adequacy of the staff's work in a particular proceeding, it proposes a contention that is not litigable. See, Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 809 (1983). In my view, these holdings raise serious questions about the admissibility of the bias/predisposition issue in the instant proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

OHIO EDISON CO., CLEVELAND ELECTRIC
ILLUMINATING CO. & TOLEDO EDISON CO
(Perry Nuclear Power Plant and
Davis-Besse Nuclear Power Station)

Docket No.(s) 50-440/346-A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER (CLI-92-06) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-440/346-A
COMMISSION ORDER (CLI-92-06)

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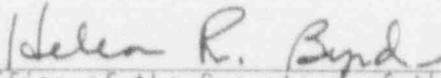
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Dated at Rockville, Md. this
5 day of March 1992


Office of the Secretary of the Commission