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July 25, 1991

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Marshall E. Miller, Chairman  
Administrative Judge  
1920 South Creek Boulevard  
Spruce Creek Fly-In  
Daytona Beach, Florida 32124

Charles Bechhoefer  
Administrative Judge

G. Paul Bollwerk, III  
Administrative Judge

Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
West Towers Building  
4350 East-West Highway  
Bethesda, Maryland 20814

Re: The Cleveland Electric Illuminating Co. and The  
Toledo Edison Co. Request for Hearing (Docket  
Nos. 50-440A and 50-346A; ASLBP No. 91-644-01-A)

Dear Board Members:

I respectfully suggest that certain items be included on the agenda for the prehearing conference, i.e., a determination of (a) the proper parties, (b) the relevant issues, (c) the sequencing of the resolution of those issues, and (d) a briefing schedule.

In an effort to expedite the resolution of this matter, The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") suggest the proceedings be conducted in two phases. The first phase would resolve certain issues of law. The second phase would be an evidentiary hearing to resolve certain factual issues. More specifically, CEI and TE request that issues 1 through 4 below, all of which are questions of law, be resolved first on briefs and argument. Then, depending on how the legal rulings on issues 1 through 4 were resolved, an evidentiary hearing on issue 5 would be held. The issues are:

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A. LEGAL ISSUES

- (1) Assuming arguendo that Perry's and Davis-Besse's actual costs are higher than the costs of non-nuclear power, can the Perry and Davis-Besse Nuclear Power plants, as a matter of law, afford CEI and TE a competitive advantage?
- (2) If the answer to Issue (1) is no, can CEI's and TE's ownership shares of Perry and Davis-Besse, as a matter of law, "create or maintain a situation inconsistent with the antitrust laws" (Section 105c(5) of the Atomic Energy Act, as amended) such that NRC is authorized to impose or retain antitrust license conditions?
- (3) Assuming arguendo that Perry's and Davis-Besse's actual costs are higher than the costs of non-nuclear power, does imposition or retention of the license conditions under Section 105c of the Atomic Energy Act, as amended, as a matter of law, deny CEI and TE equal protection and due process under the Fifth Amendment of the United States Constitution?
- (4) For the purposes of Issues (1) and (3), as a matter of law, should Perry's and Davis-Besse's actual 30-year levelized costs be compared to the costs of any non-nuclear plant CEI and TE might have built in lieu of the Perry and Davis-Besse plants? See 10 C.F.R. Part 50, App. L. §§ II.11, II.12. If not, what is the appropriate cost comparison for purposes of Issues (1) and (3)?

B. FACT ISSUE

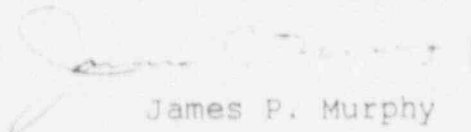
- (5) Are Perry's and Davis-Besse's actual costs higher than the costs to which they are to be compared?

Our overall purpose in suggesting this bifurcation is (a) to determine first whether an evidentiary hearing of any sort is appropriate, and (b) to focus the scope of any evidentiary hearing to the extent possible.

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We appreciate the consideration that you give to these suggestions, and we hope to have an opportunity to discuss them at the prehearing conference.

Sincerely yours,



James P. Murphy

JPM/CAC:pge

cc: Samuel J. Chilk, Secretary  
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