. .12441

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, 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

MOTION OF CITY OF CLEVELAND, OHIO,
FOR COMMISSION REVOCATION OF THE REFERRAL
TO ASLB AND FOR ADOPTION OF THE APRIL 24, 1991
DECISION AS THE COMMISSION'S DECISION

Pursuant to 10 C.F.R. §2.730, City of Cleveland, Ohio ("Cleveland"), an Intervenor-Party, files this motion for (1) revocation of the reference to the Board of the decision of April 24, 1991, denying the application of Ohio Edison Company ("OE") and the joint application of Cleveland Electric Illuminating Company ("CEI") and Toledo Edison Company ("TE") for suspension of the antitrust license conditions of the Perry and Davis-Besse Operating License ("OL"), and (2) for adoption of that decision as the Commission's decision.[1/]

1/ The Commission's grant of Cleveland's appeal of the Board's Prehearing Conference Order, pending before the Commission, may moot this motion and the reference to the Board.

D508

The Notice of the April 24, 1991 decision published in the Federal Register referred to the decision as "the Commission's denial of the" applications. 55 Fed.Reg. 200057, May 1, 1991. The decision has, however, also been referred to as the Staff's denial (Letter of April 26, 1991 from Senior Supervisory Trial Attorney to counsel for Applicants) and as the Director of Nuclear Reactor Regulation's decision (Letter of April 24, 1991 from the Director of NRR to CEI, et al.) In its Prehearing Conference Order of October 7, 1991, the Board appears to have ruled that the April 24, 1991 decision was only a "Staff determination" (PHC Order 9-10). As recently as December 11, 1991, the Commission's Staff stated that "the Director of Nuclear Reactor Regulation denied the applications based on an evaluation which concluded that they lacked legal merit." (NRC Staff's Response to Ohio Edison Company's Motion for Reconsideration of CLI-91-15, p. 2).

Pursuant to the Commission's regulations under which the applications for suspension of the OL antitrust license conditions were filed (Section 2.101, et seq.), a Director's decision becomes the Commission's decision absent Commission sua sponte review of the decision or an application for Commission review by the Applicants.[2/] The Notice, therefore, correctly

---

2/ Applicants filed under Section 2.101 apparently because there are no Commission regulations which provide for such applications since the applications involve a prohibited antitrust review after issuance of an OL. The applications are not authorized under Section 2.101. However, since the applications were accepted for filing under Section 2.101 and were processed under those regulations, the Applicants cannot be

(continued...)

referred to the "Commission's denial" of the applications. If the decision is a Commission decision, or a Director of NRR decision which by force of the regulations became a Commission decision, reference to the Board was inappropriate. A Commission decision is subject to review only by an appellate court. A Licensing Board has no authority to review or reverse a Commission decision.

Assuming, arguendo, that the decision is "only" some other kind of determination not envisioned by the Commission's regulations--perhaps to be called a "Staff determination"--there is still no warrant for the reference to the Board for determination of a legal issue which the Applicants now concede will be dispositive of the application, as a matter of law, if the legal issue is decided against the Applicants.[3/] The legal issue is ripe for decision by the Commission, without the delay and

---

2/(...continued)
heard to object to the application of those regulations to determine the status of the April 24, 1991 decision.

3/ The "bedrock" legal issue, by agreement of the parties, is as follows:

> Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared?

In addition to agreement on this statement of the "bedrock" legal issue, the parties also agreed that the applications are subject to motions for summary disposition based on the following issue:

> Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?

expense of additional briefing and without the delay and expense associated with reference to the Board of a purely legal issue, by the Commission's adoption of the April 24, 1991 decision as the Commission's decision.

The legal issue has been fully briefed in the applications filed by the Applicants; in responsive documents subsequently filed by Cleveland, and other entities, and the Department of Justice prior to the issuance of the April 24, 1991 decision; and in Applicants' responses to those responses. The briefs that are to be filed per the Prehearing Conference Order of the Board, of necessity, will be repetitive of the arguments that are already available to the Commission. To require additional briefing is an unnecessary expenditure of time and money and introduces unnecessary delay in presenting the legal issue to the Commission and an appellate court. This unnecessary expenditure of time and money is of itself sufficient reason for the Commission to revoke the reference to the Board and proceed to adopt the "Staff's determination" or "Director's decision" as the Commission's decision.

In filing this motion, Cleveland is not unmindful of the contention of OE (CEI and TE have not joined in that claim) that the Commission and its Staff have disqualified themselves as unbiased arbiters of the legal issue because of alleged undue Congressional influence, which OE alleges has compromised the Staff's and Commission's ability to decide the legal issue of their own free will. OE originally unsuccessfully sought to disqualify the Commission from passing on OE's application when

it filed a complaint for a declaratory judgment on June 28, 1988 in the United States District Court for the District of Columbia (Ohio Edison Co. v. Zech, et al., Civil Action No. 88-1695), and subsequently in an unsuccessful appeal to the United States Court of Appeals for the District of Columbia Circuit (Ohio Edison Co. v. Zech, et al., No. 89-1014). Now, however, OE's effort at disqualification is directed at the Commission's Staff and would deprive the Commission and the Board of giving any weight to the Staff recommendation reflected in the April 24, 1991, decision. (See OE's Motion for Reconsideration of CLI-91-15, filed November 26, 1991, pp. 3-4).

The claim is frivolous, whether directed at the Staff or the Commission,[4/] and undoubtedly was pursued by OE in an effort to extract a decision favorable to Applicants. As OE would have it, any decision against them on the legal issue by the Commission could only be the product of the alleged taint.

OE's claim that improper influence could taint a decision on a purely legal issue is frivolous and grossly overstates the Commission's role in statutory construction. In Ft. Pierce Utilities Authority v. United States, 606 F.2d 986 (1979), the District of Columbia Circuit considered an issue of statutory construction of another Section of the Atomic Energy Act, namely Section 186(a). The D.C. Circuit there said (at 995):

4/ The frivolous nature of OE's claim is disclosed by even a casual reading of the April 24 decision. That decision relies heavily on the memorandum opinion filed with the Commission by the Department of Justice which OE cannot accuse of decisional bias due to Congressional interference.

> It also is necessary, before turning to the merits, to say a brief word about this court's scope of review in the instant case. The issues presented here--(1) whether section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, and (2) if so, whether section 186(a) authorizes antitrust review of the section 104(b) operating licenses at issue here--both turn on matters of statutory interpretation. In this regard, we are cognizant of the general rule that "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" SEC v. Sloan, 436 U.S. 103, 118, 98 S.Ct 1702, 1712, 56 L.Ed.2d 148 (1978) (quoting Volkswagenwerk v. FMC, 390 U.S. 261, 272, 88 S.Ct.929, 19 L.Fd.2d 1090 (1968)); accord, Udall v. Tallman, 390 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).
>
> To accord this deference, however, is not to abdicate our own duty to construe the statute for we are also mindful that "the courts are the final authorities on issues of statutory construction, . . . and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decision that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" SEC v. Sloan, supra, 436 U.S. at 118, 98 S.Ct. at 1712 (quoting Volkswagenwerk v. FMC, supra, 390 U.S. at 272, 88 S.Ct. 929).

Taint or no taint, on the matter of the statutory construction of Section 105c required by the "bedrock" legal issue, regardless of where the Commission comes down on the legal issue, an appellate court will ultimately decide the issue of statutory construction, subject only to review on certiorari by the Supreme Court. Indeed, as in Ft. Pierce, supra, the appellate court will ensure that the Commission's statutory construction of Section 105 was not affected by any Congressional undue influence.

Thus, granting this motion will not only save time and money, it will expeditiously produce a decision by an appellate court on the "bedrock" legal issue that no one, including the Applicants, could challenge as the product of alleged undue Congressional influence, thus putting to rest a frivolous challenge of the Commission's integrity.

For the foregoing reasons, this motion should be granted.

Respectfully submitted,

Danny R. Williams
Director of Law

June W. Wiener
Chief Assistant Director of Law

William T. Zigli
Assistant Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44115
Telephone (216) 664-2800

Reuben Goldberg
Channing D. Strother, Jr.

Reuben Goldberg
Channing D. Strother, Jr.
B. Victoria Brennan
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

Attorneys for
City of Cleveland, Ohio

December 19, 1991

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, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December, 1991, a copy of the foregoing MOTION OF CITY OF CLEVELAND, OHIO, FOR COMMISSION REVOCATION OF THE REFERRAL TO ASLB AND FOR ADOPTION OF THE APRIL 24, 1991 DECISION AS THE COMMISSION'S DECISION was mailed first class, postage prepaid, to each of the following:

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Ivan Selin, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Kenneth C. Rogers, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

James R. Curtiss, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Forrest J. Remick, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Hon. Marshall E. Miller, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
1920 South Creek Boulevard
Spruce Creek Fly-In
Daytona Beach, FL 32124

Hon. Charles Bechhoefer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Hon. G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Joseph Rutberg, Esq.
Sherwin E. Turk, Esq.
Steven R. Hom, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mark C. Schechter, Esq.,
Janet Urban, Esq.
Transportation, Energy and Agriculture Section
Antitrust Division
Department of Justice
Judiciary Center Building
555 Fourth Street, NW
Washington, DC 20001

Gerald Charnoff, Esq.
Deborah B. Charnoff, Esq.
Margaret S. Spencer, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, NW
Washington, DC 20037

James P. Murphy, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, NW
P.O. Box 407
Washington, DC 20044

June W. Weiner, Esq.,
Chief Assistant Director of Law
William T. Zigli, Esq.,
Assistant Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, OH 44114

D. Biard MacGuineas, Esq.
Volpe, Boskey and Lyons
918 Sixteenth Street, NW
Washington, DC 20006

David R. Straus, Esq.
Spiegel & McDiarmid
1350 New York Avenue, NW
Suite 1100
Washington, DC 20005-4798

John W. Bentine, Esq.
Chester, Hoffman, Willcox and Saxbe
17 South High Street
Columbus, OH 43215

Reuben Goldberg
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, NW
Washington, DC 20005
(202) 463-8300