UNITED STATED OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
OHIO EDISON COMPANY	)	
	)	
(Perry Nuclear Power Plant, Unit 1)	)	
	)	
and	)	Docket Nos. 50-346A
	)	50-440A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
THE TOLEDO EDISON COMPANY	)	
	)	
(Perry Nuclear Power Plant, Unit 1, and Davis-Besse Nuclear Power Station, Unit 1)	)	(Suspension of Antitrust Conditions)
	)	

NRC STAFF'S RESPONSE TO OHIO EDISON COMPANY'S
MOTION FOR RECONSIDERATION OF CLI-91-15

Sherwin E. Turk
Senior Supervisory Trial
Attorney

December 11, 1991

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NRC STAFF'S RESPONSE TO OHIO EDISON COMPANY'S
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The NRC Staff ("Staff") hereby responds to Licensee Ohio Edison Company's motion seeking reconsideration of the Commission's Order in CLI-91-15,[1] whereby the Commission directed the Licensing Board "to suspend its consideration of all matters in this proceeding with the sole exception of the so-called 'bedrock' legal issue."[2] For the reasons set forth below, the Staff submits that Ohio Edison's Motion is without merit and should be denied.

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[1] "Ohio Edison Company's Motion for Reconsideration of CLI-91-15" ("Motion"), dated November 26, 1991.

[2] *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC __ (Nov. 20, 1991), *as subsequently corrected* (Nov. 21, 1991), slip op. at 3.

INTRODUCTION

In 1987 and 1988, applications seeking to amend the operating licenses for Perry Unit 1 and Davis-Besse Unit 1, by suspending the antitrust license conditions contained therein, were filed by three of the five Licensees affected thereby: Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and Toledo Edison Company ("TE") (herein collectively referred to as the "Licensees"). After reviewing the extensive public comments filed in opposition to the applications as well as the views of the Department of Justice, on April 24, 1991, the Director of the Office of Nuclear Reactor Regulation denied the applications, based on an evaluation which concluded that they lacked legal merit.[3]

On May 31, 1991, the Licensees filed requests for hearing on the denial of their applications. A prehearing conference was convened by the Licensing Board on September 19, 1991, to consider those requests and the intervention petitions filed by other interested persons.[4] On October 7, 1991, the Licensing Board issued its Prehearing Conference Order,[5] in which it, *inter alia*, (a) granted the Licensees' hearing requests; (b) admitted Cleveland, AMP-Ohio,

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[3] *See* Letter from Thomas E. Murley to Michael D. Lyster and Donald C. Shelton, dated April 24, 1991, and the "Evaluation" attached thereto. Notice of the denial was published in the Federal Register at 56 Fed. Reg. 20,057 (May 1, 1991).

[4] An opposition to the Licensees' hearing requests was filed by the City of Cleveland, Ohio ("Cleveland"), which requested, in the alternative, intervenor status in the event the requests for hearing were granted. In addition, petitions for leave to intervene were filed by Alabama Electric Cooperative, Inc. ("AEC"), American Municipal Power-Ohio, Inc. ("AMP-Ohio"), and the City of Brook Park, Ohio ("Brook Park"); and the United States Department of Justice filed a notice of intent to participate in this proceeding.

[5] *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC __ (Oct. 7, 1991) ("Prehearing Conference Order (Ruling on Hearing/Intervention Petitions and Issues/Contentions; Setting Schedule for Summary Disposition Motions and Responses)").

AEC and the Department of Justice as intervenors in the proceeding; (c) directed the parties to submit their joint formulation of the acknowledged "bedrock" legal issue; and (d) admitted two issues as they relate to the NRC Staff, regarding Ohio Edison's allegations of Staff "bias" and "prejudgment" resulting from purported Congressional interference. LBP-91-38, slip op. at 56.

As admitted by the Licensing Board, the bias/prejudgment issues are as follows:

> Did the 1988 legislative proposal by Senator Howard M. Metzenbaum providing that "[t]he Nuclear Regulatory Commission shall not suspend or modify the application of any antitrust provision contained in the Perry operating license No. NPF-58, as such provision applies to any licensee of the Perry Nuclear Powerplant, Unit 1," the debate thereon in the Senate on March 29, 1988, as reflected in the Congressional Record of that date, pp. S 3257-59, and any related communications between the NRC staff and the legislative branch, compromise the actual or apparent impartiality of the NRC staff in connection with its consideration of OE's application and, if so, should the Licensing Board and the Nuclear Regulatory Commissioners give no weight to the recommendations of the NRC staff?
>
> Was the NRC staff predisposed to deny OE's application, as suggested by Senator J. Bennett Johnston's statement in the Congressional Record, 134 Cong. Rec. S 3258, 3259 (March 29, 1988), regarding a "strong rumor" that "the NRC has indicated that they have no intention of approving this application," and, if so, should the Licensing Board and the Nuclear Regulatory Commissioners give no weight to the recommendations of the NRC staff?[6]

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[6] LBP-91-38, slip op. at 50 n.92. The Licensing Board accepted Ohio Edison's formulation of these issues, modifying the language only by deleting any references to the Department of Justice (DOJ), after finding that Ohio Edison had failed to provide *any* factual support for its claim of bias and prejudgment by DOJ. *Id.* at 49-50; *compare* n.83 *with* n.92, *id.*

The Licensing Board also afforded Ohio Edison an opportunity to conduct one round of interrogatory discovery concerning the bias/prejudgment issues, ruling that any further discovery would be permitted only with leave of the Board (*Id.* at 51-52).[7]

On November 20, 1991, the Commission issued its Order in CLI-91-15, wherein it exercised its "inherent supervisory power over adjudicatory proceedings to direct the Licensing Board to suspend its consideration of all matters in this proceeding with the sole exception of the so-called 'bedrock' legal issue." The Commission noted that Ohio Edison had "volunteered that the decision on the ['bedrock'] legal issue has the potential of allowing applicants to proceed to an evidentiary proceeding or of terminating the hearing in favor of maintaining the license conditions." (*Id.*) The Commission further stated as follows:

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[7] On September 20, 1991, Ohio Edison filed a set of interrogatories directed to the NRC Staff, seeking responses on behalf of the Staff as well as all other employees of the Commission from 1987 to the present, specifically including such persons as the Chairman and each individual Commissioner. "Ohio Edison Company's Interrogatories to the Nuclear Regulatory Commission Staff," dated September 20, 1991, at 3 and 6-10. The Licensing Board directed the Staff to respond to these interrogatories (except as to those which it finds objectionable, for which a protective order might be sought), finding that the answers "are, as a general matter, necessary to a proper decision in this proceeding and that, *as they involve Staff contacts* with congressional personnel, the answers are not reasonably obtainable from any other source" (Order at 52 n.95; emphasis added).

On October 23, 1991, the Staff provided its response to the interrogatories, in which it provided substantive answers and objected to certain matters -- such as Ohio Edison's attempt to require the Staff to respond on behalf Commission employees who are not members of the Staff or whose official responsibilities did not involve consideration of Ohio Edison's application. "NRC Staff's Response to Ohio Edison Company's Interrogatories to the Nuclear Regulatory Commission Staff," dated October 23, 1991, at 2-3. Ohio Edison subsequently filed a motion to compel further answers on November 6, 1991, in which it complained about the Staff's objections to the scope of its interrogatories. The Staff's response to that motion was forestalled by issuance of the Commission's Order in CLI-91-15, and by issuance of the Licensing Board's related "Order (Suspending Time Limit Governing Staff Response to Pending Applicant Motion to Compel)", dated November 25, 1991.

> We take this action today because the bedrock issue has the potential to be dispositive of this proceeding and particularly in light of the nature of the contention on decisional bias by the NRC staff. The admission of such a contention appears to be without precedent in our proceedings. Thus, there is no current guidance available to the Licensing Board on this kind of issue, and the Commission is not inclined to consider how such guidance is to be provided while the possibility remains that the proceeding will be resolved without any need to reach the issue.

Id. at 3-4 (footnote omitted). On November 26, 1991, Ohio Edison filed the instant motion for reconsideration of the Commission's decision.

ARGUMENT

In support of its motion for reconsideration, Ohio Edison argues (a) that consideration of the decisional bias issue "must take place in conjunction with (or prior to) the agency's consideration of the so-called 'bedrock' legal issue" (Motion at 4), (b) that the Commission is obliged to consider the issue "because of prior representations that the Commission made in this case in the United States federal courts" (*Id.* at 3), and (c) that the Commission improperly deferred consideration of these issues because of their unprecedented nature (*Id.* at 2, 9 n.7). These arguments are without merit, for the reasons provided below.

I. There Is No Need To Reach The Bias Issue At This Time.

With respect to its first argument, Ohio Edison contends that "this proceeding *cannot* be resolved *fairly* without reaching the decisonal bias issues." (*Id.*, emphasis in original). In its view, "*if improper bias is found, that fact must be considered by the Licensing Board in the weight it should give the position of the NRC Staff on the so-called bedrock legal issue.*" (*Id.*, emphasis in original). Ohio Edison's emphatic protestations notwithstanding, its *ipse dixit* assertions are without merit.

First, this proceeding is unique in that each of the three Licensing Board members empanelled to hear this case is an attorney, and the central issue for review involves the Staff's evaluation of the application's legal merits. Each of the Licensing Board members, and the panel as a whole, is fully capable of rendering a decision on the bedrock *legal* issue without having to consider what "weight" should be afforded to any party's legal arguments. Indeed, the U. S. Court of Appeals (in a case cited by the Licensing Board for other reasons), held that "Judicial review is fully capable of correcting biases as to legal questions." *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 612 (3rd Cir. 1977), *cert. denied*, 434 U.S. 62 (1978). The same principle applies in a Commission adjudicatory proceeding, where the Licensing Board, the Commission, and the federal courts on judicial review, are all capable of correcting any alleged bias in the Staff's legal position.

Second, if the legal issue is resolved in Ohio Edison's favor, such that an evidentiary hearing is then required (to consider the cost of nuclear power and related matters), any question of Staff bias could be examined in evaluating the testimony of Staff witnesses -- in the same manner as such questions are traditionally considered.[8] In that forum, Ohio Edison will have

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[8] In addition, it has long been established that the NRC Staff is only one party to a Commission adjudicatory proceeding, and that it does not occupy a favored position at hearing. *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 6 (1976). Indeed, it has been held that the Staff's views are in no way binding on the Board and cannot be accepted without being subjected to the same scrutiny as those of other parties. *Id; accord, Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973) (additional views of Mr. Farrar); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975). *But cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451, 462 (1976) (in some instances, Staff's views may be afforded more weight than those of other parties, such as where the Staff conducted a study at the Commission's explicit direction and was subject to ongoing Commission review).

a full opportunity to contest the merits and credibility of any evidentiary presentation that may be made by the Staff:

> For in all cases . . . . the applicant's (or any other party's) remedy is the same. If it disagrees with the staff's assessment, it can and should raise the issue in the hearing process and thus put before the licensing board the relative merits of its and the staff's positions. The final decision lies with the boards, not with the staff. . . .
>
> Thus, no matter what position the staff takes in the course of its review process, we cannot conceive of a situation in which an applicant would be unable to protect its interest fully in the course of the hearing on its own application.

Indian Point, supra, ALAB-304, 3 NRC at 6. Accordingly, Ohio Edison's apparent concern that the Licensing Board might be predisposed to afford the Staff's views greater consideration than its own, or that it will be unfairly prejudiced by the Board's consideration of the Staff's views, is misplaced.[9]

Moreover, the Licensing Board (and on appeal, the Commission) is the "decisionmaker" in this proceeding with respect to Ohio Edison's application.[10] Thus, even if the analysis supporting the Staff's denial was flawed or biased, the issuance of an adjudicatory decision by the Licensing Board -- subject to Commission appellate review -- would vitiate any alleged shortcoming of the Staff. In this regard, the Licensing Board correctly recognized that it was fully capable of scrutinizing the Staff's views and rejecting them if found to be lacking in merit

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[9] Indeed, the Commission has explicitly held that "[o]n some questions, such as interpretations of statutes or judicial decisions, the staff submissions have no more weight than those of any other party." *Seabrook, supra,* CLI-76-17, 4 NRC at 462.

[10] *See* 5 U.S.C. 556(b) and 5 U.S.C. 554(d); *Indian Point, supra,* ALAB-304, 3 NRC at 6.

-- and that "persuasive" judicial precedent supported the view that the Licensing Board, in conducting "an independent assessment of the Staff's decision as an adjudicatory decisionmaker "will rectify any earlier impropriety." *Id.* at 47, *citing Gulf Oil, supra*, 563 F.2d at 611-12.

For these reasons, there is no merit in Ohio Edison's assertion that "any meaningful consideration by the NRC of its decisional bias issues . . . must take place in conjunction with (or prior to) the agency's consideration of the so-called 'bedrock' legal issue." (Motion at 4).

II. The Commission's Prior Statements Do Not Require A Different Result.

Ohio Edison's second argument is that the Commission is obliged to consider the bias issue at this time because of "prior representations" made by the Commission when Ohio Edison sought early judicial intervention in this matter, whereby Ohio Edison "sought to remove its application to amend the Perry license from the NRC's consideration" (Motion at 5). This novel argument is devoid of merit.

In support of this argument, Ohio Edison cites certain statements which appear in briefs filed by the Commission in the judicial proceeding, where the Commission correctly argued that Ohio Edison's judicial foray was premature due to its failure to exhaust its administrative remedies. To be sure, in presenting that argument, the Commission noted that Ohio Edison's claims must be addressed in the first instance before the regulatory agency, and only afterwards could the issue be raised before the courts (*see* Motion at 6-8, summarizing certain of the Commission's federal court filings). However, these statements do not mandate the admission of the "bias" issue as a separate matter for litigation. To the contrary, it is fundamental that the agency possesses broad discretion to determine how best to consider and resolve questions (like Ohio Edison's assertions of Staff bias and prejudgment) in the first instance, based on its

judgment as to what course is most appropriate. *See, e.g., Duke Power Co.* v. *NRC*, 770 F.2d 386, 390 (4th Cir. 1985); *Pillsbury Co.* v. *FTC*, 354 F.2d 952, 965 (5th Cir. 1966). Now that Ohio Edison has clarified that its application could be disposed of on the basis of a legal ruling alone, there is no reason why the Commission may not defer consideration of the "bias" issue pending resolution of the bedrock legal issue. Moreover, following the issuance of a Licensing Board decision, the Commission may well conclude that the Licensing Board's (or its own) independent assessment of the bases for Ohio Edison's application vitiates any claim of bias, thus rendering consideration of this issue unnecessary.[11]

For these reasons, the Commission's prior statements do not require the litigation of these issues at this time.

III. The Commission Properly Concluded That Consideration Of These Issues Should Be Deferred, Given Their Unprecedented Nature.

In addition to the arguments considered above, Ohio Edison argues that the Commission erroneously based its decision on its "concern" that "the admission of two contentions on decisional bias 'appears to be without precedent in our proceedings.'" (Motion at 2, quoting CLI-91-15 at 4). Ohio Edison asserts that the Commission erred in failing to realize that "the absence of precedent for the decisional bias contentions is not a valid basis for their exclusion in this case." (*Id.* at 9 n.7).

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[11] Significantly, the Commission could even decide to reject Ohio Edison's assertions out of hand, without running afoul of its prior judicial declarations. Even that outcome would represent an exhaustion of Ohio Edison's administrative remedies, allowing Ohio Edison to seek judicial relief upon final Commission action herein. That, after all, was the fundamental legal principle relied upon and argued by the Commission in its prior judicial filings.

The Staff submits that these arguments fail to recognize the full import of the Commission's statement that the admission of these hearing issues is "without precedent." Indeed, the Commission understated the case considerably; not only is the admission of contentions charging Staff "bias" or "prejudgment" without precedent in Commission adjudicatory proceedings, it is directly at odds with other, well-established, clear Commission precedent.

In this regard, the Licensing Board's admission of these issues violates the well established principle that in an NRC licensing proceeding, the application is at issue, not the adequacy of the Staff's review thereof. It has thus been held that an intervenor may not proceed on the basis of allegations that the Staff has somehow failed in its performance.[12]

Moreover, the basis for the Board's admission of these issues was Ohio Edison's assertion that the Staff had improper legislative contacts during its review of the application:

> [W]hen viewed in a light most favorable to applicant OE, [the *Congressional Record* excerpts] evidence legislative contacts with the Staff relating to the merits of its review of the OE application. Given the Staff's initial role in this instance as a decisionmaker (albeit administrative rather than adjudicatory) charged with acting in accordance with the public interest, on the basis of this showing we are unwilling to countenance threshold dismissal of these allegations as they relate to the Staff.

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[12] *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 809, *review denied,* CLI-83-32, 18 NRC 1309 (1983); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989) (OL amendment proceeding).

LBP-91-38, slip op. at 48-49 (footnotes omitted).[13] However, as the Board recognized, the

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[13] The Licensing Board perceived a "bare minimum" of factual support for admission of the bias/prejudgment issues, based on statements by Senator Johnston (134 Cong. Rec. at S 3258) that "we have spoken to the NRC, and they say the result is OK," and "the NRC has indicated that they have no intention of approving this application." LBP-91-38, slip op. at 48 (emphasis in original). In reality, however, there was *no* factual support for those contentions, in that these statements were subsequently retracted in full by Senator Johnston:

> Mr. Metzenbaum: . . . . The Senator just indicated that the NRC has stated to him that they do not intend to approve the application.
>
> *Mr. Johnston: Not to me, but to staff.*
>
> * * *
>
> *Mr. Johnston: Mr. President, I am advised that this has the status of a strong rumor and not an actual statement.*
>
> * * *
>
> *Mr. Johnston: Mr. President, I think I probably misspoke myself earlier by stating as a fact that we had such confirmation from the NRC.*
>
> *Staff advises me that it is more in the nature of a judgment and rumors rather than confirmation because indeed in a pending case they simply will not tell you what they are going to do.*
>
> *They have not told my staff, my staff has now advised me, and they would not tell even us.* We can pretty well figure out what they are going to do. *I would not want to make the withdrawal of the amendment dependent on getting the NRC to say what they are going to do in a pending case because they will not tell us.*

134 Cong. Rec. at S 3258-59; emphasis added. These subsequent statements by Senator Johnston on the floor of the Senate -- never cited by Ohio Edison -- demonstrate the lack of any basis for a contention asserting Staff "bias" or "prejudgment." Rather than "admit these issues with some trepidation" (LBP-91-38, slip op. at 51), the Licensing Board could well have rejected the issues *ab initio*.

Staff did not act as an adjudicatory decisionmaker, and was therefore unconstrained to avoid *ex parte* contacts (*see* 10 C.F.R. 2.780).[14] Thus, it has long been held that the *ex parte* rules do not prohibit discussions between the NRC Staff and an applicant, or between the Staff, applicant, other litigants and third parties (including state officials and Federal agencies) not involved in the proceeding.[15]

For these reasons, the Commission properly considered that the Board's admission of these issues was without precedent, in issuing CLI-91-15.

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[14] The Licensing Board found that the Staff reviewed Ohio Edison's application in its role as an administrative decisionmaker -- which the Board distinguished from an agency's action as an adjudicatory decisonmaker, as to which the "Pillsbury" doctrine would apply. LBP-91-38, slip op. at 49 n.90. *See Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966). In so doing, the Board explicitly recognized that the Commission's *ex parte* standards did not apply to the Staff's review of Ohio Edison's application. Nonetheless, the Board's admission of these issues appears to be at odds with these principles and with the Court of Appeals' decision in the federal court litigation commenced by Ohio Edison in 1988, where the Court stated, "[t]o succeed on its claim of a due process violation, Ohio Edison must show at least the appearance of clear congressional pressure or bias *in a judicial or quasi-judicial context*." *In re Ohio Edison Co.*, Docket No. 89-1014 (D.C. Cir., Apr. 27, 1989) (*per curiam*), unpublished Order at 2; emphasis added. As stated in the text above, and as the Board recognized, the Staff did not act in an adjudicatory capacity in denying Ohio Edison's application.

[15] *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 269 (1978). *Accord, Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 883 n.161 (1984); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 144 (1982). *See also, San Onofre, supra,* ALAB-717, 17 NRC at 378-79 (the Commission's *ex parte* rules do not apply to FEMA or the Staff; "[t]he fact that a final FEMA finding is entitled to a rebuttable presumption does not convert that agency into a decisonmaker in Commission licensing proceedings. The adjudicatory boards and the Commission are the decisionmakers, not FEMA.").

CONCLUSION

For the reasons set forth above, the Commission properly suspended further consideration of the bias/prejudgment issues pending resolution of the "bedrock" legal issue. Accordingly, the Commission should deny Ohio Edison's motion for reconsideration of CLI-91-15.

Respectfully submitted,

Sherwin E. Turk
Senior Supervisory
Trial Attorney

Dated at Rockville, Maryland
this 11th day of December, 1991

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO OHIO EDISON COMPANY'S MOTION FOR RECONSIDERATION OF CLI-91-15" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated with a double asterisk by Federal Express this 11th day of December, 1991.

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