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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

MAY 7 1992

BEFORE THE ATOMIC SAFETY AND LICENSING BOAR[D]

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

NRC STAFF'S ANSWER TO THE MOTION FOR SUMMARY DISPOSITION OF INTERVENOR, CITY OF CLEVELAND, OHIO

In accordance with 10 C.F.R. § 2.749 and the Order of the Atomic Safety and Licensing Board dated March 20, 1992, the NRC Staff hereby files its Answer to the Motion for Summary Disposition of Intervenor, City of Cleveland, Ohio (Cleveland), with respect to the issues raised by Cleveland of *res judicata*, collateral estoppel, law of the case, and laches.[1] In its motion, Cleveland attempts to show that these doctrines bar the Applicants from litigating the "bedrock issue," i.e., whether the Commission is without authority as a matter of law to retain antitrust license conditions if the cost of electricity from nuclear plants is higher than the cost of electricity from alternative

[1] To the extent that Alabama Electric Cooperative's Combined Cross-Motion for Summary Disposition and Response to Applicants' Motion for Summary Disposition (AEC Cross-Motion) raises *res judicata* and similar issues, *see* AEC Cross-Motion at 5-17, this Answer also serves as the Staff's response to AEC's Cross-Motion.

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sources. Underpinning a substantial portion of Cleveland's motion is its assertion that the "bedrock issue" was previously litigated and decided in the original antitrust proceeding where the conditions at issue now were first imposed. In sum, the Staff believes that Cleveland's arguments are unpersuasive, and that the "bedrock issue" should be resolved by the Licensing Board because of the critical importance of such issue, not only to the licenses here, but to all other licenses containing antitrust conditions. Accordingly, the Staff recommends that the Licensing Board deny Cleveland's motion, and proceed to rule on the "bedrock issue."

STATEMENT OF MATERIAL FACTS AS TO WHICH A GENUINE ISSUE EXISTS

For the purpose of responding to Cleveland's motion regarding *res judicata* and related doctrines, there are no material facts as to which a genuine issue exists.

ARGUMENT

I. The Doctrine of the Law of the Case Is Not Applicable Because This Is a New and Separate Proceeding.

Cleveland argues that the doctrine of "the law of the case" bars the Applicants from litigating the "bedrock issue" now because, as Cleveland claims, this issue was previously litigated and decided over a decade ago. The theory proposed by Cleveland

collapses at the outset because it is clear that no decision has been made on the "bedrock issue" in this particular proceeding.[2]

Cleveland correctly states that the doctrine of the law of the case applies in the context of a single action or lawsuit, as opposed to separate actions. *See* Cleveland motion at 67. The Staff disagrees, however, with Cleveland's characterization of this proceeding as a continuation of the original antitrust proceeding where the conditions at issue now were first imposed.

In support of its characterization, Cleveland first cites a footnote in the Appeal Board's 1974 *Farley* decision.[3] In essence, the Appeal Board stated that for the purpose of considering the application of the doctrine of *res judicata*, it "seems" that an operating license proceeding and a construction permit proceeding may be considered the same "cause of action." *Id.* The Appeal Board went on to say, however, that in the context of that proceeding there was "no need for a definitive decision on that question." *Id.* The Appeal Board's qualified assessment as to what may be considered the same cause of action for the purpose of applying *res judicata* was dictum. Furthermore, *Farley* is inapposite to the matter before this Licensing Board because it did not involve a post-licensing amendment application. The *Farley* decision, accordingly, hardly supports Cleveland's motion.

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[2] Furthermore, as will be discussed in more detail in the remaining sections of this answer, Cleveland is incorrect that the "bedrock issue" was in fact previously litigated and decided.

[3] *Alabama Power Co.* (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 215 n.7 (1974).

The Licensing Board's *South Texas* decision,[4] cited next by Cleveland, contains language to the effect that it is "unrealistic" to consider construction permit proceedings and operating license proceedings as two "separate insulated boxes." *Id.* at 575. However, not only does this decision fail to address the relationship between a licensing proceeding and an amendment proceeding as is the case here, but more significantly this decision was reversed by the Appeal Board;[5] the Commission later declined to review the Appeal Board's decision.[6] Thus, Cleveland has provided no support for its theory that the instant proceeding is somehow a continuation of the original antitrust proceeding of over a decade ago, for the purposes of applying the doctrine of the law of the case.

On the other hand, the Commission's *South Texas* decision does make it clear that there is a significant beginning and end to both construction permit and operating license proceedings, especially in the antitrust review context -- which the Licensing Board has clearly recognized in this very proceeding. *See Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 241-42 (1991). Furthermore, this Licensing Board has already determined that "notwithstanding a similar docket designation, this proceeding is separate and apart from the earlier Commission antitrust proceedings regarding Davis-Besse and Perry that resulted in the license conditions now at issue."

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[4] *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-76-41, 4 NRC 571 (1976).

[5] ALAB-381, 5 NRC 582 (1977).

[6] CLI-77-13, 5 NRC 1303, 1308 (1977).

Id. at 244 n.43. Therefore, the doctrine of the law of the case cannot apply as Cleveland proposes.[7]

II. The Doctrines of *Res Judicata* and Collateral Estoppel Do Not Bar Litigation of the "Bedrock Issue."

Cleveland argues in its motion that *res judicata* and collateral estoppel bar the Applicants from relitigating the "bedrock issue." Cleveland fails to show, however, that the "bedrock issue" was actually litigated or decided earlier, or that the Applicants should have already attempted to litigate the issue. Thus, the elements of *res judicata* and collateral estoppel have not been established. *See Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979).

During their appeal from the Licensing Board's decision in the original antitrust proceeding that gave rise to the conditions now at issue, the Applicants contended that there was an incorrect finding of a nexus between the activities under the license and any "situation inconsistent with the antitrust laws." Without a finding of a nexus, no antitrust conditions could be imposed. *See Louisiana Power and Light Co.* (Waterford Steam Electric Generating Station, Unit 3), 6 AEC 619, 620 (1973). As Cleveland correctly states in its motion at 65-66, the Applicants took the position that there must be a finding of cost advantages offered by the nuclear plants in order for the Licensing Board's

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[7] Indeed, the doctrine of "the law of the case" may undermine a necessary predicate to Cleveland's ability to assert that same doctrine against the Applicants. As stated above, there has already been a conclusion by the Licensing Board that this is a separate proceeding from the original antitrust proceeding. Therefore, the law of the case bars Cleveland from raising the claim that this is still the same proceeding as the original antitrust proceeding, which it must do in order for it to succeed on its own "law of the case" theory.

analysis of a "structural nexus" to be valid. *See* Applicants' Appeal Brief In Support of Their Individual and Common Exceptions to the Initial Decision (Applicants' Appeal Brief) at 126-27. However, the Applicants also asserted that while nuclear power "may no longer be nearly so attractive from an economic standpoint . . . whatever economies there still are in nuclear generation, the record below makes it abundantly clear that they will be shared by the municipal electric systems . . . ." *Id.* at 127.[8]

The Applicants' focus in the initial proceeding was on whether a nexus existed between licensed activities and a "situation inconsistent with the antitrust laws," given their competitors' arguable access to the benefits of the nuclear plants' power by existing arrangements without the imposition of any license conditions. It is clear that the Applicants assumed that while economic benefits may have eroded, there were still cost advantages to the nuclear plants. As far as the Staff can determine, the issue of whether license conditions could be imposed absent any economic benefits or cost advantages was not squarely raised by the Applicants or any other parties to that proceeding, and was certainly not addressed or decided by the Licensing Board or the Appeal Board. For this reason, the doctrine of collateral estoppel should not apply since there was no "actual litigation" of the issue. *See Parklane Hosiery, supra*, 439 U.S. at 326 n.5. In addition, given that the Applicants apparently believed that the nuclear plants afforded *some* cost

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[8] The Applicants cited the fact that they already had been selling power at wholesale to municipal electric systems, and, therefore, such systems would share in the benefits of the nuclear plants through their wholesale purchases at the Applicants' systemwide average embedded costs. Accordingly, the Applicants argued, the nuclear plants could not "create or maintain a situation inconsistent with the antitrust laws." *See* Applicants' Appeal Brief at 127-32.

advantages (which, in fact, could have been and may still be the case), it would not be fair to say that the Applicants were "standing on the sidelines"[9] with respect to the "bedrock issue" during the original antitrust proceeding, and that they thus should be barred from raising the issue here by *res judicata*.

As Appeal Board stated in *Farley*, "the exceptions to the application of *res judicata* and collateral estoppel which are found in the judicial setting are equally present where administrative adjudication is involved -- namely, changed factual or legal circumstances . . . and overriding competing public policy considerations." ALAB-182, 7 AEC at 215.[10] Not only may changed factual circumstances be present here that should preclude a rigid application of *res judicata*, but the "bedrock issue" represents an "undeveloped frontier of law and policy," which may be sufficient reason for the Licensing Board to exercise its discretion and decline to invoke the doctrines of *res judicata* and collateral estoppel. *See id.* In view of the preceding discussion, the Staff believes that the doctrines of *res judicata* and collateral estoppel should not bar the Licensing Board's consideration of and decision on the "bedrock issue."

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[9] The Commission stated in *South Texas* that a potential petitioner for antitrust intervention should not "be able to stand on the sidelines at the construction permit stage and raise a claim at the operating license stage that could have been raised earlier." *South Texas*, CLI-77-13, 5 NRC at 1321.

[10] Cleveland asserts, without evidentiary support, that "each event raised in OE's application as justifying suspension of the antitrust license conditions . . . occurred well before the close of the record in the operating license stage." Cleveland motion at 75. Cleveland then suggests that the Applicants should have moved to consider this matter as a changed circumstance at that time. *Id.* While this assertion is appealing, certainly more than its *ipse dixit* assertion is required for Cleveland to successfully demonstrate the Applicants' prior knowledge and opportunity to raise this issue.

III. Applicants Should Not Be Barred By Laches From Raising The "Bedrock Issue."

Cleveland finally argues that the Applicants should be barred from litigating the "bedrock issue" because the circumstances on which the Applicants now base their request for suspension of the antitrust conditions existed, according to Cleveland, at the time operating licenses were granted to the Applicants. Therefore, Cleveland asserts, inasmuch as it has relied upon the antitrust conditions and would suffer injury should they now be suspended, and the Applicants have inexcusably failed to seek suspension of the conditions until now, laches bars the Applicants from litigating whether suspension of the antitrust conditions is warranted.

The Applicants' laches theory cannot withstand scrutiny. First, and most importantly, the Commission is a necessary component of the laches equation, not just Cleveland and the Applicants. It is well-established that "an administrative agency is a creature of statute, having only those powers expressly granted to it by Congress." *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974). If the Applicants are correct that as a matter of law the Commission is without authority to retain antitrust license conditions if nuclear power is higher in cost than alternative sources, Cleveland has failed to explain how an equitable doctrine like laches can overcome a jurisdictional void in the Commission's authority.

Second, Cleveland fails to make any showing as to when the costs of nuclear power actually increased beyond the costs of electricity from alternative sources such that the Applicants should have requested suspension of the antitrust conditions earlier. While perhaps a trend towards increased costs at nuclear plants may have begun as early as

1977, as Cleveland seems to indicate (*see* Cleveland motion at 75 and 79), Cleveland has not established that nuclear costs were actually higher at any given point in time, and more importantly that such costs remained consistently higher than the cost of alternative power sources.[11] Without this, a credible analysis of laches cannot be completed. Therefore, in this light, and given *Soriano*, laches should not bar the Licensing Board's consideration of the "bedrock issue" on the merits.

CONCLUSION

The "bedrock issue" has enormous significance not only with respect to the parties here, but also with respect to all who may be affected by other antitrust license conditions imposed by the Commission. As the Staff has demonstrated above, Cleveland's arguments for the application of the doctrines of the law of the case, *res*

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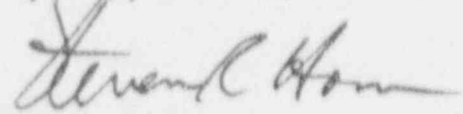
[11] One might not reasonably expect the Applicants to have requested a hearing on the "bedrock issue" prior to the time they actually filed their applications for suspension of the license conditions if for only one brief moment in the past the cost of nuclear power exceeded the cost of power from alternative sources. On the other hand, perhaps if there had been an undeniable and continuous trend upwards in the cost of nuclear power such that the "bedrock issue" would have been ripe for adjudication earlier (which Cleveland has not demonstrated), then laches may warrant more serious attention.

judicata, collateral estoppel, and laches fail. Accordingly, Cleveland's motion for summary disposition on the preceding issues should be denied.

Respectfully submitted,



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Dated at Rockville, Maryland
this 7th day of May, 1992

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

OHIO EDISON COMPANY
(Perry Nuclear Power Plant, Unit 1)

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.
(Perry Nuclear Power Plant, Unit 1, and Davis-Besse Nuclear Power Station, Unit 1)

Docket Nos. 50-346A
50-440A

(Suspension of Antitrust Conditions)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO THE MOTION FOR SUMMARY DISPOSITION OF INTERVENOR, CITY OF CLEVELAND, OHIO" in the above-captioned proceeding have been served on the following by overnight mail, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by deposit in the United States mail, first class, this 7th day of May, 1992:

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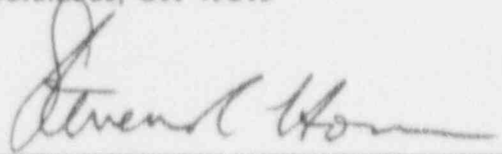

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